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295	"	*M*	362	442	"	*L*	294	564	"	*C*	536	693	"	"	157	848	"	"	308
296	"	*B*	256	443	"	*O*	186	566	"	*M*	538	695	"	"	159	851	"	*P*	334
297	"	"	193	446	"	*L*	349	569	"	*B*	427	697	"	*O*	279	852	"	"	335
298	"	"	194	447	"	*N*	95	570	"	*A*	449	698	"	*A*	580	853	"	"	315
300	"	"	196	449	"	*C*	459	572	"	*B*	406	699	"	"	581	856	"	*A*	680
303	"	"	199	450	"	"	460	576*a*	"	*C*	557	700	"	"	582	857	"	*C*	818
305	"	"	201	451	"	"	461	576*b*	"	*L*	424	701	"	"	583	860	"	"	833
306	"	*A*	327	452	"	"	462	578	"	"	463	702	"	*R*	139	861	"	"	815
311*a*	"	*P*	170	454	"	"	464	579*a*	"	"	440	704	"	"	141	863	"	*N*	158
311*b*	"	*C*	369	455	"	"	465	579*b*	"	"	433	706	"	"	143	864	"	*B*	596
312*a*	"	"	383	458	"	"	468	580	"	"	434	709	"	"	146	868	"	"	610
312*b*	"	*M*	320	460	"	"	470	581	"	"	435	710	"	"	147	871*a*	"	"	636
313	"	*C*	370	464	"	"	474	582	"	"	436	711	"	"	150	871*b*	"	"	637
318	"	"	375	469	"	*M*	494	584	"	"	438	713	"	*L*	559	872	"	*O*	317
320	"	"	377	470	"	"	495	586	"	*A*	504	718	"	"	554	876	"	"	321
323	"	*L*	258	472	"	*R*	90	587	"	*S*	143	719	"	"	555	879	"	"	324
324	"	"	259	475	"	"	93	589	"	*M*	559	721	"	"	557	881	"	*C*	850
325	"	"	260	476	"	"	94	590	"	*O*	249	723	"	*P*	279	887	"	"	856
326	"	"	261	478	"	*C*	486	592*a*	"	"	251	725	"	"	281	888	"	"	864
328	"	"	263	479	"	"	487	592*b*	"	"	251	728	"	*C*	723	889	"	"	865
329	"	*M*	363	480*a*	"	"	488	594	"	*A*	506	732	"	*S*	175	890	"	"	866
334	"	"	368	480*b*	"	"	488	595	"	"	507	733	"	"	169	891*a*	"	"	867
335	"	*C*	455	481	"	"	489	596	"	*B*	468	739	"	"	166	891*b*	"	"	867
337	"	"	390	482	"	*L*	364	598	"	"	470	741	"	"	168	892	"	"	868
341	"	"	394	483	"	"	365	601	"	"	473	742	"	*M*	660	893	"	"	871
342	"	"	395	484	"	"	366	602	"	"	474	743	"	*S*	165	899	"	*P*	366
344	"	"	397	485	"	"	367	604	"	"	476	744	"	*C*	750	901	"	*S*	210
345	"	*N*	71	486	"	"	368	606	"	*C*	649	745	"	"	750	902	"	"	211
346	"	"	73	487	"	"	369	608	"	"	651	746	"	*N*	137	905	"	"	214
347	"	*P*	171	488	"	"	370	612	"	*PC*	194	747	"	*C*	738	906	"	*N*	183
351	"	"	175	490	"	"	372	614	"	*B*	490	754	"	"	745	907	"	"	172
353	"	*M*	369	491	"	"	362	617	"	"	489	759	"	*N*	141	908	"	"	173
354	"	"	371	492	"	"	363	618	"	*L*	480	761	"	*P*	289	909	"	"	174
355	"	"	391	493	"	*P*	212	619	"	"	481	764	"	"	292	912	"	*P*	356
372	"	*N*	72	494	"	"	213	621	"	"	483	765	"	"	293	913	"	*L*	621
373	"	*O*	190	495	"	"	214	623	"	"	485	772	"	"	300	915	"	"	609
377	"	*L*	297	496	"	"	215	624	"	"	486	773	"	"	301	917	"	"	611
378	"	"	298	498	"	*C*	523	626	"	"	488	774	"	"	302	919	"	"	613
381	"	"	301	500	"	*N*	112	627	"	"	489	776	"	*PC*	234	921	"	"	615
382	"	"	302	501	"	*M*	497	628*a*	"	"	490	777	"	*B*	545	922	"	"	615
383	"	*S*	87	504	"	"	500	628*b*	"	"	490	783	"	"	551	923	"	*M*	748
385	"	*B*	273	505	"	"	501	630	"	*A*	534	785	"	"	553	932	"	*R*	190
389	"	"	277	506	"	"	502	632	"	*C*	655	789	"	"	534	934	"	"	192
391	"	"	279	509	"	"	505	633	"	*A*	536	791	"	*O*	287	935	"	"	193
397	"	"	285	511	"	"	507	634	"	"	537	792	"	*S*	177	936	"	*A*	681
398	"	"	286	512	"	"	508	636	"	*C*	683	795	"	"	180	938	"	"	683
402	"	"	290	513	"	*A*	409	638	"	*P*	241	796	"	*C*	753	940	"	"	692
403	"	*A*	367	515	"	*M*	511	639	"	"	242	801	"	"	758	941	1933	*P*	26
405	"	*O*	342																
407	"	*P*	224	516	"	*L*	390	640	"	"	243	803	"	"	760	942	"	*R*	1
408	"	*M*	427	519	"	*N*	97	641	"	"	244	805	"	*L*	577	943	"	*B*	79

33 Cr. L. J. & 135 to 140 I. C.=All India Reporter.

Please refer to COMPARATIVE TABLE *No. I in A. I. R.* 1932 *Lahore.*

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17 & 18 All India Criminal Reports=All India Reporter.

Please refer to COMPARATIVE TABLE *No. I in A. I. R.* 1932 *Allahabad.*

TABLE No. II.

Showing seriatim the pages of the ALL INDIA REPORTER, 1932 NAGPUR with corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER 1932 NAGPUR.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS and PERIODICALS.

A. I. R. 1932 Nagpur=Other Journals

AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
1	28 *N L R*	44	44	28 *N L R*	11	85 (1)18	*A I CrR*	274	112	33 *Cr L J*	861
FB	14 *N L J*	141		137 *I C*	125	85 (2)15	*N L J*	24	113	28 *N L R*	124
	135 *I C*	414	47	14 *N L J*	149		1932*Cr C*	435		140 *I C*	713
3	137 *I C*	61		136 *I C*	876		140 *I C*	394	114	28 *N L R*	118
5	28 *N L R*	31	49	27 *N L R*	307		34 *Cr L J*	32		140 *I C*	63
FB	14 *N L J*	125		135 *I C*	402	86	15 *N L J*	21	116	1932*Cr C*	274
	136 *I C*	225	50	28 *N L R*	4		1932*Cr C*	436		139 *I C*	496
10	14 *N L J*	147		137 *I C*	66		140 *I C*	629		33 *Cr L J*	859
11	27 *N L R*	347		33 *Cr L J*	408		34 *Cr L J*	119	117	28 *N L R*	127
	136 *I C*	230	51	28 *N L R*	20	88	28 *N L R*	80		140 *I C*	66
14	27 *N L R*	339		137 *I C*	153		140 *I C*	630	118	28 *N L R*	142
	135 *I C*	412	53	28 *N L R*	27	89	28 *N L R*	77		140 *I C*	68
15	27 *N L R*	343		137 *I C*	159		140 *I C*	120	121	1932*Cr C*	672
	136 *I C*	233	55	28 *N L R*	134	90	15 *N L J*	1	**FB**	28 *N L R*	233
17	27 *N L R*	304		139 *I C*	305		138 *I C*	161		33 *Cr L J*	849
	134 *I C*	861	61	139 *I C*	316	92	15 *N L J*	15		140 *I C*	49
18	27 *N L R*	389	62	138 *I C*	879		138 *I C*	186	127	28 *N L R*	163
	136 *I C*	239		28 *N L R*	325	93	15 *N L J*	18		1932*Cr C*	678
20	27 *N L R*	335	65	139 *I C*	290		138 *I C*	188		33 *Cr L J*	938
	135 *I C*	409	68	139 *I C*	295	95	15 *N L J*	11		140 *I C*	113
21	27 *N L R*	309	69	28 *N L R*	52		1932*Cr C*	447	128	28 *N L R*	130
	135 *I C*	403		137 *I C*	94		138 *I C*	175		140 *I C*	776
22	27 *N L R*	374	70	28 *N L R*	54		28 *N L R*	190	130	1932*Cr C*	666
	136 *I C*	873		137 *I C*	88		33 *Cr L J*	559		28 *N L R*	260
	15 *N L J*	154	71	1932*Cr C*	345		18 *A I CrR*	280		33 *Cr L J*	844
23	27 *N L R*	327		138 *I C*	700	97	28 *N L R*	106		140 *I C*	59
	137 *I C*	33		33 *Cr L J*	731		1932*Cr C*	519	133	1932*Cr C*	669
27	27 *N L R*	324	72	28 *N L R*	49		139 *I C*	401		28 *N L R*	156
	135 *I C*	401		1932*Cr C*	372		33 *Cr L J*	835		34 *Cr L J*	70
28	27 *N L R*	371		137 *I C*	91	99	28 *N L R*	111		140 *I C*	711
	136 *I C*	235		33 *Cr L J*	407		139 *I C*	286	134	28 *N L R*	154
30	14 *N L J*	154		18 *A I Cr R*	31	101	28 *N L R*	83		1932*Cr C*	670
	136 *I C*	882	73	1932*Cr C*	346		139 *I C*	296		140 *I C*	231
31	27 *N L R*	341		139 *I C*	63	103	28 *N L R*	102		33 *Cr L J*	937
	135 *I C*	413		33 *Cr L J*	728		139 *I C*	379	135	28 *N L R*	146
32	27 *N L R*	376	75	15 *N L J*	35	105	28 *N L R*	98		140 *I C*	716
	136 *I C*	875	**FB**	137 *I C*	750		139 *I C*	374	137 (1)28	*N L R*	254
33	27 *N L R*	382		28 *N L R*	169	107	28 *N L R*	93		1932*Cr C*	746
	136 *I C*	237	79	28 *N L R*	58		139 *I C*	369		33 *Cr L J*	940
34	27 *N L R*	378	**FB**	138 *I C*	721	109	28 *N L R*	89		140 *I C*	117
	136 *I C*	878	83	15 *N L J*	28		139 *I C*	288	137 (2)28	*N L R*	116
36	14 *N L J*	171		1932*Cr C*	433	111	28 *N L R*	18		141 *I C*	156
	136 *I C*	884		138 *I C*	38		1932*Cr C*	275	138	28 *N L R*	198
39	28 *N L R*	1		33 *Cr L J*	556		137 *I C*	150		140 *I C*	708
	136 *I C*	887		18 *A I CrR*	289		33 *Cr L J*	573	140	28 *N L R*	250
41	28 *N L R*	25	85 (1)15	*N L J*	26		18 *A I CrR*	267		140 *I C*	683
	137 *I C*	156		1932*Cr C*	435	112	28 *N L R*	57	141	28 *N L R*	159
42	14 *N L J*	179		137 *I C*	904		1932*Cr C*	500		1932*Cr C*	759
	136 *I C*	874		33 *Cr L J*	558		139 *I C*	609			

A. I. R. 1932 Nagpur=Other Journals—(*Concld.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
141	33 *Cr L J*	940	154	141 *I C*	144	165	28 *N L R*	227	173	28 *N L R*	218
	139 *I C*	900	156	28 *N L R*	179		140 *I C*	390		1932*Cr C*	908
143	28 *N L R*	245		140 *I C*	293	169	28 *N L R*	149		34 *Cr L J*	66
	140 *I C*	21	158	1932*Cr C*	863		140 *I C*	406		140 *I C*	431
144	28 *N L R*	69		141 *I C*	438	171	28 *N L R*	214	174	28 *N L R*	302
	140 *I C*	216		34 *Cr L J*	154		140 *I C*	532		1932*Cr C*	909
148	28 *N L R*	184	159	141 *I C*	450	172	28 *N L R*	216	177	28 *N L R*	221
	140 *I C*	209	162	15 *N L J*	51		34 *Cr L J*	31		140 *I C*	409
152	28 *N L R*	194		141 *I C*	182		140 *I C*	397	180	141 *I C*	236
	140 *I C*	490	163	28 *N L R*	255		1932*Cr C*	907	183	28 *N L R*	284
154	28 *N L R*	247		141 *I C*	150		19 *A I Cr R*	100		1932*Cr C*	906

LIST OF CASES OVERRULED AND REVERSED

A. I. R. 1932 Nagpur

Commissioner of Income-tax, C. P. Berar v. S. M. Chitnavis, (1929) 25 N.L.R. 35=12 N. L. J. 17=A. I. R. 1929 Nag. 50=117 I. C. 258.	Reversed in A.I.R. 1932 P. C. 178 (F.B.).
Kalicharan v. Ratansingh, (1923) 19 N. L. R. 119=A. I. R. 1923 Nag. 293 =75 I. C. 589.	Overruled in A. I. R. 1932 Nag. 101.
Rajaram v. Narayan, (1927) 22 N. L. R. 126=A. I. R. 1927 Nag. 28=97 I. C. 544.	" in A. I. R. 1932 Nag. 1 (F.B.).
Sheoshankar v. Lal Indra Sah, (1929) 116 I. C. 666=A. I. R. 1929 Nag. 139.	Reversed in A. I. R. 1932 P. C. 129.

THE
ALL INDIA REPORTER
1932
NAGPUR J. C's. COURT

* A. I. R 1932 Nagpur 1
Full Bench

JACKSON J C., SUBHEDAR AND NIYOGI, A. J. Cs.

Vishwanath—Applicant.

v.

Sadashiva—Non-Applicant.

Civil Revn. No. 540 of 1930, Decided on 13th October 1931. against decision of Small Cause Court Judge, Saoner, in Civil Suit No. 376 of 1930, D/- 7th October 1930.

*** Limitation Act (1908), Art. 75 — Instalment bond providing for whole amount to become due on default or one or more instalments—Creditor doing nothing to show waiver of clause — Creditor cannot sue for instalments counting limitation from due date of each instalment** : 97 *I. C.* 554=22 *N. L. R.* 126 =*A. I. R* 1927 *Nag.* 28, *Overruled.*

Where a bond payable by instalments provides that if default is made in the payment of one or more instalments, whole amount should become due, and default is made and the whole amount becomes due, but the creditor does nothing to show that he waived the benefit of the default clause during the period allowed by the Limitation Act for a suit for the whole amount, he cannot subsequently sue for instalments counting limitation from the day on which these instalments would have fallen due had there been no default clause : 20 *Bom.* 109 ; 32 *Mad.* 284 ; *A. I. R.* 1925 *All.* 499 ; 31 *Cal.* 297 ; 8 *N.L.R.* 44 ; 188 *P. R* 1883 and *A. I. R.* 1926 *Cal.* 789, *Ref.* ; *A. I. R.* 1925 *Pat* 557 ; 41 *All.* 104 ; 36 *Mad.* 66 *and A. I. R* 1929 *Cal.* 399, *Diss. from* ; *A.I.R.* 1915 *Mad.* 979 *Dist.*; **97 I.C. 554=22 N. L. R. 126=A. I. R. 1927 Nag. 28, Overruled.** [P 3 C 1]

Order of Reference

Macnair, J. C. — The plaintiff's suit was based on a money bond which provided for payment by instalments. The plaint did not mention whether or not the instalments, which fell due in years prior to 1927, had been paid ; it stated that the instalments, which fell due in 1927, 1928 and 1929 had not been paid and that the suit was for recovery of these instalments. It further mentioned that there was an agreement to pay the entire amount due, if two instalments were not paid and that the cause of action arose in 1928 when two instalments had fallen due. It has been found that the instalments for 1925 and 1926 were not paid.

The learned Judge held that though the plaintiff had an option to sue for the whole amount on 9th July 1926, there was nothing in his conduct to show that he had exercised that option ; it was therefore open to him, at the date of suit, to claim instalments which according to the main provisions of the bond fell due less than three years before the suit was instituted. The Judge does not cite *Rajaram* v. *Narayan* (1), but this ruling appears to justify his decision. The plaint read as a whole is for recovery of three instalments and the statement that the cause of action arose on a particular date because of a clause in the bond was rightly disregarded. In *Rajaram* v. *Narayan* (1), Hallifax, A.J.C., has stated at p. 129 (of 22 *N. L. R.*) :

"The law in this matter is not difficult. It has been expounded in number of published rulings, some of which purport to differ from others. They are in fact all the same and lay down no more than is to be found in Arts. 74 and 75, Sch. 1, Lim. Act, which is, that the limitation for a suit to recover an instalment due on such a bond, as we have here, is governed by Art. 74, and that for a suit to recover the whole amount still unpaid irrespective of the agreement to pay by instalments is governed by Art. 75 of the same schedule."

I disagree so strongly with the view and am so convinced that it will lead to frequent difficulties, that I think it neces-

(1) A. I. R. 1927 Nag. 28 = 97 I. C. 554=22 N. L. R. 126.

sary to refer to a Bench the question of its correctness. The provision of a bond for repayment be read as a whole. The bond which I am considering clearly provided that the entire amount became due when there had been default with regard to two instalments. After such default, in accordance with the terms of the bond, the agreement to pay certain sums at certain times was no longer in force. It is clear from the provisions of Art. 75, Lim. Act, that the payee may, at a proper time waive the benefit of the default clause ; if this was done, the agreement to pay by instalments would again come into force. But in *Gopal* v. *Dhondya* (2) it was held that the creditor must do something to show that he waived the benefit of the provision in order to prevent time from the date on which the whole amount became due ; and this, in my opinion is clearly good law. In *Rajaram* v. *Narayan* (1) this ruling is quoted with approval on p. 127 although on p. 128 it is stated that to do nothing may amount to waiver. In *Kanhai* v. *Amrit* (3) additional reasons are given for the view taken in *Gopal* v. *Dhondya* (2). Art. 74, Lim. Act, is applicable to ordinary bonds payable by instalments ; it cannot be applied in such a way as to conflict with provisions in the bond modifying the agreement to pay by instalments. Art. 75 governs limitation when the default causes the whole sum to become due.

It does not appear necessary in this order of reference to discuss the case law on the subject. But I remark that I have seen no case in which the decision is based on exactly the same argument as that adduced by Hallifax, A. J. C.

I frame the question to be referred to a Bench of three Judges as follows :

A bond payable by instalments provided that if default were made in the payment of one or more instalments, the whole amount should become due. Default was made and the whole amount became due. The creditor did nothing to show that he waived the benefit of the default clause during the period allowed by the Limitation Act for a suit for the whole amount. Can he subsequently sue for instalments counting limitation from the day on which these instalments would have fallen due, had there been no default clause ?

(2) [1912] 8 N. L. R. 44=14 I. C. 685.
(3) A. I. R. 1925 All. 499 = 87 I. C. 162 = 47 All. 552.

Opinion

Jackson, J. C. — The facts of this case and the question referred to the Full Bench are contained in the Order of Reference.

The first question argued before us was whether a mere failure to sue can amount to a waiver of the right given by the bond to recover the amount due if two instalments were not paid. A number of rulings on this point have been cited before us, but I do not propose to refer to all of them. In *Kankuchand Shivchand* v. *Rustamji Hormusji* (4), and *Sheshan Patter* v. *Veera Raghavan Patter* (5) it was treated as settled law that mere abstinence from suing could not amount to waiver. The same view has been taken in *Kanhai* v. *Amrut* (3), *Jadab Chandra Bakshi* v. *Bhairab Chandra Chukerbutty* (6), *Kahiruddin* v. *Atu Mal* (7), and by this Court in *Gopal* v. *Dhondya* (2). No case has been cited before us which takes the view expressed in *Rajaram* v. *Narain* (1), that to allow the claim to recover the whole debt at once to be barred by time is a waiver of that claim, and in my opinion to accept that view would be to render Art, 75, Sch. 1, Lim. Act, meaningless.

The second question seems to resolve itself into this. Can a bond providing for payment by instalments and allowing the creditor to recover the whole amount, if there is default in respect of one or more of the instalments, be so worded that the stipulation for recovery of the whole amount on default does not amount to stipulation that on default the whole sum shall become due ? One of these cases cited on behalf of the non-applicant *Sitaram* v. *Krishnaswami* (8) appears to me to have no applicability ; in that case it was held that there had been no default and Art. 75 was clearly inapplicable. But there are several rulings which do support the non-applicant's contention, that a bond may be so worded as to give the creditor an option to say whether the whole sum shall be due or only the instalments concerned:

(4) [1896] 20 Bom. 109.
(5) [1909] 32 Mad. 284=4 I. C. 38.
(6) [1904] 31 Cal. 297.
(7) [1883] 188 P. R. 1883.
(8) A. I. R. 1915 Mad. 979=38 Mad. 374=21 I. C. 24.

these are *Ajudhya* v. *Kinjal* (9) *Mohan Lal* v. *Tika Ram* (10) *Ramsekhar Prasad Singh* v. *Mathuralal* (11), *Karunakaram Nair* v. *Krishna Menon* (12), and *Umedmall Mangalchand* v. *Maniram Agarwala* (13). With due respect, I cannot agree with these decisions. *Umedmull Mangalchand* v. *Maniram Agarwala* (13) is directly opposed to *Jadab Chandra Bakshi* v. *Bharat Chundra Chukerbutty* (6), and *Basant Kumar Singh* v. *Nabin Chundra Shaha* (14), in which it has been held that the whole sum becomes due on default, whether that be provided in express terms in the bond or whether some such expression is used as that the creditor "shall be at liberty" to recover the whole sum on default. The same view has been taken in *Khairuddin* v. *Ata Mul* (7), and it seems to be in accordance with reason. The decisions in which a different view has been taken, in my opinion, approach the question from a wrong standpoint. The question is not what the creditor may do but what the debtor is liable for. However the bond may be worded it is clear that when on default the creditor is entitled to recover the whole sum the debtor on default at once becomes liable to pay the whole sum and the whole sum does become due within the meaning of Art. 75, Sch. 1 to the Limitation Act. Any suit on the bond must therefore be governed by that article and when a suit is barred by that article the creditor cannot sue for instalments which under the primary terms would have fallen due after the said default.

My answer to the question referred to is in the negative.

Subhedar, A. J. C.—I agree.

Niyogi, A. J. C.—I agree.

Final Order

According to the opinion of the Full Bench on the question referred to it, the suit of the plaintiff was time barred. In that question it was stated that the creditor did nothing to show that he waived the benefit of the default clause during the period allowed by the Limitation Act for a suit for the whole amount. It is now pleaded on behalf of the plaintiff that there was a waiver on his part of the benefit of the default clause, apart from his failure to sue within the time prescribed. The plea is based on a letter, Ex. P. 2 in which the plaintiff proposed to the master of the defendant an adjustment of accounts which would have the effect of satisfying four instalments to be satisfied under it, have been shown in the plaint as unpaid. How the letter referred to can be set up as proof of waiver I fail to see and as a matter of fact such waiver was never pleaded before today.

I hold the suit to be time barred and I reverse the decree of the lower Court and dismiss the suit with costs. I fix pleader's fees at Rs. 25.

V.B./R.K. *Order accordingly.*

(9) [1908] 30 All. 123 = 5 A. L. J. 72=(1908) A. W. N. 36.
(10) [1919] 41 All. 104=47 I. C. 926.
(11) A. I. R. 1925 Pat. 557 = 90 I. C. 249 = 4 Pat. 820.
(12) [1913] 36 Mad. 66=12 I. C. 57.
(13) A. I. R. 1929 Cal. 399.
(14) A. I. R. 1926 Cal. 789 = 96 I. C. 594 = 53 Cal. 277.

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MACNAIR, J. C.

Bhawani Singh —Defendant—Appellant.

v.

Girdhari and *another* — Plaintiffs — Respondents.

Second Appeal No. 56 of 1930, Decided on 11th April 1931, against decree of Dist. Judge, Saugor, D/- 17th October 1929, in Civil Appeal No. 42 of 1929.

Limitation Act (1908), Arts. 97 and 116—Sale of house with abadi site—Vendee not informed that consent of both cosharers was necessary as house stood in joint patti—Vendee rebuilding house—Lambardar suing for possession and getting decree—Suit by vendee for return of price, costs of new building and costs of defending suit—Suit held governed by Art. 116 and not by Art. 97—Cause of action began to run from date when it was found that sale was voidable.

A house was sold with its site without apprising the vendee of the fact that the permission of both the cosharers of the village in which the site stood was essential as the house stood in joint patti of the village. The vendee pulled down the house and erected another. The lambardar of the patti, on which the house stood, sued for possession of the site and got a decree. Vendee consequently brought a suit claiming return of price and reimbursement of the money spent in building the new house and the costs which he incurred in defending his title:

Held : that the cause of action did not begin to run from the date of the sale but from the date when it became clear that the sale was voidable at the instance of the lambardar;

Held further : that the suit was governed not by Art. 97 but by Art. 116 : *A. I. R.* 1915 *Mad.*

742; *A.I.R.* 1915 *Mad.* 703; *A.I.R.* 1921 *Bom.* 252 and *A. I. R.* 1929 *Pat.* 388, *Rel. on.*; 11 *N. L. R.* 186, *Dist.* [P 4 C 2]

W. B. Pendharkar—for Appellant.

J. Sen and *K. K. Tiwari*—for Respondents.

Judgment.—The plaintiff-respondent purchased a house with its site from the defendant-appellant by a registered sale deed for Rs. 100 on 15th November 1920. It has been found that the vendor failed to apprise the vendee of the fact that the permission of both the cosharers of the village, in which the site stood, was essential as the house stood in a joint patti of the village; he pulled down the house and erected another. In 1925 the lambardar of the patti, in which the house stood, sued for possession of the site and obtained a decree. In the present suit the plaintiff claimed return of the price of the house and reimbursement of the money spent in building the new house and the costs which he had to pay in defending his title.

The learned District Judge has given the plaintiff a decree for Rs. 611-2-0, Rs. 100 representing the price of the house, Rs. 325 the cost of re-construction and Rs. 46-2-0 as the cost of defending the suit.

In appeal it is first urged that the suit is barred by time. Reliance is placed on *Pirbhu* v. *Wazirbi* (1) for the proposition that time began to run from the date of the sale. What was held in that case was that the statute of limitation will begin to run from the date of the execution of the conveyance, if the breach of a covenant for title, caused by the absence of the right contracted for, is entire and complete on that day. In *Subbaroya* v. *Rajagopala* (2), Seshagiri Ayyar, J., with reference to breach of a guarantee for good title stated at p. 889 (of 38 *Mad.*):

"On the second question as to when the cause of action for damages arose, a very large number of cases were quoted before me. These cases can roughly speaking be classified under three heads: (a) where from the inception the vendor had no title to convey and the vendee has not been in possession of the property; (b) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale: (c) where though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties."

It seems clear that the decision of Batten, A. J. C., in *Pirbhu* v. *Mt. Wazirbi* (1) was not intended to apply to cases falling under the head (b). In *Subbaroya* v. *Rajagopala* (2), it was held that, in the first class of cases, the starting point of limitation will be the date of the sale; but in the second class of cases the cause of action can arise only when it is found that there is no good title. The view taken in this case was approved in *Multanimal Jayaram* v. *Budhumal Kevalchand* (3) and in *Mt. Lakhpat Kuer* v. *Durga Prasad* (4).

In *Pirbhu* v. *Wazirbi* (1) it appears to have been held that the starting point of limitation would be the date of the sale in some cases in which possession had been delivered. I do not need to consider whether or not this view is correct. In the case I am considering there was not at the time of the sale, entire and complete absence of the right contracted for, and *Pirbhu* v. *Mt. Wazirbi* (1) has no application. Owing to the absence of consent by the lambardar, the sale could be avoided at his instance; the cause of action arose when it became clear that this was the case. The learned District Judge has stated that the article of the Limitation Act applicable is Art. 97. This is clearly not the case, as the plaintiff did not merely ask for return of the money paid. The article applicable is Art. 116. The instrument of sale must, in view of the provisions of S. 55 (2), T. P. Act, be read as if it contained a covenant for title: see *Arunachala* v. *Ramasami* (5). There is nothing to show that limitation commenced to run before the filing of the suit in 1925. I do not need to decide whether limitation began to run then or at a later date; the suit filed in 1928 then was in time. The breach of the covenant of title caused the plaintiff to lose the purchase money, the money spent in rebuilding and the costs incurred in defending the suit. It was then rightly held that he was entitled to a decree for these sums.

There is no reason for interference with the decree except in one respect. It has been held that the plaintiff spent

(1) [1915] 11 N. L. R. 186 = 31 I. C. 877.
(2) A. I. R. 1915 Mad. 703 = 38 Mad. 887 = 23 I. C. 570.
(3) A. I. R. 1921 Bom. 252 = 61 I. C. 70 = 45 Bom. 955.
(4) A. I. R. 1929 Pat. 388 = 117 I. C. 654 = 8 Pat. 432.
(5) A. I. R. 1915 Mad. 742 = 38 Mad. 1171 = 25 I. C. 618.

Rs. 325 for re-construction, and this finding appears to mean that Rs. 325 were spent although some of the materials of the old house were used. It is however the case of both parties that the plaintiff removed the materials of the house at the time when he lost the site; the value of these materials should have been deducted from the cost of the house. There is no issue or evidence on this point and it appears necessary to remand the case for a decision. I therefore set aside the decree and direct that this point be decided after necessary statements are taken and necessary issue framed. Costs in this appeal will be costs in the suit.

P.N./R.K. *Case remanded.*

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Full Bench

JACKSON, OFFG. J. C., SUBHEDAR AND NIYOGI, A. J. Cs.

Kashirao—Applicant.

v.

Zabu—Non-Applicant.

Civil Revn. No. 105-B of 1930, Decided on 16th September 1931, against order of Small Cause Court Judge, Akola, in Civil Suit No. 156 of 1929, D/- 13th March 1930.

*** (a) Limitation Act (1908), Art. 116—Suit for damages for breach of covenant of title—Sale void ab initio — Vendee dispossessed by rightful owner—Limitation runs from date of dispossession.**

In a suit for damages for breach of covenant of title contained in a registered deed, in a case in which the vendee has been put in possession of the property by the vendor and the sale is void ab initio as against the rightful owner, the limitation begins to run not from the date of the sale but from the time vendee is dispossessed by the rightful owner: 11 *N.L.R.* 186, *not Appr.*; *A.I.R.* 1915 *Mad.* 708; *A.I.R.* 1915 *Mad.* 742; *A.I.R.* 1923 *Mad.* 46; *A.I.R.* 1921 *Bom.* 252 and *A.I.R.*; 1928 *Oudh* 465, *Rel. on.*; *A.I.R.* 1927 *P. C.* 99 and 2 *N. L. R.* 174, *Dist.*; 3 *N. L. J.* 221, *Expl.*

Per *Jackson, Offg. J .C.* and *Niyogi, A.J.C.*— The usual covenants for title are four and the expression "covenant for title" does not as is too often assumed mean covenant for right to convey but includes covenant for quiet enjoyment : 11 *N. L. R.* 186, *Held correctly decided.* [P 9 C 1]

(b) Transfer of Property Act (1882), S. 55 (2)—Scope.

In every contract of sale the statutory indemnity provided by S. 55 (2) is implied. [P 8 C 2]

S. B. Gokhale—for Applicant.

G. R. Pradhan—for Non-Applicant.

Order of Reference

Subhedar, A. J. C.—The facts of this case are shortly these: On 22nd February 1918 Zabu, the defendant-non-applicant, acting for himself and for his minor brother Shanker executed a sale deed in respect of 8 acres of land for Rs. 1,000, in favour of the plaintiffs-applicants and placed them in possession of the property. The vendor had a third brother Amruta who on 31st October 1925, secured, in Suit No. 185 of 1924, a decree for joint possession to the extent of a moiety in 8 acres conveyed to the plaintiffs and in April 1928 he got possession of the 4 acres pertaining to his share. In his first decree Amruta was however made to contribute Rs. 322-12-0 as it was held that he had derived benefit from the consideration of the sale on account of the purchase of some other land by the vendors.

On 24th June 1929 the plaintiff instituted a suit against their original vendor, the defendant, to recover Rs. 700, as damages for failure of consideration in respect of the sale transaction of the year 1918. The cause of action was stated to have accrued in 1928 when the plaintiffs lost possession of the moiety of the land conveyed. The suit was principally resisted on the ground that the claim was barred by time and following *Pirbhu* v. *Mt. Wazirbi* (1), the Small Cause Court dismissed the suit. The plaintiffs have therefore come up to this Court in revision.

It is conceded that the facts of the present case are almost identical with those of the above ruling; but it is contended that the law laid down there was incorrect and should be reviewed in the light of the following latest rulings on the point: *Subaroya* v. *Rajagopala* (2), *Arunachala* v. *T. Ramasami* (3), *Sankara Variar* v. *Umer* (4), *Multanmal* v. *Budhumal* (5) and *Jai Indra Bahadur Singh* v. *Khairati Lal*, *A. I. R.* 1928 *Oudh* 465. Reference was also made to *Ma Hnit* v. *Fatima Bibi* (6). But this last case and *Sankara Variar* v. *Umer* (4), were with

(1) [1915] 11 N. L. R. 186=31 I. C. 877.
(2) A. I. R. 1915 Mad. 708=38 Mad. 887.
(3) A. I. R. 1915 Mad. 742=38 Mad. 1171.
(4) A. I. R. 1923 Mad. 46 = 70 I. C. 787 = 46 Mad. 40.
(5) A. I. R. 1921 Bom. 252 = 61 I. C. 70 = 45 Bom. 955.
(6) A. I. R. 1927 P. C. 99 = 101 I. C. 414 = 54 I. A. 145=5 Rang. 283 (P.C.).

reference to Art. 97 and not Art. 116 of the Limitation schedule which admittedly is applicable to the present case. In *Bahadur Lal* v. *Jadhao* (7), it was conceded that limitation in such cases begins to run from the date of dispossession.

Personally I feel very much impressed by the reasonings adopted in the cases cited for the applicants which lay down that under Art. 116, Limitation Act time would begin to run even where the sale is void ab initio and possession of the property is delivered to the vendee not from the execution of the sale deed but from the date of his subsequent dispossession by the rightful owner. I therefore refer the following question for the decision of a Bench of this Court:

"What is the starting point of limitation under Art. 116, Sch 1, Lim. Act, in a suit for damages for breach of covenant of title, contained in a registered deed, in a case in which the vendee has been put in possession of the property by the vendor, and the sale is void ab initio as against the rightful owner; whether from the date of the sale or from the date of dispossession of the vendee by the rightful owner?"

Opinion

Subhedar, A. J. C.—The question referred to the Full Bench for decision is expressed as under:

"What is the starting point of limitation under Art. 116, Sch. 1, Lim. Act, in a suit for damages for breach of covenant of title contained in a registered deed, in a case in which the vendee has been put in possession of the property by the vendor and the sale is void ab initio as against the rightful owner; whether from the date of the sale or from the date of dispossession of the vendee by the rightful owner?"

This reference was necessitated by the argument of the learned advocate for the applicant in a pending application for revision to the effect that the decision of Batten, A.J C., in *Pirbhu* v *Mt. Wazirbi* (1), was not correct particularly in view of the several cases since decided by their Lordships of the Privy Council and the several High Courts in India. In the aforesaid case it is laid down that a suit for damages for breach of covenant of title contained in a registered deed is governed by Art. 116, Sch. 1, Lim. Act, and that when the absence of the right contracted for is completed at the time of the execution of the conveyance and there is no question of fraud, the limitation period begins to run from that date and not from the date of the dispossession of the vendee if possession is delivered to him in pursuance of the contract of sale. In *Bahadur Lal* v. *Jadhao* (7), it was held that Art. 116 of the Limitation schedule governed such a case for damages but it was conceded by the parties that limitation commenced to run not from the date of sale but from the time the flaw in the vendor's title was judicially determined.

In *Subbaraya* v. *Raja Gopala* (2), Seshagiri Aiyar, J., classified under the following three heads the several cases cited before him:

"(a) Where from the inception the vendor had no title to convey and the vendee has not been placed in possession of the property;

(b) Where the sale is voidable on the objection of third parties and possession is taken under the voidable sale and

(c) Where though the title is known to be imperfect the contract is in part carried out by giving possession of the properties."

The learned Judge held that in the first class of cases the starting point of limitation would be the date of the sale, while with regard to those of the other two classes the cause of action to claim damages would rise only when the vendee's possession is disturbed, because:

"The party is in possession and that is what at the outset under a contract of a sale a purchaser is entitled to and so long as his possession is not disturbed he is not damnified."

With regard to cases under either (b) or (c) class falling under Art. 97 of the Limitation schedule where the claim of a vendee plaintiff must necessarily be confined only to the return of the purchase money paid to the vendor defendant, it has been uniformly held in a series of cases that the possession or other benefit obtained in pursuance of the transaction is a subsisting consideration whether the transaction itself is void or voidable so that in all cases of these kinds the period of limitation will begin to run not from the date of sale but from the time when possession or other benefit derived from the transaction is lost, which is deemed to be the failure of consideration under this article: *Ma Hnit* v. *Fatima Bibi*, *A. I. R.* 1927 *P. C.* 99, *Narsing Shivbakas* v. *Pachu Rambakas* (8), *Sankara Variyar* v. *Umer* (4), *Premsukhdas* v. *Namdeo* (9) and *Dharamchand* v. *Gorelal* (10).

In the cases of transactions of class (b), viz., those voidable at the option of third parties where the plaintiff vendee

(7) [1936] 2 N. L. R. 174.

(8) [1913] 37 Bom. 538=20 I. C. 254.

(9) [1920] 3 N. L. J. 221.

(10) [1918] 47 I. C. 886.

upon dispossession or disturbance of title to retain possession sues for damages for breach of covenant for title either express or implied by law, the view entertained is also unanimous that in such cases the starting point of limitation under Art. 116 of the Limitation schedule is the date of dispossession of the plaintiff of disturbance of his title to retain possession under the transaction and not the date of sale. The latest cases in support of this view are: *Subbaraya* v. *Raja Gopala* (2), *Mahamed Ali Sheriff* v. *Venkatapathi Raju* (11), *Multanmal* v. *Budhumal* (5), *Hanwant Rai* v. *Chandi Prasad* (12), *Muhammad Siddiq* v. *Muhammad Nuh* (13) and *Bhawani Singh* v. *Girdhari* (14). In a transaction which is void ab initio and in which the defendant vendor has no title to, nor delivers possession of the property sold if the plaintiff vendee in his attempt to secure possession is resisted by the true owner and files a suit against his vendor for damages for breach of covenant of title, such a suit falls under Art. 116 of the Limitation schedule and limitation runs from the date of sale. *Arunachala Aiyar* v. *T. Ramasami Aiyar* (3) and *Ganappa Putta* v. *Hammod Saiba* (15). The latter decision is also authority for the proposition that the expression "compensation for the breach of a contract" used in Art. 116 of the Limitation Schedule is not limited to a claim for unliquidated damages but applies also to a claim for payment of a sum certain, e.g., purchase money, so that even if the claim of a vendee under a registered instrument be confined to the return of the purchase money only the suit would fall under Art. 116 and not under Art. 97 of the Limitation Schedule.

There now remains the consideration of the important question involved in the reference, viz., what is the starting point of limitation under Art. 116 of the Limitation Schedule for a claim for damages for breach of covenant of title express or implied in a registered instrument regarding a transaction void ab initio but in which possession of the property is delivered and the vendee is subsequently evicted by the rightful owner, whether from the date of the sale or from the time allowed in trasactions voidable at the instance of third parties.

Batten, A. J. C., in *Pirbhu* v. *Mt. Wazirbi* (1) relying on "a very strong balance of authority" under English Law held that it arose on the date of sale and he quoted Williams on the Law of Vendors and Purchasers and Dart on the Law and Practice relating to Vendors and Purchasers, and especially referred to the case of *Spoor* v. *Green* (16) and *Turner* v. *Moon* (17). But in *Multanmall Jayoram* v. *Budhamal Kevalchand* (5), Macleod, C. J., made the following very weighty observations, by way of caution, against following English law and decisions in India where statute law applies :

> "It was argued by the defendants that where a seller has covenanted that he has a good title then the covenant of title was broken immediately upon the execution of the assurance which contains them" ;

and

> "this is so stated in Dart on Vendors and Purchasers, Vol. 2, p. 788. The authority for that proposition is *Turner* v. *Moon* (17). In that case there was no question of limitation although the case of *Spoor* v. *Green* (16), was referred to by Sir Lawrence Jenkins in *Tulsiram* v. *Murlidhar* (18). But at the end of the judgment the learned Chief Justice said we allude to these facts because we desire to guard ourselves against being taken to decide that where the Transfer of Property Act applies, there may not be remedies to which a different period of limitation would be applicable."

In *Harnathkuar* v. *Indar Bahadur Singh* (19), their Lordships of the Privy Council while dealing with the argument of the appellant that his case was governed by the provisions of S. 65, Contract Act, also observed that:

> "So framed the plaintiff's claim to compensation rests not on any principle or formula of English Law but on the words of this section and it has to be seen whether the facts of this case came within its scope."

This was a case in which the plaintiff vendee in May 1914, sued the defendant vendor for possession of certain properties which had been sold to him in January 1880 but of which possession was not delivered on demand in 1914, and in the alternative for damages for

(11) [1920] 60 I. C. 235.
(12) A. I. R. 1929 All. 293=119 I. C. 243=51 All. 651.
(13) A. I. R. 1930 All. 771=124 I. C. 185=52 All. 604.
(14) A. I. R. 1932 Nag. 3
(15) A. I. R. 1925 Bom. 440=89 I. C. 59=49 Bom. 596.
(16) [1874] 9 Ex. 99=43 L. J. Ex. 57=30 L. T. 393=22 W. R. 547.
(17) [1901] 2 Ch. 825=70 L. J. Ch. 822=85 L. T. 90=50 W. R. 237.
(18) [1902] 26 Bom. 750=4 Bom. L. R. 571.
(19) A. I. R. 1922 P. C. 403=71 I. C. 629=50 I. A. 69=45 All. 179=26 O. C. 223 (P. C.).

breach of contract. The sale was held to be absolutely void as the vendor had no interest in the property sold but had only rights of expectancy. The suit was therefore dismissed by all the Courts in India but on appeal their Lordships accepted the argument that so far as the claim for compensation was concerned the suit was governed by the provisions of S.65, Contract Act, and was in time as the cause of action arose when "demand for possession was resisted" by the defendant which was in May 1914.

The following passages from the judgment of their Lordships are very instructive:

"Before this Board the claim has been based on S. 65, Contract Act. It is there provided that when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or make such compensation for it to the person from whom he received it."

"The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from S. 2. By Cl. (e) every promise and every set of promises forming the consideration for each other is an agreement, and by Cl. (c) an agreement enforceable by law is a contract. S. 65 therefore deals with [a] agreements enforceable by law and [b] with agreements not so enforceable. By clause [g] an agreement not enforceable by law is said to be void."

"An agreement therefore discovered to be void is one discovered to be not enforceable by law and on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. The agreement here was manifestly void from its "inception and it was void because its subject-matter was incapable of being bound in the manner stipulated."

It would appear that their Lordships of the Privy Council in the case of *Harnath Kuar* (19) held that cause of action to claim damages for breach of the covenant to place the plaintiff vendee in possession of the property sold accrued to him not on the date of the void agreement but when demand for possession, agreed to be delivered under it, was resisted by the defendant vendor. Even in the absence of such an express covenant for delivery of possession the same would be implied in every contract of sale by S. 55 (1) (f), T. P. Act, which casts upon the seller if so required, the duty of placing the vendee in possession of the property sold. A fortiori the cause of action to recover damages for breach of covenant of title which necessarily includes that of quiet enjoyment under S. 55 (2), T. P. Act, would only accrue to a vendee if he was already placed in possession of the property in pursuance of the void agreement on the date when his possession is disturbed by the rightful owner. This was also the view taken of this matter by Sheshagiri Aiyar, J., in *Subaraya Reddiar* v. *Rajagopala Reddiar* (2), although the transaction before him was of a voidable nature only.

The case of *Premsukhdas* v. *Namdeo* (9), was of a sale void ab initio in which the plaintiff vendee claimed from the defendant vendor damages, and not merely return of the purchase money, upon his dispossession by the rightful owner. Prideaux, A. J. C., however treated the case as falling under Art.97 of the Limitation Schedule and distinguished it from *Pirbhu* v. *Mt. Wazirbi* (1) on the ground that in the case before him there was no express covenant of title in the contract of sale as there was in *Pirbhu's* case (1). But the learned Judge seems to have overlooked that in every contract of sale the statutory indemnity provided by S. 55 (2), T. P. Act is implied. It was however held that the cause of action to claim damages arose on the date of dispossession of the plaintiff by the rightful owner.

Apart from authorities the matter may be considered from another standpoint. In both voidable and void sales if the vendor places the vendee in possession of the property sold the principal object of the sale, that is possession and enjoyment of property, is secured to the vendee and therefore until these are disturbed by the rightful owner it could not logically be said that there is a breach of contract within the meaning of Art. 116 of the Limitation schedule in a voidable transaction at the time of disturbance of possession by the rightful owner and in the case of a void transaction at the time of the execution of conveyance. In both the cases where possession is delivered to the vendee, the sale, for all practical purposes, remains good until it is avoided by the rightful owner. Cause of action to claim damages for breach of contract cannot arise in either voidable or void sales to a vendee, if he is placed in possession of the property sold, before he is evicted by the rightful owner for the very obvious reason that he in fact suffers no damages till then. It follows then that in a void transaction the limitation period should

not run against the vendee, who has been placed in possession of the property under the contract of sale, to claim damages from the vendor for breach of contract, at any time earlier than it would start running under similar circumstances in the case of a voidable sale.

For these reasons my answer to the question referred to the Full Bench for decision is that the limitation begins to run not from the date of sale but from the time the vendee is dispossessed by the rightful owner.

Niyogi, A. J. C.—I agree with the opinion recorded by Subhedar, A. J. C. I wish to add what follows :

When a vendee, whose possession is disturbed by the rightful claimant, sues his vendor for compensation, his claim, in substance, is one founded on the breach of the covenant for quiet enjoyment. The covenant for title in a generic sense includes a covenant for quiet possession, but in its special sense means only a covenant as to the vendor's right to convey. Confusion arises from laxity of expression ordinarily used in the pleadings, viz., to describe a breach of what is really a covenant for quiet enjoyment as one for title.

The usual covenants for title are : for right to convey for quiet enjoyment ; for freedom from incumbrances ; and for further assurance. Of these, the covenant for right to convey is a covenant for title and the covenant for quiet enjoyment is a covenant relating to possession. The distinction is material since it affects both the date when the covenant is broken and the measure of damages. A covenant for title is an assurance to the purchaser that the grantor has the very estate in quality and quantity which he purports to convey, whereas the covenant for quiet enjoyment is a future covenant : see 25 Halsbury, pp. 462-466. The law as to limitation of actions in respect of these two cases is succinctly laid down in 19 Halsbury, 78 in these terms :

"Where on the sale of the property the vendor covenants that he has a good title to transfer, while in fact he has not a good title, the breach of the covenant is at the time of the sale and there is no continuing breach ; but if the vendor covenants for quiet enjoyment, there is no breach of that covenant till there is an interference with the enjoyment of the purchaser or those claiming through him."

It is obvious that when the vendee obtains corporeal possession of the property purchased by him from a vendor who may or may not have a sound and unfettered right to convey, and his possession is disturbed, the cause of action for damages arises on the date of such disturbance.

Article 116, Sch. 1, Limitation Act, is specifically enacted respecting claims for compensation for breach of a contract in writing and registered. In *Tricomdas Cooverjee Bhoja* v. *Gopinath Jiu Thakur* (20) their Lordships of the Privy Council affirmed that Art. 116 is a special provision which is intended to apply to all contracts in writing and registered. On the authority of this dictum, the Courts in India have applied Art. 116 to cases of breaches of covenants, express or implied, for title incorporated in registered instruments: see *Multanmal Jayaram* v. *Budhumal Kevalchand* (5), *Ganapa Putta* v. *Hammad Saiba* (15), *Md. Siddiq* v. *Md. Nuh* (13) and see also *Ratanbai Shaligram* v. *Ghasiram Gungabisan* (21).

There may be express covenants for title and quiet possession contained in regularly drawn up instruments of sale. But even if they are absent such covenants are implied by law. By virtue of S. 55 (2), T. P. Act, 1882, every sale necessarily imports a covenant for title and quiet enjoyment and this covenant is not merely personal but runs with the land. Under that enactment, the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. "The right to enjoy possession is an incident of ownership and as such, an interest in the property."

When the vendor, in pursuance of the conveyance, delivers actual physical possession to the vendee the latter acquires the same. The vendor's covenant as to this interest must remain unaffected so long as the vendee is in the quiet enjoyment of possession. This covenant as to quiet enjoyment being a future covenant cannot obviously be broken on the date of the sale, notwithstanding that the vendor has no right to convey. The breach of that covenant can occur only on the disturbance of the vendee's possession. Since the vendor's covenant is twofold, viz., for right to convey and for quiet

(20) A. I. R. 1916 P. C. 182=39 I. C. 156=44 I. A. 65=44 Cal. 759 (P.C.).
(21) A. I. R. 1932 Bom. 36.

enjoyment, the vendee will have two distinct causes of action in the event of the breach. If the vendor has no title on the date of the conveyance, the breach of the covenant certainly occurs at the time of the sale, and if the remedy is not sought within the statutory period, the cause of action accruing from that breach will alone lapse. It cannot destroy any remedy to which the vendee may be entitled by reason of interference with his possession.

In *Pirbhu* v. *Mt. Wazirbi* (1) the plaintiff did not take his stand on the disturbance of his possession. The case was therefore treated as one for breach of a covenant for title only and was determined on the authority of the view expressed by Baron Bramwell in *Spoor* v. *Green* (16), which was followed by Joyce, J., in *Turner* v. *Moon* (17). In the firstmentioned case the plaintiff founded his action on the breach of a covenant for title as well as that for quiet enjoyment, but his case as to the breach of the covenant for quiet enjoyment having failed on technical grounds, it rested solely on the breach of the covenant for title. Baron Bramwell held that the breach of the covenant for title was not a continuing breach since the covenant remains broken indeed, but broken once for all. As the vendor was found to have no title to convey on the date of the conveyance the breach of the covenant for title was held to have occurred on that date. From the observations made by Baron Bramwell in the course of his judgment, viz., "of course, the statute of limitations would apply to any breach of covenant for quiet enjoyment which took place 20 years before suit," it is evident that if the action had been rightly laid as to the breach of the covenant for quiet possession, Baron Bramwell would indeed have treated the claim as being within time. In *Turner* v. *Moon* (17), the claim for damages was founded on the breach of the covenant for title only. It is apparent that these authorities have no direct bearing on a case in which damages are claimed on the basis of the breach of the covenant for quiet enjoyment, viz., disturbance of possession.

Jackson, Offg. J. C.—I have had the advantage of reading the opinions of Subhedar, A. J. C. and Niyogi, A. J. C. and I have not much to add.

As Niyogi, A. J. C., has pointed out, the usual covenants for title are four, and the expression "covenant for title" does not, as is too often assumed, mean merely "covenant for right to convey," but includes "covenant for quiet enjoyment." In *Pirbhu* v. *Mt. Wazirbi* (1), the covenant for title considered to have been broken was the covenant for right to convey ; and in my opinion it was rightly decided that limitation for a suit on that cause of action began to run from the date of the sale. In the present case two covenants for title have been broken, the covenants for right to convey and the covenant for quiet enjoyment; obviously, limitation for a suit based on breach of the second of these covenants can only begin to run from the date on which the vendee's possession was disturbed.

My opinion therefore is that, when possession has been given to the vendee, limitation for a suit for damages for breach of covenant for title, that covenant being, in fact, the covenant for quiet enjoyment, begins to run from the date of dispossession.

V.B./R.K. *Reference answered.*

A. I. R. 1932 Nagpur 10

JACKSON, J. C.

Ramchandra—Applicant.

v.

Balkrishna—Non-Applicant.

Misc. Review Application No. 85 of 1931, Decided on 21st October 1931, against order of Judicial Commissioner, D/- 7th August 1931, in Civil Revn. No. 291 of 1931.

C. P. Tenancy Act (1920), S. 78—Suit between landlord and tenant for arrears of rent—Revenue Officer is civil Court—Civil Court holiday reasonable ground for non-appearance.

In a suit for arrears of rent where a Revenue Officer presides as a Judge, the Court is undoubtedly a civil Court even though under S. 78 the Financial Commissioner has power to prescribe a register of suits of such Court. Under the circumstances that a day was declared holiday for civil Courts, is reasonable ground for not appearing on such day ; and order dismissing for default thereupon can be set aside.

[P 10 C 2]

W. R. Pandit—for Applicant.

S. G. Gadgil—for Non-Applicant.

Order.—I overlooked in my order of which review is sought the fact that 4th March 1931 was a holiday for civil Courts. The Court in which the Additional Tahsildar presides as Judge is undoubtedly a civil Court even though, under S. 78, Tenancy Act, the Financial Commissioner has power to prescribe a

register for suits of such Courts. In the circumstances the applicant had reasonable ground for not appearing on 4th March 1931 and the order dismissing his suit for default should have been set aside.

I grant review of my order dated 7th August 1931 and set aside the lower Court's order dismissing the suit for default. The suit will now be decided on its merits.

Costs in this Court will be borne by the non-applicant. I fix pleader's fee at Rs. 10.

V.B./R.K. *Review granted.*

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* A. I. R. 1932 Nagpur 11

STAPLES, A. J. C.

Mt. Laxmi Bai—Plaintiff—Appellant.

v.

Sambha and *others*—Defendants—Respondents.

Appeal No. 203 of 1928, Decided on 17th March 1931, from appellate decree of Dist. Judge, Wardha, D/- 22nd December 1927.

*** Hindu Law — Maintenance — Widowed daughter-in-law—Right to maintenance against father-in-law is pious obligation but becomes legal obligation with persons taking father-in-law's property even though by will.**

There is no legal obligation on a Hindu father-in-law to maintain his widowed daughter-in-law when he is not possessed of any joint family property. There is however a pious obligation to maintain her out of his self-acquired property, and the pious obligation becomes legal obligation with the sons or the heirs of the father-in-law who succeed to the property on the death of her father-in-law, irrespective of whether they take by inheritance, survivorship or under a will: 11 *Bom.* 199; 11 *All.* 194; 23 *Bom.* 608; 22 *Mad.* 305; *A. I. R.* 1929 *Oudh* 251 (*F. B.*); *A. I. R.* 1924 *Cal.* 364 and *A. I. R.* 1929 *All.* 751, *Foll.*; 31 *Mad.* 338 *and* 37 *Mad.* 396, *Ref.*; 25 *Bom.* 263, *Diss. from.* [P 13 C 1]

A. V. Khare—for Appellant.

D. W. Kathalay—for Respondents.

Judgment.—The appellant brought a suit for arrears of maintenance and for a declaration that she was entitled to future maintenance, and in the trial Court she obtained a decree both for arrears and for a declaration that she was entitled to claim future maintenance at the rate of Rs. 126 per annum from January 1926. In appeal the District Judge dismissed the claim for arrears of maintenance and reduced the claim for future maintenance to Rs. 84 a year, which amount was admitted by the defendants, who had preferred the appeal to him. The plaintiff Laxmibai has now preferred this second appeal, claiming both arrears of maintenance at the rate awarded by the trial Court and future maintenance at the minimum rate of Rs. 15 per month.

The appellant is the widow of one Narayan who was the brother of the two respondents Sambha and Sadasheo. The respondents and Narayan were all sons of one Jairam, and admittedly they constituted a joint Hindu family. Narayan died in 1916 when he was only 20 and Jairam, the father, died in 1920. It has been found that Jairam executed a will, which is filed in the suit as Ex. D-20 on 25th February 1917, and in that will provision has been made for the maintenance of the appellant Laxmibai out of the income of a malik-makbuza field. The trial Court held however that the plaintiff Laxmibai was not bound by that condition in the will and that she could claim maintenance according to her husband's share in the property at the time of his death and in proportion to the income of the family property. The lower appellate Court however has found that the property was not family property, but was the self-acquired property of Jairam, and that therefore Laxmibai could not claim any maintenance out of the property beyond what was allowed to her under will. These are the two findings which have been made the chief ground of attack in second appeal.

As regards the first finding that the property was self-acquired, I can see little, if any, ground to interfere. This is, in the main, a finding of fact, and it is supported by the evidence on record. The plaintiff's case originally was that Jairam had inherited property from his father, which formed a nucleus of joint family property, but no evidence to prove that plea was adduced. One witness, Shanker (P. W. 4), was examined, and he has come with a different story, namely, that Jairam inherited certain property from his stepmother who lived at Umrer. As pointed out by the lower appellate Court, the evidence of this witness is uncorroborated and, as his story is different to the plea put forward by the plaintiff in the plaint, it was, I think, rightly rejected. Nor do I think that much importance can be attached to the fact that Jairam in his business kept some accounts in the name of the plaintiff's husband Narayan. There is no

sufficient evidence on record, in my opinion, to hold that there was either a nucleus of joint family property or that Jairam and his sons carried on business jointly and acquired property by their joint labour. On the contrary, the evidence seems to show that Jairam acquired the property by his individual exertions. Nor is there, I think, any sufficient evidence to show that the property, when acquired, was thrown into the joint family fund and treated as joint family property; on the contrary, as pointed out by the lower appellate Court, Jairam devised all his property by will without any objection on the part of his sons, and in so doing treated it as his self-acquired property. I do not think, then, that any of the cases cited by the learned counsel for the appellant in this connexion, namely, *Kundan Lal* v. *Shankar Lal* (1), *Mohansingh* v. *Punji*, *A. I. R.* 1927 *Nag.* 327, *Motilal* v. *Harjimal*, *A. I. R.* 1926 *Nag.* 146, *Punji* v. *Govind*, *A. I. R.* 1930 *Nag.* 7 and *Karsondas Dharamsey* v. *Gangabai* (2), will apply, and I am of opinion that the finding of the lower appellate Court, that Jairam's property was his self-acquired property, must be upheld.

The only point then that remains to be determined is whether that self-acquired property of Jairam in the hands of the defendants, who are devisees under the will, is liable to the plaintiff's claim for maintenance. The question is one not free from difficulty and as regards which there has been some divergence of opinion. The correct view seems to be that a father-in-law, who is not possessed of ancestral property, is not legally bound to maintain his widowed daughter-in law and that such daughter-in-law has no claim against his self-acquired property. On the other hand, it has been laid down in a number of cases, relying on the Hindu text-books, that a father-in-law is under a pious or moral obligation to maintain his widowed daughter-in-law. The lower appellate Court has relied upon *Meenakshi Ammal* v. *Rama Aiyar* (3), where it has been laid down that, although there is such a pious obligation according to the Hindu text-books, the Courts would not be bound to enforce such obligation, but would only enforce it looking to the circumstances of the case and to the times and according to the rule of justice, equity and good conscience. It may however I think be safely inferred that in the majority of cases, where the widowed daughter-in-law is without means of subsistence and the father-in-law is in possession of self-acquired property, the moral obligation to maintain the daughter-in-law would be enforced by the Courts. Then the next question that arises is, what is the obligation on the sons or heirs of the father-in-law after his death. The view taken by the majority of High Courts is that what is a pious obligation on the part of the father-in-law becomes a legal and binding obligation on his heirs. This was laid down in *Adhibai* v. *Qursandas Nathu* (4) on the ground that what was self-acquired property of the father became the ancestral property of the joint family in the hands of his sons. In *Janki* v. *Nand Ram* (5) a Full Bench of the Allahabad High Court dissented from the view taken by the Bombay High Court, but they also affirmed that what was a pious obligation on the father-in-law became a legal obligation on the son who took the property by inheritance, not because the property would be correctly described as ancestral property, but because the son took the estate not for his own benefit but for the spiritual benefit of his father, the last proprietor. Thus the same result has been arrived at in both cases, although the reason for arriving at that conclusion is different. These cases have been followed in *Yamunabai* v. *Manubai* (6), *Rangammal* v. *Echammal* (7), *Jai Nand* v. *Mt. Paran Dei* (8), *Gopal Chandra Pal* v. *Kadambini Dasi*, *A. I. R.* 1924 *Cal.* 364 and *Jeot Ram* v. *Mt. Lauji*, *A. I. R.* 1929 *All.* 751; and the principle has again been affirmed in *Surampalli Bangarammal* v. *Surampalli Brambaze* (9).

The lower appellate Court however relied on *Bai Parvati* v. *Tarwadi Dolatram* (10), where it has been held that, when a father-in-law has bequeathed his self-acquired property to a third person,

(1) [1913] 35 All. 564=21 I. C. 13.
(2) [1908] 32 Bom. 479=10 Bom. L. R. 184.
(3) [1912] 37 Mad. 396=18 I. C. 34.
(4) [1887] 11 Bom. 199.
(5) [1889] 11 All. 194=(1889) A. W. N. 30 (FB)
(6) [1899] 23 Bom. 608=1 Bom. L. R. 95.
(7) [1898] 22 Mad. 305=9 M. L. J. 14.
(8) A. I. R. 1929 Oudh 251=118 I. C. 419=4 Luck. 49. (F. B.)
(9) [1908] 31 Mad. 338=18 M. L. J. 251.
(10) [1900] 25 Bom. 263=2 Bom. L. R. 894.

the widowed daughter-in-law has no right of maintenance against that person. The earlier case *Yamunabai* v. *Manubai* (6) was distinguished on the ground that it applied to persons who took the self-acquired property of the father-in-law by inheritance, but not to those who took it under a will. With all due respect however, I am doubtful whether that distinction is really sound; and it has been expressly dissented from in *Gopal Chandra Pal* v. *Kadambini Dasi*, *A.I R.* 1924 *Cal.* 364 and *Jeot Ram* v. *Mt. Lauji*, *A. I. R.* 1929 *All.* 751. It may also be pointed out that in *Rangammal* v. *Echammal* (7) it was held, though obiter, that a third person who took the property by a will would be in no better position to resist a claim for maintenance than the one who took the property by inheritance. In *Jai Nand* v. *Mt. Paran Dei* (8), the question of a devisee who took the property by a will was not considered, and therefore *Bai Parvati* v. *Tarvadi Dolatram* (10), was not expressly referred to; but the Judges who decided the case have held that the sons, who are in possession of the self-acquired property of their father, are legally bound to maintain the widow of their brother who predeceased their father, whether they took the property of the father by inheritance or by survivorship.

The balance of authority, then is in favour of the view that not only is there a legal obligation on the sons or heirs of the father-in-law to maintain the widowed daughter-in-law out of the self-acquired property, which has come to them from their father, but that persons who have taken such self acquired property under a will executed by the father-in-law are also legally bound to maintain the daughter-in-law. I am of opinion that to hold otherwise would be tantamount to holding that the father-in-law could defeat his widowed daughter-in-law's claim by executing a gift or will, and that would be contrary not only to the principles of Hindu law but also to the rules of justice, equity and good conscience, when it has been held that the father-in-law is under a moral obligation to maintain his widowed daughter-in-law. I therefore hold that persons in possession of the self-acquired property of a Hindu father after his death, whether they have taken such property by inheritance, survivorship or under a duly executed will or deed of gift, are under a legal obligation to maintain the widow of a son who predeceased his father. Accordingly I reverse the finding of the lower appellate Court on this point and hold that the defendants-respondents are legally bound to maintain the appellant.

The questions that remain then to be determined are the amount of maintenance that should be awarded and whether the arrears of maintenance claimed should be granted or refused. On the first point an exhaustive discussion was made by the Judge of the trial Court. The Judge of the lower appellate Court has been chiefly influenced by the view that the plaintiff could not claim maintenance against the property beyond what was allowed to her in the will, and has therefore granted only the amount of Rs. 84. which was agreed to by the defenaants. In para. 6 of his judgment the Judge has made some short discussion about the income of estate but apparently he has simply accepted the defendants' contention as regards the amount of income without looking into the evidence. On the other hand, as already stated, the Judge of the trial Court has made a full discussion of the evidence, and I can see no reason for differing from the estimate arrived at by him, namely, that the income was not less than Rs. 1,300 a year, this, in fact as stated by trial Judge is probably an underestimate. I do not think, then that the amount allowed by that Judge, namely, Rs. 10-8-0 a month, or Rupees 126 a year, is in any way excessive and as pointed in *Ekradeshwari Bahausin* v. *Homeshwar Singh* (11) in a case of this kind the widow is not only entitled to bare maintenance but to maintenance suitable to her condition in life and to the status of the family. It cannot I think be argued that the amount of Rs. 126 a year is in any way excessive according to this standard: it has been fixed according to this standard. I would therefore restore the decree of the trial Court allowing the plaintiff-appellant maintenance at the rate of Rs. 126 per annum.

As regards arrears of maintenance also I am of opinion that the view of the trial Court is correct and that the lower ap-

(11) A.I. R. 1929 P. C. 128=116 I. C. 409=56 I. A. 182=8 Pat. 840 (P. C.).

pellate Court has gone wrong in the matter. It has been laid down in *Siddessury Dassee* v. *Jawardhan Sarkar* (12) and *Raja Ratan Singh* v. *Rani Beni Bai* (13) that a widow, who does not live in the house of her deceased husband, does not thereby forfeit her claim to maintenance. It has further been found in the present case that the plaintiff lived with her father after the death of her husband but that after her father's death about six years prior to the suit she was in difficulties and she applied to the defendants for maintenance, which was refused. Continued demands were made and at last a registered notice was given. It has not been shown that the plaintiff has any other source of income or was able to maintain herself; on the contrary the inference seems to be, as held by the trial Court, that she was in difficulties and probably had to borrow money. The lower appellate Court has referred to the judgment in *Sakharam* v. *Yashodabai* (14) and *Pandurang* v. *Mt. Yashodabai* (15), but has overlooked the fact that in the present case the father of the plaintiff, who was supporting her died some six years before the suit and that arrears are only claimed for five years prior to the suit. There seems to me to be no justification for refusing the claim for arrears, and I would point out that the trial Court has only allowed arrears of maintenance at the reduced rate of Rs. 8 a month. I am of opinion that such an amcunt is in no way excessive and that, if anything, a concession has been made in favour of the defendants. I would therefore restore the decree of the trial Court as regards arrears of maintenance also.

The decree of the lower appellate Court therefore is set aside and instead the decree of the trial Court is restored. Two-thirds of the costs of the appeal in this Court will be borne by the respondents, the remaining one-third being borne by the appellant, as she had claimed maintenance at the rate of Rs. 15 per month, or Rs. 180 a year, in the appeal. Costs of the appeal in the Court of the District Judge will be borne by the defendants-appellants, whilst costs of the cross-objections in that Court will be borne by the plaintiff-respondent. Costs of the suit will be borne as ordered by the trial Court.

V.B./R.K. *Appeal allowed.*

(12) [1902] 29 Cal. 557=6 C. W. N. 530.
(13) [1904] 1 N. L. R. 33.
(14) Second Appeal No. 173 of 1924, Decided on 27th April 1925.
(15) Second Appeal No. 196 of 1925, Decided on 21st December 1925.

A. I. R. 1932 Nagpur 14

MACNAIR, J. C.

Balkrishna—Judgment-debtor—Appellant.

v.

S. M. Chitnavis—Decree-holder—Respondent.

Second Appeal No. 184 of 1930, Decided on 29th January 1931, against order of Dist. Judge, Nagpur, D/- 27th January 1930.

(a) Civil P. C. (1908), S. 2 (2)—Execution.

An order dismissing an application for execution in default is not a decree. [P 15 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 90 and 92—Application under R. 90 must be decided on merits even in default of purchaser.

Where an application under O. 21, R. 90, has been made, the provisions of R. 92 make it necessary that the application should be allowed or disallowed, and the Court cannot set aside the sale in default of the decree-holder or purchaser unless it is satisfied that the judgment-debtor has proved cause for such action : *A. I. R.* 1928 *Nag.* 265 (*F. B.*), *Ref.* [P 15 C 1]

(c) Civil P. C. (1908), O. 21, Rr. 90 and 92—Application under S. 90 — Default of decree-holder purchaser—Execution application dismissed—Order must be deemed to be under O. 21, R. 92.

Where on an application under O. 21, R. 90, the Court dismisses the application for execution for default of decree holder purchaser and sets aside the sale, the order setting aside the sale must be deemed to be under O. 21, R. 92 and is appealable. [P 15 C 1]

B. R. Mandlekar—for Appellant.

M. K. Hardas—for Respondent.

Judgment.—The plaintiff-respondent attached certain property in execution of a decree against the appellant and purchased it himself at an execution sale. The appellant made an application under O. 21, R. 90, Sch. 1, Civil P. C., to set aside the sale. A date was fixed for evidence with regard to this application and, on that date the respondent (decree-holder) failed to appear. The executing Court passed the following order :

" Decree-holder absent. Judgment-debtor by Mr. Mundlekar. Dismissed in default of the decree-holder. Sale set aside as it is taken by the decree-holder himself. Property be released. Costs Rs. 14-8-0 on decree-holder."

The respondent appealed to the District Judge who held that no appeal lay under O. 43, R. 1 (j), Sch. 1, Civil P. C., but the order amounted to a decree and

an appeal lay for this reason. The learned District Judge set aside the order of the executing Court and directed that Court to come to a decision with regard to the application to set aside the sale.

In the second appeal it is urged that the order of the executing Court was not subject to appeal. Under S. 2 (2) (b), which defines "decree," it is stated that decree " shall not include any order of dismissal for default." O. 21, R. 57, provides for the dismissal of an application for execution for default. The learned District Judge appears to be mistaken in holding that no order of dismissal for default can be passed with regard to execution applications. It is not material that the provisions of O. 9, do not apply to execution applications. The words of S. 2 (2) are clear and an order dismissing an application for execution in default is not a decree.

I do not agree with the learned District Judge that O. 43, R. 1 (j) is not applicable. An application under O. 21, R. 90, had been made and the provisions of O. 21, R. 92, make it necessary that this application should be allowed or disallowed. It is quite clear that the executing Court would not have passed the order which it did pass had there been no application to set aside the sale. The order then must be considered to be an order setting aside the sale passed under the provisions of O. 21, R. 92, and was subject to appeal.

I remark that the reasoning in *Shankar Lal* v. *Jawahar Lal* (1), does not give ground for holding that in the circumstances of this case, there was no necessity for the Court to deal with the application in the manner provided by O. 21, R. 92. Kinkhede, A. J. C., states that if the decree-holder releases in favour of the judgment-debtor whatever right he acquired by the auction, the Court might be justified in setting aside the sale unless the interests of the others would be prejudiced by so doing. But this statement appears to me merely to mean that if an application to set aside the sale is supported by all persons interested, it should be allowed.

As the learned District Judge has stated, when the decree-holder failed to appear on the date fixed for evidence, the Court should have decided the application ex parte. It was still the duty of the judgment-debtor to show that the sale ought to be set aside. The lower appellate Court then was right in setting aside the order of the executing Court and directing that Court to dispose of the application to set aside the sale in accordance with the law. This appeal therefore fails and is dismissed; costs on the appellant.

Counsel's fee Rs. 25.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1928 Nag. 265 =111 I. C. 895=24 N. L. R, 127 (F. B.).

A. I. R. 1932 Nagpur 15

JACKSON, OFFG. J. C.

Tikkilal and *others*—Defendants—Appellants.

v.

Gulabchand—Plaintiff—Respondent.

Second Appeal No. 114 of 1930, Decided on 30th July 1931, from decree of Addl. Dist. Judge, Seoni, D/- 8th November 1929.

(a) Hindu Law—Partition—Deed unequivocal—No additional act need be proved.

If a deed of partition is unequivocal in its language and the intention of the parties is clear from it, it is not necessary to prove acts in support of the deed : *A. I. R.* 1928 *All.* 419, *Foll.*; *A. I. R.* 1916 *P. C.* 110, *Dist.* [P 16 C 1]

(b) Hindu Law — Partition—One member separating—Presumption of complete partition does not necessarily arise—Agreement to continue joint need not be proved.

A presumption of complete separation does not arise in all cases when there has been separation of one or more members, and no definite agreement to continue to be a joint family on the part of the remaining members is necessary: *A. I. R.* 1921 *Bom.* 276; *A. I. R.* 1927 *Bom.* 68; *A. I. R.* 1925 *P. C.* 49; *A. I. R.* 1924 *P. C.* 126 *and* 30 *Cal.* 725 (*P.C.*), *Ref.* [P 16 C 2]

(c) Hindu Law—Partition—Adult son separating — Minors with their father remain joint.

When an adult son separates from a family consisting of his father and minor brothers, and if father acts on behalf of his minor sons, and if his intention be to remain joint with his minor sons he can decide so and his minor sons will remain joint with him : 30 *Cal.* 725 (*P.C.*), *Ref.* [P 17 C 1]

M. R. Bobde—for Appellants.

W. B. Pendharkar—for Respondents.

Judgment.—In this case the plaintiff-respondent sued for a declaration that he had a half share in the two houses attached by the defendants-appellants in execution of their decree against the plaintiff's two brothers Hirchand and Kallu. The plaintiff's case is that Kallu separated from the rest of the family in 1921, Hirchand and Gulabchand remaining joint with their father Jaikisan; the

houses in suit fell to the share of Jaikisan. Hirchand and Gulabchand, and after Jaikisan's death Hirchand and Gulabchand had each a half share. The defendants denied that there was any partition and pleaded in the alternative that there was a partition after Jaikisan's death between the three brothers in which the houses attached fell to the share of Hirchand. The lower Courts have held in favour of the partition as alleged by the plaintiff and had given him the declaration he has asked for.

In appeal it is again contended that there has been no partition. It is argued on the authority of *Banga Chandra* v. *Jagat Kishore* (1), that the partition deed Ex. P-2, executed by Jaikisan and Kallu is not sufficient to prove the partition; and it is pointed out that the lower appellate Court has remarked that there is no evidence worth the name about actual partition. The decision in question seems to me to have no application. Their Lordships of the Privy Council were considering the value of recitals as to necessity in sale deeds executed by a limited owner, and I am in respectful agreement with *Jai Narain Rai* v. *Baijnath Rai* (2), in which it has been held that if a deed of partition is unequivocal in its language and the intention of the parties is clear from it, it is not necessary to prove acts in support of the deed. I hold that the deed is sufficient in the present case to prove the partition in 1921. This necessarily involves rejection of the defendants' plea of a partition that took place after Jaikisan's death.

It is argued however that in any case the plaintiff is not entitled to a half share in the houses, but only to four-ninths, because the separation of Kallu raised a presumption that all the brothers of the family separated from each other. The plaintiff would thus get only a one-third share in the property that was not given to Kallu, which would be increased to four-ninths by his getting one-third of his father's one-third share on his father's death. In *Ramchandra* v. *Tukaram* (3), it is laid down that, if it is proved that there has been a breach in the state of union amongst the members of a Hindu joint family, the law presumes that there has been a complete partition both as to parties and property. This view however has been modified in *Babanna* v. *Parawa* (4), in which it is said that it is not correct to say that, because one brother has separated or has expressed an intention to separate, therefore the intention of the other brothers must be taken to be the same; they may, without any special agreement amongst themselves, continue to live as members of a joint Hindu family. Fawcett, J., who was a party to the earlier decision, remarked that in it the rule of law was too widely stated and that there is no general legal presumption that can be made applicable to every case. *Babanna* v. *Parawa* (4), follows the decision of the Privy Council in *Palani Ammal* v. *Muthuvenkatachala Moniagar* (5), in which their Lordships, after remarking that the remaining coparceners may continue to be copareeners without any special agreement amongst themselves, add:

"That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them."

In *Hari Baksh* v. *Babu Lal* (6), it has been held that

"the fact of a separation having been effected between brothers constituting a joint Hindu family governed by the Mitakshara law raises no presumption that there was a separation of the joint family constituted by one of the brothers and his descendants."

It is clear from these decisions that a presumption of complete separation does not arise in all cases when there has been separation of one or more members, and also that no definite agreement to continue to be a joint family on the part of the remaining members is necessary. The Privy Council decision in *Balabux* v. *Rukhmabai* (7), is not authority to the contrary on either point. That decision says that there is no presumption when one coparcener separates from the others that the latter remain united, but not that there is always a presumption of complete separation. On the question of agreement it merely holds that an agree-

(1) A. I. R. 1916 P. C. 110=36 I. C. 420=43 I. A. 249=44 Cal. 186 (P.C.).
(2) A. I. R. 1928 All. 419=108 I. C. 449=50 All. 615.
(3) A. I. R. 1921 Bom. 276=61 I. C. 761=45 Bom. 914.
(4) A. I. R. 1927 Bom. 68=100 I. C. 147=50 Bom. 815.
(5) A. I. R. 1925 P. C. 49=87 I. C. 333=52 I. A. 83=48 Mad. 254 (P.C.).
(6) A. I. R. 1924 P. C. 126=83 I. C. 418=51 I. A. 163=5 Lah. 92 (P.C.).
(7) [1903] 30 Cal. 725=30 I. A. 130=8 Sar. 470 (P.C.).

reement amongst the remaining coparceners to remain united or to reunite must be proved like any other fact; but that does not mean that an agreement is necessary. When an agreement is relied on it must certainly be proved; but as I have already pointed out, the Privy Council and the Bombay High Court following the Privy Council have held that no special agreement is necessary, it being possible to infer an agreement, if the facts justify such an inference.

Hirchand and Gulabchand were minors when partition took place in 1921, and in *Balabux* v. *Rukhmabai* (7), their Lordships of the Privy Council found it difficult to see how an agreement to reunite could be made by or on behalf of a minor. It would perhaps follow, if there can be no actual agreement, that it is impossible to infer one. But I do not think that there is any difficulty in the present case, in which I have to decide whether Jaikisan remained joint with his minor sons and not whether they reunited. In the partition Jaikisan acted on their behalf, and, if his intention was that he and they should not be separated, that intention would, I think, be as effective to continue the joint family as an agreement, express or inferred, between adults. To hold otherwise would mean that an adult son could, by separating himself from the family, cause separation between his father and the latter's minor sons against the father's will and probably against the interests of the minors.

That Jaikisan's intention was to remain joint with Hirchand and Gulabchand is indicated by the partition deed itself which specifies only the share to be given to Kallu. It is true that it does not expressly say that the other members would remain joint; but it seems to me to make it clear that the intention was that they should remain joint. The fact that Hirchand and Gulabchand were minors makes it extremely probable that their father would not wish to separate them from himself, and there is evidence to prove that though Kallu after separation went to live separately, the rest of the family continued to live together.

I am satisfied that Jaikisan, Hirchand and Gulabchand remained joint after Kallu separated and that Gulabchand is entitled to half share in the attached houses. The appeal therefore fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1932 Nagpur 17

STAPLES, A. J. C.

Zibal—Applicant.

v.

Laxman—Non-Applicant.

Civil Revn. No. 275 of 1930, Decided on 23rd December 1930.

(a) Provincial Insolvency Act (1920), S. 72—Insolvent discharged—Court cannot take action under S. 72 for offence committed under S. 72 before discharge.

After an insolvent has been discharged, the insolvency Court cannot proceed against him under S. 72 even though an offence is committed within the meaning of S. 72 before the order of discharge : *A. I. R.* 1928 *Sind* 114 and *A. I. R.* 1928 *Cal.* 211, *Dist.* [P 18 C 1]

(b) Provincial Insolvency Act (1920), Ss. 69 and 72—Offences under S. 69 do not include that under S. 72.

The offences clearly and fully set forth in S. 69 do not include the offence of obtaining credit within the meaning of S. 72. S. 69 (c) (1) refers to debts incurred before the order of adjudication and not to debts incurred after that order. [P 18 C 1]

S. A. Ghadgey—for Applicant.

R. G. Pande—for Non-Applicant.

Facts.—The applicant was, on his application, declared an insolvent by the First Subordinate Judge, but was subsequently discharged on 10th October 1925. The non-applicant, Laxman, applied to that Court on 8th September 1928 for prosecuting the applicant under S. 72, Provincial Insolvency Act, as the applicant obtained credit from the non-applicant of Rs. 200 while he was an undischarged insolvent without informing him of that fact. The application was opposed on the ground that the insolvency Court had no jurisdiction to take any action on the application, as the applicant was then a discharged insolvent. The insolvency Court upheld the plea and rejected the application. The District Judge, on appeal from the order, reversed it on the ground that the insolvency Court had jurisdiction to entertain the application, as S. 72, Provincial Insolvency Act, did not require that the application under the section should be made before the order of discharge.

Order.—I am clearly of opinion that the view taken by the lower appellate Court is wrong and that the view set forth by the Judge of the insolvency Court in his order to be found in the order-sheet of 2nd September 1929 was

correct. After an insolvent has been discharged the insolvency Court cannot proceed against him under S. 72, Provincial Insolvency Act, even though an offence was committed within the meaning of that section before the order of discharge. The reason for this is that after the order of discharge, the person from whom the insolvent has obtained credit during the insolvency can proceed against the insolvent in the ordinary course of law, and in the present case the non-applicant has, as a matter of fact, obtained a decree against the applicant. Further under S. 71 of the Act it is laid down that the insolvent shall not be exempt by reason of obtaining his discharge where he has committed any offence specified in S. 69, but the offences which are clearly and fully set forth in S. 69 do not include the offence of obtaining credit within the meaning of S. 72. In this view I am supported by para. 742 in the Law of Insolvency by D. F. Mulla, which is a very recent commentary on the insolvency law.

The learned counsel for the non-applicant contended that an offence under S. 72, Provincial Insolvency Act, is really an offence specified in S. 69 (c) (1), of the Act, but I cannot accept this contention. S. 69 (c) (1) must, I think, refer to debts incurred before the order of adjudication and not to debts incurred after that order, the simple reason being that the insolvent is supposed to be incapable of incurring debts during his insolvency and is expressly forbidden from doing so by S. 72. The learned counsel for the non-applicant also referred to *In the matter of Utma Mallick*, *A. I. R.* 1928 *Sind* 114 and *Jewraj Khariwal* v. *Dayal Chand Jahury* (1), but I do not think that either of those cases will support him. In the former case the conditions necessary for taking action under S. 72, Provincial Insolvency Act, are laid down, but the question of whether any proceedings under that section can be taken against an insolvent, who has obtained his discharge, has not been considered : Similarly *Jewraj Khariwal* v. *Dayal Chand Jahury* (1), will have no application, because it only refers to Ss. 70 and 69 of the Act, and does not consider S. 72 at all.

I am of opinion then as already stated that the order of the lower appellate Court is incorrect and therefore set aside the order and dismiss the application for prosecution of the applicant made by the non-applicant under S. 72, Provincial Insolvency Act. Costs of the application in both Courts will be borne by the non-applicant. I fix pleader's fees at Rs. 15.

R.M./R.K. *Application dismissed.*

(1) A. I. R. 1928 Cal. 211=111 I. C. 372=55 Cal. 783.

A. I. R. 1932 Nagpur 18

NIYOGI, A. J. C.

Kalekhan—Appellant.

v.

Mt. Hura—Respondent.

Appeal No. 310 of 1930, Decided on 15th July 1931.

Mahomedan Law — Dower — Widow's right to possession of property for dower debt is personal right and assets arising from property can be utilized for satisfaction of husband's debts—Civil P. C. (1908), O. 21, R. 66.

The right of a Mahomedan widow in possession of her husband's property for dower debt is a personal right given to her by the Islamic law and does not by any means amount to interest in land ; there is obviously nothing to prevent the assets arising from her claim for dower being entitled for the satisfaction of the husband's debts, subject of course to the personal right of the widow to retain possession. If such property is being sold under O. 21, R. 66, it is incumbent on the decree-holder to get it stated in the proclamation of sale that the property is in possession of the widow by virtue of her claim for dower and all that is sold is the right, title and interest of the heirs and the legal representatives of the deceased debtor, and the auction-purchaser, whether he be a decree-holder or a stranger, would purchase it burdened with her personal right, which itself is qualified by her liability to account for income ; 29 *All.* 640 ; 7 *All.* 353 ; 9 *Bom. L. R.* 188 ; *A. I. R.* 1925 *P. C.* 63 and *A. I. R.* 1923 *All.* 331, *Ref.*

[P 19 C 2 ; P 20 C 1]

K. V. Deoskar—for Appellant.

Fida Hussain—for Respondent.

Judgment.—This appeal arises from execution proceedings. In a Small Cause Court Suit, No. 305 of 1928, the appellant Kalekhan obtained a decree against Rulli, Kadar and others, including Mt. Hura, the respondent, as heirs and legal representatives of Imami, the original debtor. The appellant attached a house in execution of his decree. Mt. Hura, the respondent, laid an objection against the attachment on the ground that the house was in her possession, pursuant to her claim for dower to the extent of Rs. 500. Her objection was dismissed in the first Court, but was allowed in appeal, with the result that the house

was altogether released from attachment. There seems to be no doubt that the will dated 10th December 1921 was executed by Imami. The dower debt of Rs. 500 is mentioned therein. It cannot be disputed that Mt. Hura having come peacefully into the possession of the house in assertion of her claim for dower is entitled to remain in possession until the satisfaction of the dower debt, either from the income of the property or otherwise.

The question is whether the creditor is precluded from attaching the house and bringing it to sale in execution for what it is worth. It is argued for the respondent that so long as Mt. Hura has the lawful right to continue in possession of the house, it is not capable of attachment and sale. Although it may be conceded on the authority of *Ameer-un-Nissa* v. *Moorad-un-Nissa* (1), *Umatul Mahdi* v. *Kulsum* (2) and *Hamira Bibi* v. *Zubaida Bibi* (3), that the possession obtained by a Mahomedan widow in assertion of her claim of dower cannot be disturbed, the question still remains whether the property cannot be treated as assets of the deceased husband for purpose of the satisfaction of his debts. The answer would depend upon the nature of the right claimed by the widow. In *Mt. Bebee Bachum* v. *Hamid Hassein* (4) their Lordships of the Privy Council observed as follows :

"It is not necessary to say, whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in the case of *Ahmad Hoossein* v. *Mt. Khodeja* (5). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received."

In *Ali Muhammad Khan* v. *Azizullah Khan* (6) it was held that

"dower stands on no higher footing than any other debt due from her deceased husband; and, except where there is a distinct agreement to that effect, there is no presumption of hypothecation of his estate for her dower to be drawn from the mere circumstance that dower is due."

In *Mahabubibi* v. *Amina* (7) it was held that the right of a Mahomedan widow to the dower is not an interest in immovable property. Similarly in *Muzzaffar Ali Khan* v. *Parbati* (8), it was held that her possession was that of a creditor to hold the property until her debt is satisfied with the liability to account to those entitled to the property. Although for sometime the view prevailed that her possession was analogous to that of a mortgagee in possession : see *Azizullah Khan* v. *Ahmad Ali Khan* (9) and *Banoo Begum* v. *Mir Aun Ali* (10), that cannot now be accepted as sound in view of the dictum of their Lordships of the Privy Council in *Maina Bibi* v. *Chaudhri Vakil Ahmad* (11). From a review of these cases the deduction follows that the right of a Mahomedan widow in possession of her husband's property for dower debt is a personal right given to her by the Islamic law and does not by any means amount to an interest in the land.

The creditor of a deceased Mahomedan is entitled to recover his debts out of the assets left by him. The assets no doubt vest in the heirs and are available for distribution amongst them but as the heirs themselves are liable to the deceased's debt to the extent of the assets, it is obvious that they must go primarily to the discharge of the debts. As the widow in possession has no interest in the assets arising from her claim of dower, there is obviously nothing to prevent the assets being utilized for the satisfaction of the husband's debts subject of course to the personal right of the widow to retain possession. In *Kaniz Fatima Begam* v. *Ram Nandan* (12) a Mahomedan widow endeavoured to deter attachment precisely on the ground urged in the present case and their Lordships of the Allahabad High Court rejected her claim.

For the foregoing reasons I am of opinion that the house in question is

(1) [1855] 6 M. I. A. 211 (P. C.).
(2) [1907] 35 Cal. 120=8 C. L. J. 245=12 C. W. N. 16.
(3) A. I. R. 1916 P. C. 46=39 I. C. 11=43 I. A. 264=38 All. 494 (P. C.).
(4) [1871] 14 M. I. A. 377=10 Beng. L. R. 45 =517 W. R. 113 (P. C.).
(5) [1868] 10 W. R. 369=3 Beng. L. R. A. C. 28n.
(6) [1883] 6 All. 50=(1883) A. W. N. 204.
(7) [1873] 10 Bom. A. C. R. 430.
(8) [1907] 29 All. 640=(1907) A. W. N. 221=4 A. L. J. 521.
(9) [1885] 7 All. 353=(1885) A. W. N. 54.
(10) [1907] 9 Bom. L. R. 188.
(11) A. I. R. 1925 P. C. 63=86 I. C. 579=52 I. A. 145=47 All. 250 (P. C.).
(12) A. I. R. 1923 All. 331=73 I. C. 977=45 All. 384.

liable to be attached and sold in execution of the decree. All that is necessary to state is that under O. 21, R. 66, Civil P. C., it would be incumbent on the decree-holder to get it mentioned in the proclamation of sale that the house is in possession of Mt. Hura by virtue of her claim of dower. All that is sold in execution is the right, title and interest of the judgment-debtors and the auction-purchaser, whether he be a decree-holder or a stranger, would purchase the house burdened with Mt. Hura's personal right which itself is qualified by her liability to account for the income.

For these reasons I allow the appeal and direct that the house be sold subject to the terms above stated. The respondent will pay the costs of the appellant in all Courts Pleader's fees Rs. 10 only.

V.B./R.K. *Appeal allowed.*

A. I. R. 1932 Nagpur 20

BOSE, A. J. C.

Sukhdeo—Applicant.

v.

Yashodabai—Non-Applicant.

Civil Revn. No. 364-B of 1928, Decided on 14th April 1931.

Civil P. C. (1908), O. 1, R. 10—Bona fide mistake under O. 1, R. 10—Requisites stated.

Although a suit may have been filed in the name of a wrong person due to want of due care and attention on the part of a pleader and a petition writer, yet where the mistake has been made honestly, it is a bona fide mistake within the meaning of O. 1, R. 10. [P 20 C 1,2]

G. R. Deo—for Applicant.

M. R. Bobde—for Non-Applicant.

Judgment.—The plaintiff Yashodabai sues for the recovery of Rs. 275 due to her by the defendant on two bonds. The suit was originally instituted by Radhakisan Baijnath who is Yashodabai's brother. He has no interest in the bonds, nor do they stand in his name, but he happens to have been mentioned in them as the wahiwatdar of the plaintiff. Apparently the plaint was drafted by a petition-writer (though it was signed and presented by a pleader), who made a mistake, and drew it up in the plaintiff's name instead of Yashodabai's. That, at any rate is the explanation of Radhakisan who has affirmed to its truth, and is what has been believed by the learned Judge of the lower Court. He held therefore that the suit had been instituted in the name of the wrong person as plaintiff through a bona fide mistake, and ordered Yashodabai's name to be substituted under O. 1, R. 10, Civil P. C., 1908. The suit was then still within time.

It has been objected on behalf of the defendant that the mistake cannot be called bona fide for it was clearly made without the exercise of due care and caution. I am of opinion that this is not necessary. It is true that in many branches of the law these elements are necessary to constitute good faith. Equity, especially, abounds with illustrations of the doctrine; there, constructive knowledge and constructive notice are frequently fastened upon a man who in fact has neither. We meet with it also in the definition of good faith in relation to the law of crimes under the Indian Penal Code. But there are also other places where human nature is treated for what it is, and not for what it might and ought to be; where we look to the knowledge a man actually did have and not what he might have had; not what some other man deemed reasonable would have had. There are branches of the law where, though a man was stupid, ignorant and careless, he is still deemed to have acted in good faith provided his blundering was honest. The fact that he refrained from making enquiries which other men would have made, that he acted as no other reasonable man would have acted, are elements for determining whether his blundering was honest or calculated, but they do not in themselves constitute bad faith. For it is the state of his mind we are considering, the extent of his knowledge, not another's; not even what his own would have been in different circumstances. The most forcible illustration of this rule occurs in cases of negotiable securities, especially under the English law, regarding bona fide holders for value: see *Jones* v. *Gordon* (1); and Willis on the Law of Negotiable Securities, Edn. 3, p. 16. And this is the rule which has been applied to O. 1, R. 10 in *Nistarini Dasya* v. *Sarat Chandra Mazumdar* (2). In my opinion it is the right rule to apply in cases of this kind.

On the facts, the learned Judge of the lower Court, has found that the mistake was honest. I agree with him. It is difficult to see what dishonest motive

(1) [1877] 2 A.C. 616=47 L.J. B.K. 1=37 L.T. 477=26 W.R. 172.

(2) [1915] 29 I.C. 689.

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there could have been in filing the suit in Radhakisan's name, and none has been suggested to me in argument. There was carelessness and negligence on the part of the petition-writer possibly also on the part of the pleader, but we are not considering the degree of their responsibility; we are concerned only with the bona fides of Radhakisan and Yashodabai. It is difficult to see how they could have acted otherwise when the petition-writer drew up the plaint in Radhakishan's name and the pleader presented it on his behalf. They would naturally have relied upon their knowledge and skill. It is true, there are cases where a man has to pay for the negligence of those he employs, but this is not one of them. So I agree the mistake was bona fide, and consequently the amendment was right.

The next point relates to a question of fact. It attacks the finding of the lower Court that consideration passed. The plea on this issue is as unusual as it is peculiar. The defendant has admitted execution of the bond, but he claims to have been a benami debtor. He states his brother-in-law Sitaram wanted to borrow money from Radhakishan, but as Sitaram was his munim Radhakishan would have refused to accept his bonds, so the plaintiff executed the bonds instead. I am unable to see how the defendant can escape liability even if this is true. According to this statement he persuaded Radhakishan to advance the money and he undertook to be responsible. The money or other consideration was advanced to him personally, and would not have been advanced if he had not made himself personally liable as principal. I fail to see how a contract could be more complete. But I do not think the story is true. I am unable to believe it. The lower Court also has disbelieved it.

The bonds in suit are stated to be in satisfaction of an earlier promissory note also executed by the defendant. The plea with regard to this is the same : Sitaram was the real debtor and the defendant was only lending his name to the transaction. However the defendant's learned advocate argues, even if this is false, then on 30th April 1926 when the bonds were signed nothing like the Rs. 275 for which the bonds have been drawn was due upon the promissory note; therefore that indicates that this could not have been the real consideration for the bonds. If this is right then I can only hold that the defendant has not discharged the burden which lay upon him of proving what the consideration really was and its extent, and so would be liable for the full Rupees 275 and its interest. Hence it is not an argument that helps him. The lower Court has decided that the real consideration of the bonds was the old promissory note, and as only Rs. 249-14-0 was then due on this note, has decreed the claim as if the bonds were for that figure instead of Rs. 275. The plaintiff is content with that decree, and, as the defendant has not shown that it gives too much, I dismiss his application for revision with costs. Pleader's fee Rs. 15.

B.V./R.K. *Application dismissed.*

A. I. R. 1932 Nagpur 21

JACKSON, J. C.

Siyaram—Applicant.

v.

Ramnarayan and *others* — Non-Applicants.

Civil Revn. No. 525 of 1930, Decided on 7th July 1931.

Civil P. C. (1908), O. 21, R. 89— Property attached and sold —Purchaser from judgment-debtor during continuance of attachment has interest in property within O. 21, R. 89.

When a property is attached and sold, a person who purchases it from the judgment-debtor during the continuance of the attachment has an interest in the property within the meaning of O. 21, R. 89 so as to entitle him to apply under that rule to have the sale set aside; and the dismissal of such person's objection under R. 58 followed by failure to bring the suit under R. 63 does not preclude him from making an application under O. 21, R. 89: *A. I. R.* 1926 *Nag.* 10, *Dist.* [P 22 C 1,2]

S. R. Bobde—for Applicant.

D. W. Kathalay, V. G. Joshi and *R. G. Rao*—for Non-Applicants.

Judgment.— Ramnarayan, the first non-applicant, in execution of a decree against Bapumiya, the third non-applicant, attached a house and brought it to sale. The sale was held on 8th July 1930 and the house was sold for Rupees 2,800 to Moharan Ali, the fourth non-applicant. Rateable distribution of the proceeds had been claimed by Narayan, the second non applicant, and the amount due to him and to Ramnarayan, who brought the property to sale, was Rupees 1,500. The balance of Rs. 1,300 was attached by Siyaram, the present applicant, another decree-holder of Bapumiya.

Mohammad Ali, the fifth non-applicant, however, who had bought the house from Bapumiya after attachment by Ramnarayan but before the auction-sale applied successfully under O. 21, R. 89, Sch. 1, to the Civil P. C., to have the sale set aside. The sale proceeds have been ordered to be returned to the auction-purchaser and if this order is upheld the applicant will lose the benefit of his attachment. He has accordingly applied for revision of the lower Court's order setting aside the sale.

The first point taken on behalf of the applicant is that Mohammad Ali was not entitled to have the sale set aside under O. 21, R. 89, Civil P. C., because he neither owns the property sold nor holds an interest therein. Mohommad Ali had raised an objection to the attachment of the house, but his objection had been disallowed and he brought no suit under O. 21, R. 63. It is argued that the order disallowing his objection is conclusive of the fact that Mohammad Ali has no interest in the property sold. Reliance is placed upon the decision in *Onkar* v. *Dhansingh* (1), the placitum of which runs as follows:

"The words 'either owning the property or holding an interest' in R. 89, O. 21, Civil P. C., indicate a present subsisting ownership or interest in the applicant.

A person whose claim under R. 58 as well as suit under R. 63 of the said order have already been dismissed cannot apply under the said rule."

This placitum is stated widely enough to apply to the facts of the present case, in which the failure to institute a suit under R. 63 has the same effect as if such a suit had been instituted and dismissed. The facts however of the two cases are very different and the enunciation of the law contained in *Onkar* v, *Dhansingh* (1). must be interpreted with reference to the facts of that case, in which it was held that the sale to the objector of the attached property was not genuine. That finding in the objection proceedings and in the suit that followed clearly did preclude the objector from applying to have the sale that followed set aside under R. 89.

In the present case the sale to Mohammad Ali is admitted to be genuine; but, as it took place after Ramnarayan's attachment, under S. 64, Civil P. C., it was void as against Ramnarayan's claim and could not affect his right to bring the property attached to sale. What Mohammad Ali pleaded in the objection proceedings was that Ramnarayan had agreed to give up his right under the attachment and all that the executing Court decided was that the alleged agreement had not been proved. There was thus no decision that Mohammad Ali had no interest in the property attached and the dismissal of his objection was no bar to his making an application under O. 21 R. 89.

The question then arises whether Mohammad Ali's application has been rightly allowed. I am not precluded from considering this question in revision, because there has clearly been an irregularity on the part of the lower Court. Under O. 21, R. 92 (2), Civil P. C., no order setting aside a sale shall be made unless notice of the application has been given to all persons affected thereby. No notice of Mohammad Ali's application was given to Siyaram, the present applicant, though it seems to me clear that he was a person affected by that application, the granting of which would nullify his attachment of the surplus sale proceeds. As his case was not before the lower Court, I can certainly consider it; but I have come to the conclusion that there is not sufficient ground for refusing to set aside the sale in the fact that Siyaram's attachment becomes ineffective. If the sale is confirmed, then Mohammad Ali will lose the interest that he acquired by the sale in his favour and, as between Mohammad Ali and Siyaram, I think that the former is better entitled to protection.

I am of opinion that the order of the lower Court should be maintained and I dismiss the application for revision with costs. I fix pleader's fee at Rs. 25.

V.B./R.K. *Revision dismissed.*

(1) A. I. R. 1926 Nag. 10=90 I. C. 963=21 N. L. R. 102.

A. I. R. 1932 Nagpur 22

MACNAIR, J. C.

Laduram—Appellant.

v.

Sakharam—Respondent.

Misc. Appeal No. 42 of 1930, Decided on 21st March 1931, from order of Dist. Judge, Chhindwara, D/- 28th January 1930, in Insolvency Case No. 18 of 1928.

Provincial Insolvency Act (1920), Ss. 43 and 27 (2)—Time for application for dis-

charge can be extended even if application for extension is not made in time.

Section 27 (2) authorizes a Court to extend the time for an application for discharging an adjudicated insolvent even if an application for extension of time is made after the period specified for the application for the order of discharge has expired : *A. I. R.* 1928 *Pat.* 338 (*F.B.*) and *A. I. R.* 1930 *Mad.* 389 (*F.B.*), *Foll.* [P 23 C 2]

T. J. Kedar—for Appellant.

B. V. Pradhan—for Respondent.

Judgment.—Sakharam presented an insolvency petition : he was declared an insolvent on 17th July 1928 and was allowed six months' time to apply for a final discharge. Laduram, a creditor, asked that certain transfers made by the applicant should be annulled. While proceedings in this application were pending, Laduram, on 9th January 1930, asked that the order of adjudication should be annulled on the ground that the debtor had not applied for an order of discharge within the period specified by the Court. The insolvent appeared and agreed that the order of adjudication should be annulled, but Laduram discovering that the annulment of the order of adjudication would put an end to proceedings for annulling transfers, asked that the order of adjudication should remain in force.

The learned District Judge, without deciding whether he had power to extend the time fixed for the application of discharge, held that there was no reason for the exercise of that power and annulled the order of adjudication. Laduram, after obtaining the leave of this Court, has filed an appeal.

In *Ram Krishna Misra Ex parte* (1), Das and Ross, JJ., held that the provisions of S. 43, Insolvency Act, were mandatory and that the order of adjudication must be annulled if a debtor had not applied for an order of discharge within the period specified. But this decision was overruled by a Full Bench in *Gopal Ram* v. *Magni Ram* (2). A Full Bench of the Madras High Court in *Palani Goundan* v. *Official Receiver, Coimbatore* (3), approved of the Patna Full Bench decision. I agree with the reasoning in the Patna and Madras High Courts' Full Bench decisions and hold that S. 27 (2), Provincial Insolvency Act, authorizes a Court to extend the time for an application for discharging an adjudicated insolvent even if an application for extension of time is made after the period specified for the application for the order of discharge has expired. The learned District Judge then had power to allow the application made by Laduram and to extend the period within which the debtor could apply for his discharge : in my opinion there was good reason for the exercise of the power.

It is not material that the creditor had applied for annulment of the order of adjudication, as this application was made owing to misapprehension of its success and had been withdrawn. It seems obvious that it was not the intention of the framers of the Provincial Insolvency Act that the debtor should derive advantage from his failure to apply. I remark that in *Palani Goundan* v. *Official Receiver, Coimbatore* (3) the application to extend the time for the application for discharge was made by a creditor. Laduram will be prejudiced if he is unable to pursue his application for annulment of transfers. I therefore set aside the order of the District Judge and direct that the period within which the debtor should apply for discharge be extended up to a date which will allow of a decision on the application for annulment of transfers ; costs in this Court will be borne by the respondent ; counsel's fee Rs. 40.

V.B./R.K. *Order set aside.*

(1) A. I. R. 1925 Pat. 355=88 I. C. 70=4 Pat. 51.

(2) A. I. R. 1928 Pat. 338=107 I. C. 830=7 Pat. 375 (F.B.).

(3) A. I. R. 1930 Mad. 389=124 I. C. 61=53 Mad. 288 (F.B.).

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* A. I. R. 1932 Nagpur 23

BOSE, A. J. C.

Gulabgir—Applicant.

v.

Nathmal—Non-Applicant.

Civil Revn. No. 353-B of 1929, Decided on 26th March 1931.

*** (a) Negotiable Instruments Act (1881), Ss. 4, 8 and 13—Pro-note—Consideration not from ostensible payee *X* but from real owner *Y*—Pro-note recital that consideration was from *X*—*Y* suing on pro-note — Pro-note not payable to bearer nor endorsed to order—*Y* cannot sue on pro-note as such.**

Where a pro-note has been executed in favour of *X* and the consideration for it also purports to have moved from *X* but where it is admitted that really the consideration has moved from *Y* and where the instrument is neither made payable to bearer nor endorsed to order, then *Y* cannot sue on the basis of the pro-note as such, but has to fall back on the original con-

sideration. The doctrine of benami cannot be applied in such a case : *(Case law discussed.)* [P 24 C 2, P 25 C 2]

*** (b) Negotiable Instruments Act (1881), Ss. 8 and 48—Assignee of pro-note can sue on it, though not named in pro-note.**

There can be a valid assignment of a pro-note as a chose-in-action and provided that S. 130, T. P. Act, has been complied with, such an assignee can be entitled to the possession of the instrument in his own name and can sue on it, though his name is not in the instrument. What the Negotiable Instruments Act does is to prohibit negotiation except in the manner specified by it, but not to prohibit assignment in any of the several ways allowed by law. The difference is that in the latter case the note is taken subject to all defects, but not in the former : 30 *Mad.* 88 ; 17 *M. L. J.* 393 ; 24 *Mad.* 654; *A. I. R.* 1928 *Nag.* 54 and *A. I. R.* 1929 *Nag.* 274, *Ref.* [P 25 C 1]

(c) Contract Act (1872), S. 62—Pro-note—Antecedent debt—Pro-note for such debt—Suit on pro-note failing, action on debt would lie.

Where there exists antecedent debt and a promissory note is executed for such a debt, a suit on the promissory note failing, an action on the debt would lie. It cannot be said that because the advance of money and the execution of the promissory note were simultaneous, a suit would lie only on the promissory note and not on the debt evidenced by it. There seems to be nothing in reason in support of such a distinction : *A. I. R.* 1928 *All.* 371 *(F. B.)* and 40 *Mad.* 727, *Foll.* [P 26 C 2]

(d) Civil P. C. (1908), O. 6, R. 2 and O. 7, R. 7—Facts in plaints entitling plaintiff to particular relief—Plaintiff is entitled to it, if Court deems it just—Practice, relief.

Where a plaintiff has stated the facts fully in his plaint which give rise to an alternative claim, but he has not formally asked for that relief the Court can grant the alternative relief though not specifically asked for. If the facts stated in the plaint entitle the plaintiff to a particular relief he is entitled to be given it even though he may not have asked for it specifically, provided the Court thinks it just to do so ; *(Case law discussed.)* [P 26 C 2]

G. G. Hatwalne—for Applicant.

V. N. Herlekar—for Non-Applicant.

Judgment.—The claim in this case is based upon a promissory note, but it is one executed in somewhat unusual circumstances. It is drawn in favour of one Shrikumar Jaikumar Chawre. The consideration of Rs. 125 purports to have been advanced by him in cash. And yet both the plaintiff and the ostensible payee Shrikumar Chawre are agreed that the consideration never moved from him; and that Shrikumar has no interest in the note. The plaintiff claims that he is the real person interested in the transaction, that he advanced the money to the defendant, and that Shrikumar merely lent him the use of his name. This is the case which has been accepted by the learned Judge of the lower Court.

* * * *

The next question is of greater difficulty. It arises in this way. The promissory note has been drawn in favour of Shrikumar and not the plaintiff, and the consideration purports to have moved from Shrikumar. It is not made payable to "Shrikumar or bearer;" nor does it bear the words "Shrikumar or order." It has no endorsement. * * * It is therefore the type of document contemplated by Illus. (b) to S. 4, Negotiable Instruments Act, 1881, and falls within the definition of "promissory note" given therein. The question which arises, then, is whether the plaintiff, whose name does not appear on that document, can sue upon it, or whether that is a privilege reserved for Shrikumar alone. Upon this point there is a conflict of authority.

The following authorities hold that the real owner cannot sue : *Reoti Lal* v. *Manna Kunwar* (1), *Dori Lal* v. *Sewak Ram* (2), *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (3) and *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (4). The following hold he can : *Gurumurti* v. *Sivayya* (5), *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.* (6), and an obiter in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (4). So far as this Court is concerned, Kotval, A. J. C., has followed the former view in *Vishnu* v. *Achut*, *A. I. R.* 1928 *Nag.* 54. He holds that the real owner cannct sue upon a promissory note not payable to bearer. This he deduces from S. 8, Negotiable Instruments Act, which states that the

"holder of a promissory note is any person entitled in his own name to the possession thereof."

Following the ruling in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (4), he holds that the words "entitled in his own name" can only mean the person named in the note, that is the payee or the indorsee. With the proposition that the doctrine of benami cannot be applied in such a case I am in entire and respectful agreement. But I respect-

(1) A. I. R. 1922 All. 70=65 I. C. 785=44 All. 290.
(2) [1915] 29 I. C. 988.
(3) [1904] 28 Mad. 205=15 M. L. J. 249.
(4) [1906] 30 Mad. 88=16 M. L. J. 508 (F.B.).
(5) [1897] 21 Mad. 391.
(6) A. I. R. 1928 Cal. 148=105 I. C. 549=55 Cal. 551.

fully differ from the wider position that no person not named in an instrument of that kind can ever sue.

There are authorities which contemplate a valid assignment of such an instrument as a chose-in-action : see, *Muhamad Khumarali* v. *Ranga Rao* (7), *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (4) and *Arunachala Reddi* v. *Subba Reddi* (8). And, provided the provisions of S. 130, T. P. Act, had been complied with, I would find it difficult to see how such an assignee would not be entitled to possession of the instrument in his own name. What the Negotiable Instruments Act, does is to prohibit negotiation except in the manner specified by it, but not to prohibit assignment in any of the several ways allowed by law. The difference is that in the latter case the note is taken subject to all defects, but not in the former. For purposes of negotiation the scheme of the Act is to divide the instruments with which it deals into two broad categories. In the first it places those which are either expressly or constructively payable to bearer within the meaning of S. 13 (1), Expln. (2), Negotiable Instruments Act. These are negotiable under S. 47 by mere delivery, coupled of course with the intention of passing the property therein. They pass from hand to hand in exactly the same way as bank notes or cash. They represent money and possess most of its characteristics. Had the note been of this kind, I think, the plaintiff could have recovered as a holder in due course under S. 9. But it is not. It falls within the second broad category, namely, those payable either expressly or constructively to order, within the meaning of S. 13 (1), Expl. (i). The instrument now in suit being an instrument payable to a particular person and not containing words prohibiting transfer or indicating that it shall not be transferable, is taken to be an instrument payable to order. That is the meaning of that section. It is also the decision of Jackson, A. J. C., in *Bankidas* v. *Tanabai* (9). And under S. 48 of the Act such instruments can be negotiable only by endorsement and delivery. Ex. P-1 contains no endorsement and therefore was incapable of negctiation in the state in which it then stood and now stands. That being so the plaintiff cannot sue upon it as such : and no question of assignment arises, for there has been none. So, if the matter ended there the plaintiff's suit would have to be dismissed. But in my opinion it does not.

It is argued by the learned pleader for the non-applicant upon the authority of *Brojo Lal Saha Banikya* v. *Budh Nath Pyari Lal & Co.* (6), that the only effect of the plaintiff not being named in the note would be to deprive him of the special privileges which the ordinary holder of a promissory note can claim, such, for instance, as the presumption relating to consideration, but that it would not disentitle him from suing. In other words, he desires the promissory note to be ignored as such and the suit to proceed upon the original consideration. I am not prepared to agree that *Brojo Lal Saha Banikya* v *Budh Nath Pyari Lal and Co.* (6), lays down quite that propcsition. It definitely holds that a real owner can sue upon the note provided he is capable of giving a good discharge to the debtor from the holder of the instrument—a view upon which I express no opinion. But there is a mass of authority to the effect that if for any reason a plaintiff's suit upon a promissory note fails, then he can fall back upon the original consideration and sue upon that, apart from the note, provided it is otherwise open for him to do so. Their Lordships of the Privy Council have decided that in *Saminathan Chetty* v. *Palaniappa Chetty* (10). So has this Court in *Gokuldas* v. *Parmanand* (11) and *Nathusa* v. *Phulchandsa* (12). There are also other cases to which I need not at the moment refer.

The only thing therefore, is to see whether the plaintiff is for any reasen precluded from falling back upon the original consideration. At one time there seemed to be a feeling that he would be if the lending of the money and the making of the note were so contemporaneous as to form parts of one transaction. *Sheikh Akbar* v. *Sheikh Khan* (13), *Parsotam Narain* v. *Taley*

(7) [1901] 24 Mad. 654.
(8) [1907] 17 M. L. J. 393=3 M. L. T. 7.
(9) A. I. R. 1929 Nag. 274 = 118 I. C. 673 = 25 N. L. R. 173.

(10) [1914] 41 I. A. 142=26 I. C. 228 (P. C.).
(11) [1909] 6 N. L. R. 125=8 I. C. 281.
(12) [1912] 8 N. L. R. 7=14 I. C. 399.
(13) [1881] 7 Cal. 256=8 C. L. R. 528.

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Singh (14). *Pothi Reddi* v *Velayudasivan* (15). *Muthu Sastrigal* v. *Visvanatha Pandarasannadhi* (16) and *Ammalu Ammal* v. *Namagiri Ammal* (17), are illustrations of that point of view. But, the bulk of authority, including that of this Court, is the other way : see *Gokuldas* v. *Parmanand* (11), *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (18), *Mian Baksh* v. *Bodhiya* (19), *Kundanlal* v. *Bhikari Das* (20), *Dhaneswar Sahu* v. *Ramrup Gir* (21), *Krishnaji* v. *Rajmal* (22), *Ranchhod* v. *Ravjibhai* (23), *Chidambaram Chettiar* v. *Ayyaswami Thevan* (24), and *Natarajulu Naicker* v. *Subramanian Chettiar* (25). In *Dhaneswar Sahu* v. *Ramrup Gir* (21), Kulwant Sahay, J., following the decision of Petheram, C. J., in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (18) holds :

" An implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it. It follows therefore that apart from the instrument. viz., the promissory note, there is always a contract to repay a loan, and such contract can be proved independently of the instrument,"

In *Kundan Lal* v. *Bhikari Das* (20), Sulaiman and Kendall, JJ., state :

" We further think that even if the plaintiffs were not able to prove the whole contract by this additional evidence, they could succeed if their suit were treated as one for recovery of the amount had and received, or for compensation for the amount paid by them on behalf of the defendants to the creditor of the latter under S. 70, Contract Act. The suit therefore cannot necessarily fail bseause the hundis are not admissible in evidence."

Referring to the distinction which some authorities draw between cases where the execution of the promissory note and the taking of the loan are simultaneous and here where they are not, Boys and Kendall, JJ., observed in the Full Bench case of *Mian Bakhsh* v. *Bodhiya* (19), that they can find no basis for such a distinction, and they quote the observations of Abdur Rahim, J., in *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (26), where he says :

" Where there exists an anteceedent debt and a promissory note is executed for such a debt, a suit on the promissory note failing, an action on the debt would lie. The whole contention is that because the advance of money and the execution of the promissory note were simultaneous, a suit would lie only on the promissory-note and not on the debt evidenced by it. There seems to be nothing in reason in support of such a distinction."

With these observations I agree.

One question alone remains. The plaintiff s suit as laid was founded on the promissory note. He has stated the facts fully in his plaint which would give rise to the alternative claim, but he has not formally asked for that relief. Does this operate as a bar ? I am of opinion that it does not. As Hallifax and Kotwal, A. J. Cs. observe in *Jairam* v. *Motilal* (27) :

" A Court should not be astute to defeat a claim, not on eonsideration of the merits, but on some technical point of procedure."

Under O. 6, R. 2, Civil P. C., all that a plaintiff need do is to state in a concise form the material facts upon which he relies for his claim. He has not to plead law. Under O. 7, R. 7, the plaintiff has also to state specifically the relief which he seeks either simply or in the alternative. But that order also states that :

" it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for."

The meaning is clear. If the facts stated in the plaint entitle the plaintiff to a particular relief he is entitled to be given it even though he may not have asked for it specifically, provided the Court thinks it just to do so. This was the decision of their Lordships of the Privy Council in *Gopi Narayan Khanna* v. *Bansidhar* (28). It is also the rule enunciated in the following cases : *Cockerell* v. *Dickens* (29), *Sukhdeo Prasad* v. *Lachman Singh* (30), *Hemendra Nath Roy* v. *Upendra Narain Roy* (31), *Ab-*

(14) [1903] 26 All. 178=(1903) A. W. N. 217.
(15) [1886] 10 Mad. 94.
(16) [1915] 38 Mad. 660=21 I. C. 864.
(17) [1917] 43 I. C. 760.
(18) [1896] 23 Cal. 851.
(19) A. I. R. 1928 All. 371 =115 I. C. 630 = 50 All. 839 (S. B.).
(20) A. I. R. 1929 All. 254 =116 I. C. 293 = 51 All. 520.
(21) A. I. R. 1928 Pat. 426 =111 I. C. 482 = 7 Pat. 845.
(22) [1899] 24 Bom. 360=2 Bom. L. R. 25.
(23) A. I. R. 1926 Bom. 357=95 I. C. 847.
(24) [1916] 40 Mad. 585=36 I. C. 741.
(25) A. I. R. 1922 Mad. 181 =69 I. C. 939 =45 Mad. 778.
(26) [1916] 40 Mad. 727=35 I. C. 219.
(27) A. I. R. 1921 Nag. 106 =58 I. C. 961 = 17 N. L. R. 22.
(28) [1905] 27 All. 325=32 I. A. 123=2 A. L. J. 336=8 Sar. 799 (P. C.).
(29) [1840] 2 M. I. A. 353=3 Moor. P. C. 98= 1 Sar. 203 (P. C.).
(30) [1902] 24 All. 456=(1902) A. W. N. 114.
(31) [1916] 43 Cal. 743=32 I. C. 437.

bakke Heggadethi v. *Kinhiamma Shetty* (32), *Venkata Jaggannatha Raju* v. *Radhakrishniah* (33), and *Rup Ram* v. *Harphul* (34).

In the view I have taken in the present case, it is unquestionable that the plaintiff would have been entitled to a decree if he had specifically asked for the alternative relief. No new facts had to be stated ; they were all there. There was nothing to take the defendants by surprise. He has pleaded fully to all the facts. There was a full investigation and there are clear findings. Therefore I think it just that the plaintiff should be given his decree just the same as if he had asked for relief. I am supported in this by the following authorities in which the alternative relief was given upon a claim originally based upon a promissory note, though it had not been specifically asked for :

Golap Chand Marwaree v. *Thakurani Mohokoom Kovaree* (35), *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (18), *Saminathan Chetty* v. *Palaniappa Chetty* (10), *Dhaneswar Sahu* v. *Ramrup Gir* (21) and *Krishnaji* v. *Rajmal* (22).

I therefore reject the application with costs. Pleader's fees Rs. 15.

B.V./R.K. *Application rejected.*

(32) [1906] 29 Mad. 491.
(33) [1916] 32 I. C. 941.
(34) A. I. R. 1921 Lah. 125 = 64 I. C. 896 = 2 Lah. 256.
(35) [1878] 3 Cal. 314=2 C. L. R. 412.

A I. R. 1932 Nagpur 27

STAPLES, A. J. C.

Jagmohanprasad—Appellant.

v.

Sampatlal Mulchand—Respondent.

Appeal No. 598 of 1928, Decided on 31st January 1931, from decree of Dist. Judge, Jubbulpore, D/. 9th August 1928.

Contract Act (1872), S. 188—Agent doing unauthorized act — Principal is not bound though deriving benefit therefrom—Agent not disclosing principal's name—There can be no claim against principal—Contract Act, S. 230.

A principal cannot be bound by an unauthorized act done by his agent, even though he derives benefit therefrom, and when the agent does not disclose the name of his principal there can be no claim against the principal : 14 *C. P. L. R.* 22, *Rel. on* ; *A. I. R.* 1927 *Oudh* 44, *Dist.*; *A. I. R.* 1918 *P. C.* 148 and 33 *Cal.* 343, *Ref.*

[P 28 C 1]

M. D. Khandekar—for Appellant.

M. B. Kinkhede—for Respondent.

Judgment. — Respondent 1, firm of Sampatlal Mulchand brought a suit against the appellant and respondent 2 Chhakorilal. In the trial Court a decree was passed against both the defendants, but on appeals the District Judge found that only the appellant, who was defendant 2, was liable, and dismissed the suit as regards defendant 1.

The plaintiff-respondent has not appeared, and this appeal has been heard ex parte against him, he apparently being satisfied now with the decree against the appellant only. In my opinion it is clear that the present appellant cannot escape liability, and the only point really at issue was whether the other defendant, i. e., the respondent Chhakorilal, could be held liable or not. The established facts are that the respondent Chhakorilal owned lime works, known as the Chhakorilal Pathak Lime Works, at Jukehi, and the appellant Jagmohanprasad was an agent of Chhakorilal, holding a power-of-attorney. Jagmohanprasad borrowed Rs. 600 on 30th December 1924 and Rs. 200 on 1st January 1925 from Sampatlal Mulchand and executed a promissory note for each loan. These notes have been produced in evidence as Exs. P-1 and P-2 and are admitted. The notes are signed by Jagmohanprasad alone in his personal capacity, and it is clear that, if the suit had been brought on those notes, under S. 28, Negotiable Instruments Act, only Jagmohanprasad could be held liable. The suit however was brought not on the notes but for the consideration, following the procedure which appears to be sanctioned by a passage in *Sadasuk Janki Das* v. *Sir Kishan Pershad* (1). It seems to me that the plaintiff's object in bringing the suit upon consideration instead of upon the promissory notes was to get over the difficulty of S. 28, Negotiable Instruments Act, and to make Chhakorilal also liable for the debts because the money was used for the business.

Even however granting that the suit was for the consideration and not on the promissory notes, so that S. 28, Negotiable Instruments Act, would not apply, I would agree with the lower appellate Court that Chhakorilal cannot be held liable, but that the appellant was rightly held liable. Admittedly the money was taken by the appellant and also admittedly the appellant took the loans in his

(1) A. I. R. 1918 P. C. 146=50 I. C. 216=46 I. A. 33=46 Cal. 663 (P.C.).

own name and not as agent. Under S. 230, Contract Act, therefore Jagmohanprasad would be personally liable on the contract, as he did not disclose the name of his principal. The learned counsel for the appellant has argued that under S. 188, Contract Act the appellant as agent had authority to borrow money for the business of the firm, and cited *Dhanpat Rai* v. *Allahabad Bank, Ltd. Lucknow* (2). It may be noted however that in the present case it is expressly mentioned in the power-of-attorney that Jagmohanprasad has no power to borrow money, and therefore he would not have authority under S. 188, Contract Act, to borrow. In this connexion I would refer to *Ferguson* v. *Um Chand Boid* (3). The Lucknow case moreover can be distinguished on the ground that there the agent ostensibly gave himself out as an agent and did not borrow on his own account, but only obtained permission to overdraw the account of the firm. The overdraft moreover was clearly for the benefit of the firm's business.

The fact that the money borrowed was applied for the purposes of the firm may give rise to a cause of action between Jagmohanprasad and Chhakorilal inter se but will not give the plaintiff-respondent any claim against Chhakorilal; nor can it absolve the appellant Jagmohanprasad from liability. The simple reason for this is that there was no contract between the plaintiff-respondent and Chhakorilal. The learned counsel for the respondent has cited *Seth Ramlal* v. *Seth Narsingdass* (4), which is a case in point. There it was held that a partnership firm would not be bound by a contract made by one of the partners, even though the partnership had derived benefit from the contract: a fortiori it follows that a principal would not be bound by an unauthorized act done by his agent, even though he derived benefit therefrom, and when the agent did not disclose the name of his principal there can be no claim against the principal.

I am of opinion therefore that the matter has been rightly decided by the lower appellate Court and dismiss the appeal. Costs of the appeal will be borne by the appellant. Other costs as ordered by the lower appellate Court.

B.V./R.K. *Appeal dismissed.*

(2) A. I. R. 1927 Oudh 44=98 I. C. 783=2 Luck. 253.
(3) [1905] 33 Cal. 343.
(4) [1900] 14 C. P. L. R. 22.

A. I. R. 1932 Nagpur 28

MACNAIR, J. C.

Shankar Rao and *others*—Appellants.

v.

Daulat and *others*—Respondents.

Second Appeal No. 80 of 1930, Decided on 7th April 1931, from decree of Dist. Judge, Nagpur, D/- 23rd October 1929, in Civil Appeal No. 136 of 1929.

C. P. Tenancy Act (1898), S. 39—Mortgage of holding by occupancy tenant without legal necessity is competent—Sons have no vested interest by birth.

So long as the Tenancy Act (2 of 1898) was in force sons obtained by birth no vested interest in an occupancy holding, and it was quite competent for an occupancy tenant to mortgage the holding without legal necessity : 4 *N. L. R.* 9 ; 5 *N. L. R.* 172 ; 8 *N. L. R.* 154 ; 6 *N. L. R.* 6 and *A. I. R.* 1930 *Nag.* 65, *Ref.* [P 29 C 2]

A. N. Chorghade—for Appellants.

W. R. Puranik—for Respondent 1.

Judgment.—On 18th June 1910, Sitaram executed a mortgage deed in favour of the plaintiff. The mortgaged property with which I am concerned consisted of an absolute occupancy holding and a house appertaining to this building. At the date of the mortgage deed Sitaram and his sons formed a joint Hindu family. The plaintiff sued for foreclosure : he has failed to prove that there was legal necessity for the mortgage. The trial Judge held that the sons had a vested interest in the holding and passed a foreclosure decree with respect to the share of Sitaram.

The lower appellate Court held that the right of an absolute occupancy tenant was not a proprietary but a tenant right and that the sons of an absolute occupancy tenant had no vested interest in the holding during the lifetime of the tenant. The learned Judge remarked that S. 5, Tenancy Act (Act 1 of 1920), merely laid down the manner in which the succession was to be regulated after the death of the tenant and did not cause the sons of the tenant to have a vested interest in the holding during the lifetime of the tenant. A decree for foreclosure with respect to the whole of the holding and the house appurtenant to it was therefore passed.

In second appeal it is urged that the sons obtained by birth, an interest in

the holding. Mr. Puranik, counsel for respondent 1, does not support the lower appellate Court's interpretation of S. 5 of Act 1 of 1920. S. 5 is as follows :

"The interest of an absolute occupancy tenant in his holding shall on his death pass by inheritance or survivorship in accordance with his personal law."

It seems to be clearly intended that the sons of a tenant should take an interest by birth : otherwise the interest of a tenant would seldom, if ever, pass by survivorship. This is made clear by S. 2, Tenancy Act, which contains a clear proviso :

"No person shall take any interest during the lifetime of any ancestor of such person in the male line of descent from the tenant."

The absence of such provision in S. 5 shows that, on the death of a tenant, his descendants together with their progeny take the same interest in the holding as they would in the case of other property. In a recent Bench decision it has been affirmed that, under the new Tenancy Act, sons take an interest in an absolute occupancy holding by birth. S. 5 is so construed by me and Mohiuddin, A. J. C., in *Laxman* v. *Bhulabai* (1) at pp. 17 and 26 (of 26 *N. L. R.*)

But Mr. Puranik points out that the question to be considered is the interest of the sons at the date when the mortgage was executed : if the sons had on that date no interest, the father had power to transfer the property by executing the deed. He concedes that some ten years later the Act of 1920 created a vested interest in the sons ; but that has the same effect as if the sons had been born in 1920.

Section 41 (1) of the old Tenancy Act (Act 11 of 1898) is as follows :

"The right of an absolute occupancy tenant in his holding shall on his death devolve as if it were land."

Section 46 (1) of the Act states :

"When an occupancy tenant dies, his right in his holding shall devolve as if it were land."

These sections have been construed by a series of rulings. In *Pancham Singh* v. *Nankoo Singh* (2), Drake-Brockman, Ag. J. C., stated at pp. 184 and 185 :

"Moreover, by virtue of S. 41 (1), Tenancy Act, the right of an absolute occupancy tenant 'devolves as if it were land,' and the use of the word "devolves" appears by necessary implication to exclude, for example, the taking by survivorship which obtains among Hindus in respect of joint ancestral property."

In *Ghanya* v. *Ukund Rao* (3), Stanyon, Ag. J. C., stated at p. 13 :

"The Tenancy Act does not recognize such things as succession by right of survivorship, the vesting of a son's interest by birth, and so on."

In *Tekchand* v. *Tulai* (4), Skinner, Ag. J. C., approved of the view that the right of an absolute occupancy tenant was not subject to the rights of coparcenary and survivorship, which obtained among Hindus in respect of joint ancestral property. In *Vilhu* v. *Mt. Mendri* (5), the view was again affirmed :

"that the Central Provinces Tenancy Act, by providing that the right of a tenant "shall devolve as if it were land," appears to exclude by necessary implication the taking by survivorship which obtains among Hindus in respect of joint ancestral property."

In *Bhura* v. *Ramrao* (6) at p. 157, Stanyon, Ag. J. C., referred, with approval, to his previous decision that

"the Tenancy Act does not recognize such things as succession by right of survivorship, the vesting of a son's interest by birth, and so on."

Mr. Chorghade on behalf of the appellants relies on the remarks regarding the nature of an absolute occupancy tenant right in *Ragho* v. *Sadoo* (7). It may well be that this right is different from the rights of tenants proper, but this does not affect the validity of rulings which interpreted the provisions of the Tenancy Act. It seems quite clear that if a tenancy devolves as if it were land and this provision excludes taking by survivorship, sons can have no vested interests in the holding ; the holding could not pass by inheritance if the sons had vested interest in it. The rulings I have cited interpreting the expression "devolves as if it were land" have been consistently followed for 20 years.

The principle of stare decisis makes it necessary for me to hold that sons obtained by birth no vested interest in an absolute occupancy holding so long as Act 2 of 1898 was in force. It is quite clear that the tenant of the holding with which I am concerned was Sitaram alone and not the joint family of which Sitaram was a member. The sons had no vested interest in the holding in 1910 : Sitaram could mortgage the holding without legal necessity. The appeal

(1) A.I.R. 1930 Nag. 65=123 I.C. 449=25 N.L.R. 1.
(2) [1907] 3 N.L.R. 182.
(3) [1908] 4 N.L.R. 9.
(4) [1909] 5 N.L.R. 103=3 I.C. 52.
(5) [1909] 5 N.L.R. 172=4 I.C. 792.
(6) [1912] 8 N.L.R. 154=17 I.C. 366.
(7) [1910] 6 N.L.R. 6=5 I.C. 428.

therefore fails and is dismissed : costs on the appellants.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1932 Nagpur 30

GRILLE, A. J. C.

Madhorao Gadre—Appellant.

v.

Ramlal and *others*—Respondents.

Second Appeal No. 603 of 1929, Decided on 12th September 1931, against decision of Dist. Judge, Hoshangabad, in C. A. No. 209 of 1928.

C. P. Land Revenue Act (1917), S. 203 — Non-agriculturist holder of site has no right of transfer with permission to occupy unless such permission is proved.

Section 203 is not confined to the rights of agricultural house-holders only; their rights and liabilities are determined by the first three sub-clauses and the house-holders in general are governed by the remaining sub-clauses.

Where no declaration under S. 5, sub-Cl. (5) is made in respect of a village and there is no express contract between the proprietor and a non-agricultural holder of a site in the abadi other than a license to occupy, the license although unrevocable as far as the holder and his heirs are concerned does not convey with it a right to transfer with permission to occupy, unless such permission is proved. The fact that the holder has built houses of substantial value on the site is immaterial. [P 31 C 1]

M. R. Bobde and *S. B. Gokhale*—for Appellant.

J. Sen—for Respondents.

Judgment.—Mt. Kamodi, a non-agriculturist, was the owner of two houses contiguous to each other in Mouza Sodalapur. These were brought to sale in execution of a civil Court decree and were bought by one Ramratan who subsequently died and is now represented by his widow and others. The malguzar of the village, Madhorao claimed possession of the site and as the defendants refused to vacate he brought a suit for possession. The defendants resisted the claim on the ground that as Mt. Kamodi was a non-agriculturist she had a right to transfer the houses with their sites. The plaintiff denied that the site could be transferred by her and an issue was framed:

"Is the site in suit capable of being transferred with the house as alleged ?"

No evidence was led in the case and the only document filed beyond postal receipts is a copy of the Wajibularz which is of no assistance in the case as it does not more than repeat the first three subsections of S. 203, C. P. Land Revenue Act. The trial Court decreed the plaintiff's claim on the strength of the ruling in *Narayan* v. *Behari* (1), holding that the transferee has the same right as the transferor provided no objection is raised by the malguzar and that in this case there was an objection and that in the absence of any contract to the contrary the malguzar has a right to eject the transferee who is in possession of the site in the village abadi without obtaining his consent. The defendants appealed claiming that the provisions of the Land Revenue Act were not applicable in the case and that Mt. Kamodi had full rights of ownership over the house and the site and consequently a transferable right therein irrespective of the malguzar's consent. The lower appellate Court, while holding that the site undoubtedly did belong to the landlord, considered that the question raised is not one of ownership but is whether the landlord is entitled to enter into possession. Although the judgment is not very clear on the point, it appears that the learned District Judge, relied on the decision in *Bhondusao* v. *Jagat Ram* (2), and held that on the facts of the case the landlord was not entitled to revoke the license in which it was presumed that he must have given consent to the construction of these houses as the large one was a substantial house built of bricks; the smaller house is partially in ruins. The decree of the lower Court was set aside and the suit was dismissed. The malguzar Madhorao has preferred this second appeal.

The ruling in *Bhondusao* v. *Jagat Ram* (2) has really no applicability to the present case. In that case one of two neighbours in an abadi sold a smaller strip of land from his site to the other and the malguzar claimed possession of the strip. The question as to whether ownership passed as a result of the alleged sale of this strip was expressly left undecided and it was held that the infringement if any of the malguzar's right in consequence of this transfer was not sufficient to entitle him to possession of the strip transferred as the tenant vendor had a substantial house adjacent to the strip and the presumption was that he had obtained the malguzar's consent

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(1) [1915] 11 N. L. R. 126=31 I. C. 307.
(2) [1899] 12 C. P. L. R. 146.

to the building of it. The parties in the case were non-agriculturists.

Section 203, Land Revenne Act, is not confined to the rights of agricultural house-holders only ; their rights and liabilities are determined by the first three subclauses of the section and house holders in general are governed by the remaining subclauses. By sub-Cl. (5) the Financial Commissioner (now the Local Government) may declare in any village that the rights of non-agricultural house holders in sites are to be heritable and transferable. No such declaration has been made in respect of this village. The subsection however is governed by the general sub-S. (8) which says that nothing in the section shall affect the terms of any contract between the proprietor and the holder of a site in the abadi. Mt. Kamodi or her heirs must be presumed to have occupied the site in question by virtue of a contract either express or implied. No evidence has been led "by either" side to show what this contract was and it cannot be presumed to be more than a license to occupy. It will not be revoked as far as Mt. Kamodi or her heirs are concerned; but this license cannot carry with it a right to transfer with permission to occupy unless such permission is proved. The right to transfer a site is an incident of ownership of the site which Mt. Kamodi admittedly never had. The effect of the decision of the lower appellate Court would be to destroy the malguzar's title in the site permanently inasmuch as the transferee would be entitled to hold in the same manner as Mt Kamodi and would be entitled to transfer the site in a similar way when he himself no longer wished to occupy it. In this case the fact that the house was a substantial one and that the two houses together were sold for Rs. 600, appears to have been the deciding factor in the mind of the learned District Judge. The question of value seems to me in this case to be immaterial and in claiming the site to be transferable the defendants claim ownership of the site in Mt. Kamodi, a right which she did not possess. The transfer of this site as of other village sites is subject to the consent of the malguzar which in this case has been refused and the plaintiff's contention must succeed.

The decree of the lower appellate Court is accordingly set aside and that of the trial Court restored. The respondents will pay the appellant's costs throughout.

R.M./R.K. *Decree set aside.*

A. I. R. 1932 Nagpur 31

MACNAIR, J. C.

Vinayak—Appellant.

v.

Jairam and *others*—Respondents.

Second Appeal No. 15 of 1930, Decided on 11th April 1931, from appellate decree of First Addl. Dist. Judge, Nagpur, D/- 30th September 1929.

(a) Civil P. C. (1908), S. 151 — Decree directing partition in impossible manner—S. 151 should be applied.

Where a decree directs partition in an impossible manner the provisions of S. 151 should be applied. [P 31 C 2]

(b) C. P. Tenancy Act (1920), Ss. 93 and 105 (o)—Civil Court can effect partition by allotting entire holdings.

Section 105 (o) does not prohibit civil Courts from effecting partition by allotment of entire holdings to various cosharers. [P 32 C 1]

M. B. Kinkhede and *M. D. Khandekar*—for Appellant.

B. R. Mandlekar—for Respondent.

Judgment.— The plaintiff-appellant obtained a preliminary decree for partition. This decree directed that a number of fields held in absolute occupancy and occupancy rights should be divided by the Revenue Officer under S. 93, Central Provinces Tenancy Act. It was apparently overlooked that, under the rules, the Revenue Officer could not partition the individual holdings as such partition would involve formation of holdings of which the area was less than ten acres. When passing the final decree, the learned Judge held that no partition of the tenancy holdings could be effected as the preliminary decree provided for partition in an impossible manner.

In first appeal it was held that the preliminary decree could not be varied and that Cl. (o), S. 105, Central Provinces Tenancy Act, prohibited civil Courts from partitioning a number of holdings by allotting some holdings to each cosharer.

With regard to the first point it is sufficient to say that the provisions of S. 151, Civil P. C., should be applied when it is discovered that the decree directs partition in an impossible manner.

With regard to the second point I .remark that S 105 (o), Tenancy Act prohibits a civil Court from exercising jurisdiction over the partition of holdings under S. 93 ibid, and S. 93 only refers to the breaking up of a holding. The lower appellate Court then should vary the preliminary decree, so as to give effect to its main intent that the holdings should be divided, and should endeavour to effect partition by allotting holdings to the various cosharers. It is not clear from the record how the fields are divided into holdings : it may be that a particular partition cannot be effected without breaking up one or more holdings. If this is the case the plaintiff should be directed to apply for partition of some holdings in a manner allowed by the rules : I see no reason why a satisfactory partition cannot be reached without the formation of a holding of less than ten acres. The plaintiff should receive a full one-third of the land if this is reasonably possible : otherwise, he will have to be content with land of value less than one-third of the whole as his share together with a sum of money. Costs in this Court will be costs in the proceedings : counsel's fee Rs. 40.

V.B./R.K. *Order accordingly.*

A. I. R. 1932 Nagpur 32

MACNAIR, J. C.

Liladhar and *others*— Plaintiffs—Appellants.

v.

R. S. Sunderlal—Defendant—Respondent.

Second Appeal No. 176 of 1929, Decided on 9th April 1931, from decree of Addl. Dist. Judge, Chhindwara, D/- 26th November 1928.

Deposit—Deposit in connexion with illegal contract recoverable when not based on such contract—Contract Act (1872), S. 23.

Where a deposit has been made in connexion with an illegal contract such deposit can be recovered by a suit, if the plaintiff does not rely for his claim on the illegal contract.

[P 33 C 1]

R. N. Padhye—for Appellants.

G. R. Trivedi—for Respondent.

Judgment. — The plaintiffs sued for return of a deposit of Rs. 1,000 : the deposit was made in a village of the Chhindwara District. A document (Ex. D-1) states that the amount was to remain in deposit for three years and was then to be repaid or credited towards the price of coal.

The defendant urged that the suit filed before the expiry of three years was premature, but at the same time he urged that the object of the deposit was to secure him from loss in dealing with the plaintiffs, that these dealings ceased and that he had already brought a suit for recovery of the money due on these dealings.

In view of these admissions the plaintiffs' plea that it was understood at the time the deposit was made that it would be returned when the dealings stopped must, I think, succeed. The suit then was not premature.

In the lower Courts it was urged that the Chhindwara Court had no jurisdiction : that was not urged before me and admittedly the deposit was made in the Chhindwara District : the cause of action, in part, arose in the Chhindwara District.

The defence which has succeeded in the lower appellate Court is that the suit cannot succeed because the contract with regard to coal was opposed to public policy. I have not been referred to any case in which this maxim has been applied to prevent recovery of a deposit as security merely on the ground that such security facilitated the carrying out of an illegal contract. In Broom's Legal Maxims at p. 562 it is stated :

"The well established test, for determining whether money or property which has been parted with in connexion with an illegal transaction can be recovered in a Court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of the cause of action, necessarily relies upon the illegal transaction ; if he requires aid from the illegal transaction to establish his case, the Court will not entertain his claim."

In the present case it was the defendant who urged that there had been an illegal transaction and that the result of this transaction was that he was entitled to retain the Rs. 1,000 on account of the price of coal. I do not think that the terms of Ex. D-1 made it necessary for the plaintiffs to allege and prove that they had obtained coal and paid for it. The plaintiffs could clearly succeed without mention of the fact that any transaction regarding coal had taken place. To show that the suit was not premature he had only to state that he had not had dealings with the defendant for some time before institution. I add that there

is a finding of fact that nothing was due to the defendant on account of coal.

The case of course would have been very different if the Rs. 1,000 had been paid as an advance payment for coal. I am therefore of opinion that though the contract regarding coal has been found to be illegal, the plaintiffs are entitled to recover their deposit made on the understanding that it should remain as a deposit until all the dealings under the illegal contract were contemplated. I therefore set aside the decree of the lower appellate Court and restore the decree of the first Court ; costs in all Courts will be borne by the defendant.

B.V./R.K. *Appeal allowed.*

A. I. R. 1932 Nagpur 33

SUBHEDAR, A. J. C.

Uttamrao—Plaintiff—Appellant.

v.

Gangaram—Defendant—Respondent.

Second Appeal No. 272-B of 1929, Decided on 10th August 1931, from decree of Second Addl. Dist. Judge, Akola, D/- 2nd September 1929.

Transfer of Property Act (1882), S. 53—Sale for good consideration by debtor to one of his creditors—No benefit reserved for debtor—Though assets are insufficient for payment to remaining creditors, sale is not fraudulent within S. 53.

Where in a case, no bankruptcy law is applicable, there is nothing to prevent a debtor from preferring a certain creditor and paying him in full without paying anything to the remaining creditors even though the rest of the debtor's assets are not sufficient for the satisfaction of his other creditors. Where therefore a debtor makes a transfer in favour of one of his creditors for good consideration for satisfying debt due to that creditor and no benefit is reserved for the debtor himself, such transfer is not a fraudulent transfer within S. 53 though no assets are left with the debtor to satisfy his other debts: *A. I. R.* 1915 *P. C.* 115, *Rel. on*; *A. I. R.* 1929 *P. C.* 279, *Ref.*; 33 *Mad.* 334; *A.I.R.* 1927 *Nag.* 166; *A.I.R.* 1921 *Nag.* 103 and *A. I. R.* 1919 *P. C.* 6, *Dist.*

[P 33 C 2]

M. Bhasker Rao Niyogi—for Appellant.

V. K. Rajwade and *G. G. Hatwalne*—for Respondent.

Judgment.—The facts leading to this appeal are shortly these: In execution of a simple money decree defendant 1 attached a field belonging to his judgment-debtor, defendant 2, and got it sold, and it was purchased by defendant 3. The plaintiff laid an objection in the executing Court against the attachment on the basis of a sale deed which he had taken from defendant 2 on 4th January 1926 for a consideration of Rs. 800. That objection was dismissed and the plaintiff therefore filed a regular suit to have it declared that he was the owner of the attached field and that the same was not liable to sale in execution of defendant 1's decree against defendant 2. The suit was contested only by defendants 1 and 3 on the ground that the sale was without consideration, that the field conveyed never in fact changed hands and that the transaction was void because it was entered into with the intention of shielding the property from the hands of defendant 2's creditors, the plaintiff and defendant 2 being relations.

The trial Court, upon a careful consideration of the evidence on record, held that the sale in plaintiff's favour was for consideration, that the field conveyed was duly placed in possession of the purchaser, and that the transaction was not in any way fraudulent. It accordingly granted the plaintiff a declaration as prayed for by him.

Against this decision defendant 1 filed an appeal which was disposed of by Mr. Karmarkar, Additional District Judge, Akola. He agreed with the finding of the first Court that the sale in question was for consideration and that it was followed by delivery of possession of the property sold. The learned Judge however held that the plaintiff did not appear to him to be a bona fide transferee and that therefore the sale in his favour was fraudulent within the meaning of S. 53, T. P. Act. He accordingly allowed the appeal and dismissed the plaintiff's suit. Against this decree the plaintiff has come up in second appeal.

It has been contended on behalf of the appellant that on his own findings, that there was good consideration for the sale in the shape of the discharge of antecedent debts owed by the vendor to the plaintiff as well as to another creditor, and that the sale was followed by delivery of possession and in the absence of any finding that any substantial benefit was reserved by this transaction to the debtor, the view of the learned Judge that the transaction came within the purview of S. 53, T. P. Act was entirely erroneous in law. This contention appears to me to be well founded.

In a similar case in which as here no consideration of the law of bankruptcy applied their Lordships of the Privy Council in *Musahar Sahu* v. *Hakim*

Lal (1) (at p. 525 of 43 *Cal.*) made the following weighty observations :

"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid : *Middleton* v. *Pollock* (2). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor, there being in the case no question of bankruptcy."

Their Lordships of the Privy Council recently affirmed the aforesaid proposition of law in *Ma Pwa May* v. *S. R. M. M. A. Chettiyar Firm* (3). In this case it was held that a mortgage executed for adequate consideration, being partly the discharge of a genuine debt, no benefit being retained by the mortgagor, is not invalid under S. 53, T. P. Act, as being made to defeat or delay creditors, even though the mortgagor, who is heavily indebted, thereby prefers the mortgagee over other creditors, one of whom has instituted a suit, and before registration of the mortgage has obtained an order before decree attaching the mortgagor's property. In *Mardan Singh* v. *Karanju* (4) it was also explained by this Court that an assignment is not fraudulent because it may operate to the prejudice of a particular creditor and that a sale of property for good consideration is not fraudulent against the creditors merely because it was made with the intention of defeating a particular execution.

The facts found by the learned Additional District Judge in para. 7 of his judgment are that the plaintiff was aware that his vendor defendant 2 was heavily indebted and that another transaction in the shape of a conveyance by defendant 2 in favour of his wife was also gone through about the same time when the plaintiff's sale deed was executed. The wife of defendant 2 also objected in the execution proceedings but the objection was disallowed. She did not file any suit like the present one filed by the plaintiff and it may therefore be taken that the sale in her favour was without consideration and fraudulent. These circumstances would not however, in my opinion, bring the sale in favour of the plaintiff within the purview of S. 53, T. P. Act as contended by the pleaders for the respondents.

The cases relied on by the lower appellate Court in support of its finding on the question of law have no application to the facts found in the present case and are easily distinguishable. In *Palamalai Mudaliyar* v. *South Indian Export Company* (5), it was held that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immovable property into cash which can easily be concealed and thus to defeat or delay his creditors cannot be treated as a transferee in good faith within the meaning of S. 53, T. P. Act. The cases of *Narayan* v. *Nathu* (6) and *Gopal* v. *Ram Krishna* (7), were cases under the Provincial Insolvency Act the provisions of which are entirely different from those of S. 53, T. P. Act. In the case of *Seth Ghunsham Das* v. *Umapershad* (8), there was a clear finding by their Lordships of the Privy Council that

"there can be little doubt that the mortgage was a mere device for reserving the bulk of the available assets of Dhanroopmal for the benefit of his family and indirectly for himself."

For the reasons given above I accept the appeal and setting aside the decree of the lower appellate Court restore that of the trial Court with all costs.

B.V./R.K. *Appeal allowed.*

(1) A. I. R. 1915 P. C. 115=32 I. C. 343=43 I. A. 104=43 Cal. 521 (P.C.).
(2) [1876] 2 Ch. D. 101=45 L. J. Ch. 293.
(3) A. I. R. 1929 P. C. 279=120 I. C. 645=56 I. A. 379=7 Rang. 624 (P.C.).
(4) [1900] 13 C. P. L. R. 180.
(5) [1909] 33 Mad. 334=5 I. C. 33.
(6) A. I. R. 1927 Nag. 166=103 I. C. 486.
(7) A. I. R. 1921 Nag. 103=62 I. C. 289=17 N. L. R. 69.
(8) A. I. R. 1919 P. C. 6=50 I. C. 264 = 15 N. L. R. 68 (P.C.).

A. I. R. 1932 Nagpur 34

JACKSON, J. C.

Dalchand—Plaintiff—Appellant.

v.

Seth Hazarimal and *others* — Defendants—Respondents.

First Appeal Nc 40 of 1930, Decided on 16th July 1931, against decree of Sub-Judge, First Class, Chhindwara, D/- 25th February 1930.

Contract Act (1872), S. 202—Agent selling cloth and entitled to retain part of price as remuneration—He has no interest in cloth unsold within meaning of S. 202.

An agent, who sells cloth and who is entitled by an agreement with his principal to retain part of the price of the goods as his remuneration sold, has no interest in the cloth kept with him by the

principal, for sale within the meaning of S. 202 : 5 *Bom.* 253 and 24 *Bom.* 403, *Foll* : *A. I. R.* 1929 *Nag.* 170, *Dist.* [P 35 C 2, P 36 C 1]

D. T. Mangalmoorti, *A. V. Vazalwar* and *N. T. Mangalmoorti*—for Appellant.

M. R. Bobde—for Respondents.

Judgment. — The plaintiff, on 12th February 1926, appointed the defendants as his agents for the sale of cloth. The defendants were to account to the plaintiff for the cloth sold at the rates prevailing in Bombay and were entitled to keep for themselves any excess over those rates that they might secure from purchasers. The other terms of the contract are given in the two documents, dated 12th February 1926, Ex. P-2, executed by defendant 1, and Ex. D-1, executed by the plaintiff. The rent of the shop in which the defendants were to carry on their trade in cloth and the salary of one servant were to be paid by the plaintiff, and it was stipulated that, if the stock of cloth fell below Rs. 2,000 in value, the plaintiff would no longer be liable for the rent or the pay of the servant. The plaintiff supplied the defendants with cloth of the value of Rs. 6,008-9-0 on 23rd February 1926. Between that date and 17th October 1926 the defendants sold cloth worth Rs. 989-9-0 at Bombay rates and paid that sum to the plaintiff. On 31st October 1926 the plaintiff served them with a notice (Ex. P-3), terminating the agency and requiring the defendants, within eight days, to return the cloth remaining unsold and account for the cloth sold and intimating that his liability for rent and the pay of a servant would cease from the end of the month. In their reply (Ex. P-7) the defendants promised to comply within a fortnight. In reply to a second notice (Ex. P-5), dated 8th November 1926, the defendants (Ex. P-8) denied their liability to return the cloth or to account and claimed that the plaintiff was liable to them for damages. Further notices from the plaintiff received no reply and on 13th December 1928 he filed the suit out of which this appeal arises, in which he has been given a decree for the delivery of cloth worth Rs. 4,545-10-0 and the payment of Rs. 1,447-9-3 in cash or, if the cloth is not delivered, for the payment of Rupees 5,993-3-3.

It is the first ground of appeal on behalf of the defendants that the term relating to the payment of rent and the servant's salary really meant that the contract was to terminate when the plaintiff had not goods of the value of Rs. 2,000 to supply to the defendants and that the lower Court is wrong in holding that it meant that the contract was to terminate when the stock of the plaintiff's cloth in the defendants' hands fell below that value. There has been confusion in the use of pronouns in the two documents ; but I consider that the lower Court is correct in thinking that the stipulation relates to the value of the stock in the defendants' hands. As I read the stipulation however it is not concerned with the termination of the contract but simply with the plaintiff's liability to pay the rent of the shop and the salary of one servant. There is in fact, no term in the contract providing for the termination of it. It is entirely indefinite as to the time for which the agency was to continue, and the defendants cannot plead that, as they displayed, in selling the plaintiff's cloth, the skill and diligence required by S. 212, Contract Act, it is the plaintiff who is liable to compensate them under S. 205 of the Act for revoking the agency without sufficient cause. The plaintiff was entitled, under S. 203, to revoke the authority, given by him to the defendants without any cause, unless S. 202 of the Act applies, that is, unless the defendants had an interest in the property which forms the subject-matter of the agency.

It is urged on behalf of the defendants that they had an interest in the cloth supplied to them by the plaintiff for sale, because they were entitled to keep for themselves any amount obtained by them above the Bombay rates. They rely upon Illus. (a), S. 202, Contract Act, which runs as follows :

" *A* gives authority to *B* to sell *A's* land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death.

For the plaintiff, *Vishnucharya* v. *Ramchandra* (1), has been cited, in which it has been held that an agent for the collection of rents cannot be regarded as having an interest in the property merely because he is authorized to take his salary out of the rents. It is objected on behalf of the defendants that this decision runs directly contrary to Illus. (a), S. 202. But I find that a similar view has been taken in *Lakhmichand* v. *Cho-*

(1) [1881] 5 Bom. 253.

tooram (2), in which the facts more closely resemble those of the present case and it was held that the interest which an agent has in effecting a sale and the prospect of remuneration to arise therefrom is not such an interest as would prevent the termination of the agency.

I am in respectful agreement with the decisions in these two Bombay cases. They and the case before me are clearly distinguishable from the case stated in Illus. (a), S. 202, Contract Act. In the illustration, the principal was under a liability to the agent quite apart from the contract of agency, and the authority given to him to sell the principal's land was by way of security for the discharge of that liability. In the present case, the agent had no interest in the property to be sold or in the sale proceeds thereof until a sale had been actually effected, and revocation of the agency, before sale had been effected, deprived him of nothing that had accrued to him.

I hold that the plaintiff was entitled to revoke the agency of the defendants and did revoke it by the notice (Ex. P-3), dated 30th October 1926, and that the defendants are clearly liable to pay him damages for their failure to return the cloth that still remained in stock with them and to pay to the plaintiff the sums received by them by the sale of cloth subsequent to revocation. The lower Court has allowed damages at the rate of 1 per cent per mensem on the value of the cloth unsold and retained by the defendants. I consider that the lower Court's award is fair. *P. P. Deo, Receiver of the estate of Balkrishna Koshti* v. *Narayan* (3), has no application to the present case, as it is not one in which interest has been claimed on money due of which payment has been withheld. The withholding of goods is quite a different matter. There is a cross-appeal by the plaintiff (First Appeal No. 120 of 1930). There are two grounds of appeal the first of which, I am informed, has been set up under a misapprehension. The second objects to the lower Court's allowance of interest at the low rate of 6 per cent per annum from the date of the suit till realization ; but it seems to me that this rate is adequate.

Both appeals are dismissed with costs.

B.V./R.K. *Appeals dismissed.*

(2) [1900] 24 Bom. 403.
(3) A. I. R. 1929 Nag. 170=25 N. L. R. 81.

A. I. R. 1932 Nagpur 36

SUBHEDAR, A. J. C.

Gulabchand and *others*—Appellants.

v.

Harbhagat—Respondent.

Second Appeal No. 450 of 1927, Decided on 18th November 1931.

(a) C. P. Land Revenue Act (1898), Ss. 69 (4) and 83—S. 69 has no application to question of proprietary interest in land recorded as *sir* and so question of such rights may be decided whenever occasion for such decision arises.

Section 69 relates to disputes as to whether or not land admittedly belonging to a particular proprietor is *sir* land or not *sir* land. S. 69 has no application whatever to disputes as to whether *A* or *B* is the proprietor of the land recorded as *sir* and consequently the question of proprietary rights in such land may be decided whenever an occasion for such a decision arises irrespective of a suit under S. 83 : 12 *N. L. R.* 139 ; *Nag. S. A. No.* 508 *of* 1917 and *Nag. S. A. No.* 585 *of* 1922, *Rel. on.* [P 37 C 2, P 38 C 1]

(b) Easements Act (1882), S. 62 (c)—Possession amounting to license for fixed period—License can be revoked at end of period without any notice.

There is no presumption that a subtenancy for a single year continues after that year has expired. Where therefore the possession of a person for one year amounts to a license for that period only the license must be deemed to have been revoked at the end of that period and no notice to quit is required : *A. I. R.* 1927 *Nag.* 320, *Ref.* [P 39 C 2]

M. R. Bobde, W. R. Puranik and *R. M. Bhagade*—for Appellants.

Shriddarrao Gokhale—for Respondent.

Judgment. — By my order dated 3rd September 1931 in Misc. Judicial Case No. 42 of 1930, I allowed the appellants an opportunity to argue grounds Nos. 3 second part of 4 (a), 4 (b), 5 and 10 of the original memorandum of appeal, as it was agreed by the parties that these grounds though touched in arguments, were not dealt with in my previous judgment. The relevant facts may be restated thus : The field in dispute was originally *sir* field No. 376 which was mortgaged by Kashiram with the plaintiff as far back as 1886. This field was sold and purchased by the plaintiff on 15th August 1908 in execution of the mortgage decree in Civil Suit No. 165 of 1907 and since only formal possession was then taken by the plaintiff, he, in 1914, instituted Suit No. 236 of 1914 for khas possession of this land against the quondam mortgagor Kashiram, the predecessor-in-title of the defendants-appellants. When the case came up before this Court in Second Appeal No. 557 of 1915 it was held that the

plaintiff purchased in the auction sale only the proprietary rights and not the cultivating rights in the *sir* field which remained with Kashiram, in view of the provisions of S. 45 (1), Tenancy Act then in force. The result of this litigation was a declaration by the highest judicial authority in the land that in the year 1914 when Suit No. 236 of 1914 was brought, field No. 376 had lost its character as *sir* land, the plaintiff becoming the proprietor and Kashiram the ex-proprietary occupancy tenant thereof.

This decision was given on 5th January 1917 (Ex. P-4) in spite of the fact that in the settlement of 1912-13 the land was still recorded as "*sir* of Kashiram" (Ex. P-12), apparently in ignorance of the fact that it had lost its character as *sir* land under the provisions of S. 45, C. P. Tenancy Act, 1898. On 1st July 1924 Sakharam having surrendered his occupancy rights the plaintiff-respondent brought the present suit to eject the defendants-appellants who claimed to hold possession of the field under a prior lease from Sakharam. Ground No. 3 runs as under :

"That the settlement entry showed the field as *sir*, this entry was final and conclusive and was not challenged in proper time. The plaintiff cannot plead and prove in the present suit that the field was held in occupancy right by Kashiram and Sakharam."

The contention of the learned advocate for the appellants is that this settlement entry of 1912-13, recording the land as "*sir* of Kashiram," not having been set aside in a regular suit under S. 83, Land Revenue Act, 1898, became final and conclusive and therefore, in spite of the judgment of Batten, A. J. C., in Second Appeal No. 557 of 1915, the land remained as *sir* of the original proprietor and could not legally be surrendered by his son Sakharam, to the plaintiff on 1st July 1924, as his exproprietary occupancy holding. It was therefore urged that the plaintiff acquired no title by the surrender to maintain the present suit for possession. This contention is indeed very plausible but clearly untenable for two very sound reasons.

In the first place, the argument completely ignores the interpretation placed by this Court, time and again, as to the limited scope of the provisions of S. 69 of the old C. P. Land Revenue Act, sub-S. (4) whereof declares that an order or entry of the Settlement Officer recording or omitting or refusing to record any land as *sir* land, shall be final, unless and until it is reversed or modified by the decree of a civil Court in a suit instituted under S. 82 *ibid* within one year after the settlement comes into effect. In *Dinanath* v. *Manbodhi* (1), Stanyon, A. J. C., held that the section in question merely deals with the classification of land and does not in any way touch the question of proprietary rights therein, which may be decided whenever an occasion for such a decision arises, irrespective of a suit under S. 83, Land Revenue Act. The point was further made clear by Batten, Offg. J. C., in *Hazarimal* v. *Shyanibahu* (2), the facts of which were almost identical with those of the present case. That was a suit by the plaintiff for the correction of a settlement entry, which recorded the defendant as a proprietor, instead of as an occupancy tenant of *sir* land. The two Courts below dismissed the suit solely on the ground of limitation, holding that the special period of one year laid down in sub-S. (4), S. 69, Land Revenue Act, was applicable to the case. In repelling this view the learned Offg. Judicial Commissioner made the following weighty pronouncement :

"Section 69 relates to disputes as to whether or not land admittedly belonging to a particular proprietor is *sir* land or not *sir* land. S. 69 has no application whatever to disputes as to whether *A* or *B* is the proprietor of land. In this case the plaintiffs' claim is that they are the proprietors of the land and that defendant 1 is only their occupancy tenant. They complain that at the settlement defendant 1 was recorded as proprietor instead of as occupancy tenant. The mistake alleged to have occurred is that whereas defendant 1 was formerly the proprietor of the land as his *sir* and he has now ceased to be proprietor and has now become occupancy tenant, he is still wrongly recorded as proprietor of the *sir* land instead of as occupancy tenant of the land which was formerly *sir*. If the plaintiffs fail in their case they can have no possible objection to defendant 1 being recorded as *sir* proprietor instead of ordinary proprietor. The question whether the land would be recorded as *sir* or not does not arise in the case. The sole question is whether or not plaintiff is the proprietor and defendant 1 the tenant. The special rule of limitation laid down in S. 69 (4), C. P. Land Revenue Act, has therefore no application whatever to the case."

To the same effect is the decision of Baker, J. C., in *Jagatsingh* v. *Dharoop-*

(1) [1916] 12 N. L. R. 139=36 I. C. 547.
(2) Nag. Second Appeal No. 508 of 1917, decided on 6th April 1918.

singh (3). Accepting the view of law laid down in the aforesaid cases as absolutely sound I overrule the contention of the appellants' counsel, that the settlement entry of the year 1912-13 could not be challenged as incorrect in the present litigation, simply because it was not set aside in a suit under S. 83 of the old C.P. Land Revenue Act. That the entry is clearly erroneous has not been and cannot be disputed at all, because, long before it came to be made, the land had already lost its character of *sir* under the provisions of S. 45, C. P. Tenancy Act, 1898, and should not therefore have been recorded as *sir* land, even under the provisions of S. 69 (1) of the old Land Revenue Act.

In the next place the matter under discussion is concluded as res judicata by the decision in Civil Suit No. 236 of 1914 (Ex. P-8), which culminated in Second Appeal No. 557 of 1915 (Ex. P-4). That was essentially a suit for determination of the question of title to the land in dispute in the present case; the plaintiff claimed both the proprietary and the cultivating rights therein by virtue of his auction purchase, whereas the then defendant Kashiram denied the plaintiff's title only to the cultivating rights in the land. In spite of the fact that a year prior to the institution of the suit the settlement officer had recorded the field as his *sir*, Kashiram did not, in his defence, rely on this entry, which he might and ought to have done under Expl. 4, S. 11, Civil P. C.; in other words, if he at all relied on the settlement entry, it was obligatory upon him to defend that suit by pleading that the entry had wiped off even the proprietary rights which the plaintiff may have acquired in the land in dispute by his auction-purchase. As would appear from the first Court's judgment in that suit (Ex. P-8), the only issue framed on the question of title was:

"Whether the plaintiff obtained only the proprietary rights or the cultivating rights also in the sale."

The decision of the trial Court as well as of that Court on this issue was that although the decree obtained in Civil Suit No. 165 of 1907 directed the sale of both the proprietary and the tenant rights in the land, the plaintiff under the law then in force, could not acquire both, but that he simply got the proprietary rights and the cultivating rights in the land remained with the defendant. In other words, the defendant was declared an exproprietary occupancy tenant of the land, and plaintiff the proprietor thereof, with the result that the settlement entry of 1912-13, recording Kashiram as the sole proprietor of the land, was constructively held incorrect. Since the defendants-appellants defended the present suit on a title derived from Kashiram's son, Sakharam, they are precluded from challenging the plaintiff's title to the proprietary interest in the land and Sakharam's title as occupancy tenant thereof which were finally determined in the previous litigation. I hold then that on 1st July 1914 Sakharam was only an occupancy tenant of the original *sir* field No. 376, which is the field in dispute, and that he could validly surrender his tenant right to the plaintiff, who was the landlord of the holding.

Even taking the position of the appellants as rank trespassers in possession of the land in dispute, because the five years lease on the basis of which they originally resisted the plaintiff's claim for possession is held inoperative and fictitious, it is clear that they may not be bound by the decision arrived at in the previous litigation of 1914-17. It is however equally clear that on the facts ascertained in the present case the plaintiff has so well established his own title and that of Sakharam to the land in dispute as landlord and occupancy tenant respectively before the surrender that the surrender of the holding by Sakharam to the plaintiff has clothed the latter with all the legal rights to successfully claim eviction of the appellants as trespassers.

On grounds Nos. 4 (a) (second part) and 4 (b) it was argued that the lower Court's decision, that the surrender was not fictitious, fraudulent or champertous was wrong because the Courts below failed to take into consideration the order of the insolvency Court (Ex. P-24) which declared certain transfers made by Sakharam fictitious and fraudulent. There is undoubtedly no mention in the judgments of both the Courts below of the insolvency order, but it cannot be assumed that the matter was not before them when they gave their findings. However in view of the fact that Sakharam himself as C. W. 1 clearly stated that he had received Rs. 1,000, as consideration for the surrender, the lower Courts' finding

(3) Nag. S. A. No. 585 of 1922, decided on 5th January 1924.

that the surrender was genuine is perfectly correct. This matter has been dealt with by the lower appellate Court in para. 13 of its judgment. I agree with the concurrent findings of the Courts below that the deed of surrender was a genuine transaction. In view of this clear finding it is obvious that the surrender could not be held fictitious, fraudulent or champertous.

Ground No. 5 could not be pressed in view of the conclusive finding that the lease in favour of the appellants was inoperative and fictitious.

On ground No. 10 it was argued that, since the evidence of Sakharam shows that the appellant Chaganlal was already in permissive possession of the land in dispute for some time prior to the filing of the present suit on 15th November 1924, a reasonable notice to quit should have been given to the appellants by the plaintiff before he could eject them. I find it difficult to appreciate this argument. In their pleadings the appellants did not assert anywhere that they were in permissive possession of the field at any time prior to 18th March 1923, when the five years' lease (Ex. D-12) in their favour was to come into force. It has undoubtedly come out in the evidence of Sakharam that the appellant Chaganlal was associated with him in the cultivation of the field in suit for a year prior to the five years' lease. There are however no materials on the record to prove the exact terms under which the appellants were in possession of the land in 1922-23, except that in the jamabandi of that year (Ex. D-3) the appellant Gulabchand is recorded as holding the land on batai. The appellant's possession in 1923 was evidently under Ex. D-12 which has been found by all the Courts to be a fictitious lease. On such materials as are on the record it is difficult to hold that Gulabchand's or Chaganlal's possession in 1922-23 was that of a subtenant, holding from year to year, as was the case in *Sheomangal* v. *Nanhelal* (4), so as to entitle the appellants to receive a reasonable notice to quit before ejectment. It was observed in *Thakur Mooratsingh* v. *Munilal* (5) that, where the person in possession of a holding is proved to have been a sub-tenant from year to year for a number of years, a presumption may arise that the sub-tenancy was renewed in subsequent years; but there is no presumption that a sub-tenancy for a single year continued after that year had expired. At the most then, the possession of Gulabchand or Chaganlal for one year in 1922 23 was merely that of a licensee for a fixed term of one year. That being the position, the license must be deemed to have been revoked at the end of the year and the appellants were not entitled to any notice to quit, as is now contended for on their behalf, vide S. 62 (c), Easements Act 1882.

For the reasons given above I confirm my previous judgment and decree dismissing the appeal. The costs of this rehearing of the appeal will be paid by the appellants in addition to the costs already scheduled. Pleader's fee Rs. 75.

P.N./R.K. *Appeal dismissed.*

(4) [1918] 14 N. L. R. 3=43 I. C. 392.
(5) A. I. R. 1927 Nag. 320=103 I. C. 713 = 23 N. L. R. 148.

A. I. R. 1932 Nagpur 39

MACNAIR, J. C. AND STAPLES, A. J. C.

Parashram—Appellant.

v.

Krishna—Respondent.

First Appeal No. 151 of 1928, Decided on 17th March 1931, against decree of Addl. Dist. Judge, Nagpur, D/- 27th August 1928.

Mortgage—Interest—Terms not providing for rate of interest after amount is due—Reasonable rate should be allowed by Court—Civil P. C. (1908), O. 34, R. 11.

Where, the terms of a mortgage deed do not indicate what rate of interest should be paid after the entire amount becomes due, a reasonable rate of interest should be allowed by the Court.

The presumption is that when a mortgage deed is executed the parties contemplate the possibility that payment may not be made at the time when the entire amount becomes due. If the deed contains stipulations regarding payment of interest before this date, a presumption arises that the parties intended that interest should be paid after that date. Stipulations may be such as to justify an inference that interest on the due date is to be paid at a particular rate; but where no inference regarding the rate can be drawn, the presumption is that it was intended to pay interest at a reasonable rate: *A. I. R.* 1928 *Nag.* 67 and 5 *N. L. R.* 37, *Dist.* [P 40 C 2]

W. R. Puranik—for Appellant.

Judgment.—The sole point raised in this appeal refers to the amount of interest included in the amount due on the mortgage in suit. The mortgage was executed to provide for the payment of old debts; 25 per cent was added to the amount found due and the deed provided

for payment in ten instalments. The learned Additional District Judge has stated that the amount of interest which would have been paid, if there had been no default, works out to two and a half per cent per annum, but this is a miscalculation. As the debtors had to repay a portion of the debt each year, they were not to enjoy the use of the whole money for ten years; taking an average they were to enjoy its use for five and a half years and the rate of interest was four and a half per cent per annum. The deed contains a clause that if instalments were defaulted, interest at two per cent per mensem compound was to be paid till satisfaction. There is however a further clause that, if two instalments were defaulted, the whole amount should become due, and the deed makes no provision for interest on the whole sum if it became due. The trial Judge, relying on *Asaram* v. *Dnanoba* (1), has held that after the whole sum became exigible the mortgagees were entitled to interest only at the rate at which the principal sum would have borne interest if there had been no default. The Judge states that this rate was two and a half per cent per annum, but has allowed six per cent per annum because the defendants agreed to pay interest at that rate.

In appeal it is urged that interest should throughout have been allowed at the rate which, it was agreed, should be paid on defaulted instalments. Reliance is placed on *Sheoppa* v. *Rukhma* (2): but that case merely decided how a particular bond should be interpreted. The deed provided for payment of instalments without interest: the interest on defaulted instalments was moderate. The Judge came to the conclusion that the deed read as a whole embodied the intention of the parties that interest should be paid after the whole sum became due at the rate agreed with respect to the defaulted instalments. The next argument is that the decision in *Asaram* v. *Dnanoba* (1) has no application to the facts we are considering. In our opinion, this contention is correct. In the deed considered in *Asaram* v. *Dnanoba* (1) there was a clear and definite agreement to pay interest at 14 annas per cent per mensem on the principal amount up to the date fixed for payment; there was no express stipulation to pay interest after the whole sum became exigible, and it was held, following *Mahadeo Prasad* v. *Dhiraj Singh* (3), that the plaintiff was then entitled to interest at the original rate of 14 annas per cent per mensem. In *Mahadeo Prasad* v. *Dhiraj Singh* (3) it is remarked that for five years the rate of interest was defined with precision, and an inference was drawn that, if the mortgagor failed to pay at the end of five years, it was intended that the mortgagor should pay interest at the same rate.

In the case we are considering there is no precise definition of the rate of interest prior to default: it is not possible to draw an inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of sawai and payment by instalments. The appellant's counsel urges that the clause regarding interest on defaulted instalments shows that the parties intended that interest at the rate mentioned should be paid after the entire amount became due. But the rate of interest is very high and the condition may merely have provided for the period until the whole amount became recoverable.

In our opinion then as the terms of the deed do not indicate what the rate of interest should be paid after the entire amount became due, a reasonable rate of interest should be allowed by the Court. O. 34, R. 11, Sch. 1, Civil P. C., directs that the Court should award such interest and, though this rule was added after the trial Judge delivered his judgment, it reproduces the view previously held by the majority of High Courts. This view is based on the principles which were applied both in *Sheoppa* v. *Rukhma* (2), and *Asaram* v. *Dnanoba* (1). The presumption is that when a mortgage deed is executed, the parties contemplate the possibility that payment may not be made at the time when the entire amount becomes due. If the deed contains stipulations regarding payment of interest before this date, a presumption arises that the parties intended that interest should be paid after that date. Stipulations may be such as to justify an inference that interest on the due date is to be paid at a particular rate; but where no inference

(1) A. I. R. 1928 Nag. 67=105 I. C. 758=23 N. L. R. 168.
(2) [1909] 5 N. L. R. 37=2 I. C. 27.
(3) A. I. R. 1923 All. 7=77 I. C. 122=44 All. 772.

regarding the rate can be drawn, the presumption is that it was intended to pay interest at a reasonable rate.

We think that six per cent per annum is not a rate which might have been contemplated by the parties. We fix 12 per cent per annum simple interest as a reasonable rate. A fresh date for payment will now be fixed three months from the date of this judgment; the amount due on that date will be calculated, interest being allowed at the rate we have held to be reasonable. Costs in this appeal calculated on the amount to which it has succeeded will be added to the amount found due; the respondents incurred no costs. The trial Judge's order as to costs is not very clear. The plaintiff's costs, calculated by taking the amount for which he should have sued as a basis, will also be added to the sum found due.

R.M./R.K. *Order accordingly.*

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* A. I. R. 1932 Nagpur 41

SUBHEDAR, A. J. C.

Ajmersingh—Applicant.

v.

Ramsingh—Non-Applicant.

Civil Revn. No. 31 of 1931, Decided on 10th August 1931, against order of Addl. Dist. Judge, Narsinghpur, D/- 12th December 1930.

*** (a) Civil P. C. (1908), O. 41, R. 22 (4)—Appeal being rejected for deficiency in court-fees—Cross-objections abate.**

An appeal must be properly filed before the Court in order that the cross-objection may be heard. Where the memorandum of appeal is rejected for deficiency in payment of court-fees, the cross-objections filed in the appeal also abate and the Court has no power to hear them : *A.I.R* 1924 *Lah.* 43 ; 41 *Mad.* 904 *(F.B.)*; *A. I. R.* 1921 *Mad.* 405 and *A. I. R.* 1931 *Rang.* 38, *Rel. on.* [P 41 C 2]

(b) Civil P. C. (1908), O. 41, R. 22 (4)—R. 22 (4) must be interpreted strictly.

The provisions of O. 41, R. 22 (4), must be interpreted strictly and not extended beyond their obvious scope. [P 42 C 1]

*** (c) Civil P. C. (1908), O. 41, R. 22 (4)—Rejection of insufficiently stamped memorandum is not dismissal in default.**

An insufficiently stamped memorandum of appeal is of no validity at all and the rejection of such a memorandum is not a dismissal in default within the meaning of O. 41, R. 22 (4). [P 42 C 1]

Abdul Razak—for Applicant.

Order.—The facts leading to this application for revision are shortly these ; The applicant had filed a regular appeal in the Court of the Additional District Judge, Narsinghpur, and on receipt of notice of the appeal the non-applicant filed cross-objections under O. 41, R. 22 (1), Civil P. C. The applicant's appeal was held by the lower appellate Court to be insufficiently stamped and the applicant was directed to pay the full court-fees by a certain date. On his failure to do so the appeal was "dismissed" as insufficiently stamped. The non-applicant respondent thereupon pressed that his cross-objections should be heard on merits, but the appellant applicant contended that as the appeal itself stood rejected for want of proper court-fee stamp the cross-objections also abated and the Court could not hear and dispose of them on merits. The Additional District Judge having rejected the plea of the applicant, he has come up to this Court in revision.

The question for determination in the case therefore is whether upon a memorandum of appeal being rejected for deficiency in payment of court-fees the cross-objections filed in the appeal abate. The answer to this depends upon a proper interpretation of the provisions of O. 41, R. 22 (4), Civil P. C., which is as follows:

"Where, in any case in which any respondent has under this rule filed a memorandum of objection the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit."

Under the provisions of S. 561 of the old Civil P. C., it was held that a cross-objection could not be heard when the original appeal itself was withdrawn or dismissed for default after the memorandum of objection had been filed. The Allahabad High Court also held under the same section that dismissal of an appeal bars the hearing of the cross-objection : *Ramjiwan Mal* v. *Chand Mal* (1). Under the present Code the Lahore High Court has held that an appeal must be properly filed before the Court in order that the cross-objections may be heard, and that when an appeal is dismissed on the ground of insufficiency of court-fee stamp the Court had no power to hear cross-objections : *Duni Chand* v *Aziz Khan* (2) and *Lajpatrai* v. *Lachman* (3).

A Full Bench of the Madras High Court similarly held that the special right given to the respondent to an appeal to file cross-objections could not be extended beyond the meaning of the clear words of

(1) [1888] 10 All. 587=(1888) A.W.N. 258.
(2) [1912] 11 P.R. 1912=10 I.C. 207.
(3) [1920] 59 I.C. 795.

the aforesaid rule in the Civil Procedure Code, and that the right of a respondent to proceed by way of a memorandum of objection was dependent upon the filing of the original appeal in time : *Alagappa Chettyar* v. *Chockalingam Chettiar* (4). The same view of the law is taken by a Bench of the Lahore High Court in *Jai Gopal Singh* v. *Muna Lal* (5). In *Murugappa Chettiar* v. *Ponnusami Pillai* (6), it was held that a memorandum of cross-objection could not be heard after the original appeal had abated. In *U Shin* v. *Maung Tha Gywe* (7) it has recently been held that where the appeal is rejected for failure to pay deficit court-fees the cross-objections thereto must also be rejected. Thus there appears to be a consensus of judicial opinion that the provisions of R. 22 (4) aforesaid must be interpreted strictly and not extended beyond their obvious scope.

The view of the lower Court that the word "default" appearing in the said rule would cover a case of default in payment of proper court-fees seems to me to be unwarranted. Under S. 6, Court-fees Act no document which is required by law to bear a court-fee can be filed, exhibited or recorded unless it bears a proper court-fee. It follows therefore that an insufficiently stamped memorandum of appeal is of no validity at all and the rejection of such a memorandum is not a dismissal in default within the meaning of the aforesaid rule. It is apparently for this reason that this Court in the Judicial Commissioner's Civil Circular No. 1-49, para. 5, has directed that appeals rejected on the ground of deficiency in court-fees stamp are not to be registered in the register of civil appeals but are to be returned as miscellaneous judicial cases.

For these reasons I am of opinion that the cross-objections of the non-applicant cannot be heard on their merits and I therefore direct the lower appellate Court to dismiss them. The non-applicant must pay the applicant's costs in this Court. Pleader's fee Rs. 10.

R.M./R.K. *Order accordingly.*

(4) [1918] 41 Mad. 904=48 I.C. 203 (F.B.).
(5) A.I.R. 1924 Lah. 43=73 I.C. 655=4 Lah. 140.
(6) A.I.R. 1921 Mad. 405=62 I.C. 757=44 Mad. 828.
(7) A.I.R. 1931 Rang. 38=129 I.C. 500=8 Rang. 538.

A. I. R. 1932 Nagpur 42

JACKSON, J. C.

Nurul Hasan—Appellant.

v.

Sk. Imambux and *others*—Respondents.

Second Appeal No. 9 of 1929, Decided on 17th September 1931, against decree of Dist. Judge, Nagpur, D/- 27th October 1928.

Evidence Act (1872), S, 92, Proviso 4 — Partnership between *P* and *D* formed in 1921 — Under its terms which were reduced to writing and registered partnership to continue for five years—Oral evidence to prove that partnership dissolved in 1922 and *P* got his share of assets is admissible.

When an oral agreement is made which in respect of the manner of payments rescinds or modifies a contract in writing and registered and any payment is made in accordance with that oral agreement, S. 92 does not preclude evidence of that payment or of the oral agreement that explained it.

Where a partnership is formed in 1921 between *P* and *D* to carry on certain business and under the terms of the contract which are reduced to writing and registered, the partnership is to continue for five years, an oral evidence to prove that the partnership had, in spite of the terms in the contract, been dissolved in June 1922 and *P* was paid his share of the assets is admissible : *A. I. R.* 1921 *Nag.* 51, *Appr.*; 26 *Cal.* 160; 28 *Cal.* 256; 25 *Cal.* 603 (*F. B.*); *A. I. R.* 1927 *Cal.* 27; *A. I. R.* 1929 *Mad.* 794; *A. I. R.* 1926 *Cal.* 170 and 30 *Mad.* 231, *Rel. on.*; 42 *Mad.* 41 and *A.I.R.* 1928 *Bom.* 522, *Expl.* : 32 *Mad.* 281, *not Foll.*; *A. I. R.* 1920 *Bom.* 115, *Ref.* [P 43 C 2]

R. N. Padhye and *A. Razak* — for Appellant.

M. B. Kinkhede, *V. R. Dhoke* and *A. R. Kulkarni*—for Respondents.

Judgment.—In this case the plaintiff sued for dissolution of partnership and for rendition of accounts. It is admitted that the plaintiff and the defendants formed a partnership in 1921 to carry on the business of buying and selling oranges in Nagpur. Under the terms of the contract which were reduced to writing and registered the partnership was to continue for five years, that is, from 13th June 1921 to 13th June 1926. The defendants pleaded that as the partnership had resulted in loss it was dissolved in June 1922 and a sum of Rs. 3,270 was paid to the plaintiff as his share of the partnership assets. This defence has succeeded in both of the lower Courts but the trial Court held that there had not been a complete accounting and passed a decree declaring that the partnership was dissolved from 25th June 1922 and ordering that a Commissioner be appointed to examine the accounts of the partnership from 13th June 1921, up to

date ; that decree has been upheld by the lower appellate Court.

The main question that I have to consider in second appeal is whether the evidence adduced to prove the dissolution of partnership in June 1922 is admissible in view of proviso 4, S. 92, Evidence Act, which prohibits evidence of a subsequent oral agreement to rescind or modify a contract that has been reduced to writing and registered. This point has been dealt with by the lower appellate Court in para. 2 of its judgment, in which it is held that the evidence is admissible.

A number of rulings on the point have been cited before me by both sides : one of those relied on by the lower appellate Court appears to me to have no relevance, that is, *Herambdev Dharnidhardev* v. *Kashinath Bhaskar* (1). In that case there was a grant followed by a re-grant of property, and it was held that the two transactions were entirely distinct, and that Prov. 4, S. 92, had no applicability. *Tan Chew Hoe Neo* v. *Chee Swee Cheng*, *A. I. R.* 1929 *P. C.* 72, is also not in point. In that case oral evidence was admitted to prove that joint tenants had become tenants-in-common because this involved no violation or contradiction of the terms of conveyance to the tenants. In *Srinivasaswami Aiyangar* v. *Athmarama* (2), it was held that S. 92, Prov. 4, precludes evidence of an oral agreement to rescind a registered contract or of conduct of the parties showing that such contract is non-existent. But the latter part of this decision is directly opposed to the decision in *Shyama Charan Mandal* v. *Heras Mollah* (3), in which evidence of conduct was admitted to prove that a lease was intended to be inoperative. This decision and also *Khankar Abdur Rahman* v. *Ali Hafez* (4) followed a Full Bench decision in *Preonath Shaha* v. *Madhu Sudan Bhuiya* (5). In the latter two cases oral evidence of conduct was admitted to show that a document operated as a mortgage and not as a sale.

In *Jagannath* v. *Shankar* (6), it was held that oral evidence was inadmissible to prove that a smaller sum than what was due had been received in full satisfaction of the mortgage debt. The correctness of that decision has been doubted in *Sukhlal* v. *Jetha* (7), and it has been dissented from in *Bhaba Sundari* v. *Ram Kamal*, *A. I. R.* 1927 *Cal.* 27 and *Balasundara* v. *Ranganatha*, *A. I. R.* 1929 *Mad.* 794. In the latter two cases and in *Mahim Chandra Dey* v. *Ramdayal Dutta* (8), oral evidence has been held admissible to prove that a debt had been discharged partly by payment and partly by release of the debt. So also in *Kattika Bapanamma* v. *Kattika Krishtnamma* (9), in which a suit was brought on a registered deed agreeing to give maintenance, it was held that, though a subsequent oral agreement to give the plaintiff land to hold in lieu of maintenance was not provable, actual discharge of the claim by possession of the land could be proved. *Mallappa* v. *Nagu Chetty* (10) and *Sukhlal* v. *Jatha* (7) do not really differ from the above cases. In both it was held that an agreement to take less than was due under a registered bond could not be proved ; but it was not held that if payment had been made in pursuance of such agreement, that payment in full satisfaction could not be proved. The law is, I think, correctly stated in *Sambhu* v. *Tikaram* (11), which says that when an oral agreement is made, which in respect of the manner of payments rescinds or modifies a contract in writing and registered and any payment is made in accordance with that oral agreement, S. 92, Evidence Act, does not exclude evidence of that payment or of the oral agreement that explained it.

My conclusion in the present case is that it was open to the defendants to adduce oral evidence to prove that the partnership had, in spite of the terms in the contract that it would continue for five years, been dissolved in June 1922 and that the plaintiff had been paid his share of the assets. As to the adequacy of that evidence I can say nothing in second appeal. It has been accepted by both the lower Courts and that concludes the matter. The decree of the trial Court will stand and this appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1890] 14 Bom. 472.
(2) [1909] 32 Mad. 281=2 I.C. 612.
(3) [1899] 26 Cal. 160.
(4) [1901] 28 Cal. 256=5 C.W.N. 351.
(5) [1898] 25 Cal. 603=2 C.W.N. 562 (F.B.).
(6) A.I.R. 1920 Bom. 115=44 Bom. 55.
(7) A.I.R. 1928 Bom. 522=115 I.C. 382.
(8) A.I.R. 1926 Cal. 170=91 I.C. 757.
(9) [1907] 30 Mad. 231=17 M.L.J. 30.
(10) [1919] 42 Mad. 41=48 I.C. 158.
(11) A.I.R. 1921 Nag. 51=59 I. C. 240=17 N. L. R. 111.

A. I. R. 1932 Nagpur 44

NIYOGI, A. J. C.

Ramnath and *others*—Appellants.

v.

Narayan—Respondent.

Misc. Appeal No. 51-B of 1930, Decided on 9th July 1931, against decree of 3rd Addl. Dist. Judge, Amraoti, D/- 3rd July 1930.

(a) Pre-emption—Right of, unless given by statute, does not exist in cases of sales ordered by Court in execution although on compromise decree.

The fact that the decree was passed on an agreement of compromise would not make the sale held in execution of the decree a voluntary sale. When the compromise is made a rule of the Court by being incorporated in the decree, it is in pursuance of the decree and not of private agreement of compromise that the property comprised in the decree could be dealt with in execution : 44 *Cal.* 789, *Appr.* [P 44 C 2]

The fact that under R. 484, Chap. 26 of the Rules framed by the Bombay High Court the execution purchaser gets a conveyance from the judgment-debtors, after the sale held by the Commissioner is confirmed by the High Court, cannot convert the execution sale into a private sale. The right of pre-emption arises either by virtue of personal law or custom or statute. The right of pre-emption does not arise in respect of property sold in execution of a decree when such right is claimed under the personal law or custom. It is only a personal right. Unless the right of pre-emption is expressly conferred by statute, the right cannot arise in respect of involuntary sales : 13 *All.* 224; *A. I. R.* 1929 *Bom.* 206 and 3 *Cal.* 806 (*P.C.*), *Ref.* [P 45 C 2]

(b) Berar Land Revenue Code (1896), S. 205—Sale does not include judicial sale.

The word "sale" occurring in S. 205 is not comprehensive enough to embrace a judicial sale and thus a sale in execution of a decree transfers the property free from a claim of pre-emption : 4 *N. L. R.* 138, *Appr.* ; *A. I. R.* 1929 *Nag.* 353, *Dist.* ; *A. I. R.* 1927 *P. C.* 113, *Ref.* [P 46 C 2]

H. S. Gour and *Bapat*—for Appellant.

F. E. Sanjana—for Respondent.

Judgment.—In Suit No. 688 of 1917 between Bansilal Motilal and Govindlal and others a decree was passed by the Bombay High Court with the consent of the parties. The consent decree provided that certain immovable properties which were the subject-matter of the suit should be sold by public auction or with the consent of the parties, by private treaty, through a special commissioner appointed for the purpose. In execution of the decree of the commissioner sold by public auction on 24th February 1928 immovable properties including fields Nos. 133/2, 214/2, 214/3 and 97/1 which were all situated in the Amraoti District. The sales were confirmed in due course in accordance with the rules of the Bombay High Court, on 26th April 1928. The properties, including the fields described above, were purchased by Ramnath, Punamchand and Rambilas. Three separate suits were filed claiming pre-emption in respect of the aforesaid fields. Narayan Sakharam, Krishnaji and Ganpat Bapuji filed respectively Civil Suit No. 28 of 1929, Civil Suit No. 57 of 1929 and Civil Suit No. 34 of 1929 in respect of field No. 133/2, fields Nos. 214/2 and 214/3 and field No. 97/1 respectively. All these suits were dismissed as untenable on the ground that execution sale did not give rise to the claim of pre-emption. On appeal the learned Additional District Judge remanded the suits for the purpose of determination whether the sale held by the commissioner was by public auction or by private treaty. The defendants have filed three separate appeals against the remand orders. They are Miscellaneous Appeals Nos. 51-B, 52-B and 53-B of 1930. This judgment disposes of all the appeals.

In view of the Bombay High Court's order confirming the execution sale (vide Ex. D-4) and the commissioner's certificate of the sale (Ex. D-3), it is obvious that the sale confirmed by that Court was held by public auction. The only question, for the purpose of the present suit, is whether the sale held by the commissioner was in the nature of a voluntary or a compulsory sale. It is contended for the respondent that as the sale was held in execution of a consent decree it must be held to have been a private sale and not one made at the instance of the Court. There appears to me no difficulty in holding that the sale was an ordinary Court sale in the sense that it was compulsory and not a voluntary sale. The fact that the decree was passed on an agreement of compromise would not make the sale held in execution of the decree a voluntary sale. When the compromise is made a rule of the Court by being incorporated in the decree it is in pursuance of the decree and not of private agreement of compromise that the property compromised in the decree could be dealt with in execution. In *Galstaun* v. *Woomes Chandra Bannerjee* (1), a decree was passed with the consent of the parties and in execution of the decree certain property was sold. The ques-

(1) [1917] 44 Cal. 789=35 I. C. 850.

tion arose whether the sale proceeds which were received in the Court could not be rateably distributed amongst other judgment-creditors, who had also applied for execution of their decrees against the property which was covered by the consent decree. In particular the question which arose for determination was whether the sale held by Mackenzie Lyall & Co. the auctioneers named in the consent decree pursuant to the agreement of the parties, was a Court sale or private sale. The arguments advanced here are precisely those which were advanced in that case. Mookerjee and Cuming, JJ., held that as the auctioneers, who were specifically named in the consent decree, held the sale under the orders of the Court in execution of the decree, the sale was not a private sale but a Court sale. The line of reasoning pursued by their Lordships bears fully on this case. They observed at p. 795 :

"It has been contended here that this was a sale held, not in execution at the instance of the Court, but rather at the instance of the judgment-debtor, Sullivan, pursuant to the agreement between him and his creditor Abbas. In support of this argument, reference has been made to the decision in *Golam Hossein* v. *Fatima Begum* (2). Stress has also been laid on the circumstance that the steps contemplated by the Code of Civil Procedure, as necessary preliminaries to a valid sale held at the instance of the Court, were not taken in this case because the properties were not attached and the requisite notices were not issued. In our opinion it is fairly clear, on the proceedings taken in their entirety, that the sale was held by the Court through the agency of the auctioneers. The employment of agents for the conduct of a sale of this description is clearly contemplated by R. 65, O. 21 of the Code, which provides that save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf and shall be made by public auction in the manner prescribed. In the present case, the person appointed by the Court, under O. 21, R. 65, was no doubt the very person nominated by the parties at the time the consent decree was made. It is also true as observed by Kay, L. J., in the case of *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son* (3) that a consent order is a mere creature of agreement and carries out the agreement between the parties, or as Parke, J., puts it in *Wentworth* v. *Bullen* (4), the contract is not the less a contract and subject to the incidents of a contract, because there is superadded the command of a Judge. But it is nevertheless an order of the Court and possesses one at least of the essential characteristics of an order made by a Court of justice, namely, it is an order capable of execution by the Court. In the case before us, the agreement of the parties that the moveable properties of the judgment-debtor would be sold by Mackenzie Lyall & Co. was accepted by the Court and embodied in the decree. The inference follows that when, upon the application of the judgment-debtor, the Court instructed Mackenzie Lyall & Co. to hold the sale, the Court took a step in execution and the sale was held in execution by a person appointed by the Court in that behalf."

The contention that the sale was a voluntary and private sale for the reason that it was in pursuance of a consent decree, has no force in view of the aforesaid observations, with which I am in full agreement. The fact that under R. 484, Chap. 26 of the Rules framed by the Bombay High Court the execution purchaser gets a conveyance from the judgment-debtors, after the sale held by the Commissioner is confirmed by the High Court, cannot convert the execution sale into a private sale.

The respondent's learned counsel's appeal to S. 6, Partition Act, for the purpose of showing that the sale was irregular, is of no avail in the present suit which being one for pre-emption cannot stand except on the basis of a valid and completed sale. The questions raised by the lower appellate Court as to whether the auction sale was held in accordance with O. 21, Civil P. C., and whether the sale of revenue paying land was valid, relate to the validity of the auction sale held by the commissioner and they are manifestly beyond the scope of this suit. The incontestable fact is that the parcels of lands have been sold in execution of a decree in accordance with the rules of the Bombay High Court and it cannot be impugned here.

The next question is, if the sale was a Court sale, are the defendants entitled as co-occupants to claim pre-emption in respect of the property sold ? The right of pre-emption arises either by virtue of personal law or custom or statute. It has been consistently held that the right of pre-emption does not arise in respect of property sold in execution of a decree when such right is claimed under the personal law or custom. This subject was considered at length by Mahmood, J., in *Baij Nath* v. *Sital Singh* (5). The learned Judge observed at p. 227 as follows:

"Such sales are not the result of any private contract to which the person whose property is a party. They are the result of an authority conferred by the legislature upon the Courts for

(2) [1912] 6 I. C. 300.
(3) [1395] 2 Ch. 273=64 L. J. Ch. 523=12 R. 331=72 L. T. 703=43 W. R. 567.
(4) [1829] 9 B. & C. 840=9 L. J. (o. s.) K. B. 33.
(5) [1891] 13 All. 224=(1891) A. W. N. 68.

the purposes of awarding remedies against those who have failed to perform their pecuniary obligations."

This decision was followed in *Vasoodevan Moosad* v. *Ittirarichan Nair* (6). The right of pre-emption is only a personal right and not an incident of property: *Hamedmiya* v. *Benjamin* (7). Accordingly that right springs up where there is a privity of contract between the owner, who sells, and the purchaser. The seller is incompetent to enter into contract of sale with any one unless the party having the option to purchase has had the opportunity to exercise his option; if no such opportunity is given the purchaser is as much culpable of acting in derogation of the pre-emptor's right as the seller. A judicial sale however takes place against the will of the owner and is therefore not the outcome of his volition. There is no privity of contract between the judgment-debtor and the execution-purchaser. The sheriff authorized by the writ simply seizes the property of the execution debtor and passes his debtor's title to it without even warranting that title to be good: *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (8). It is clear that unless the right of pre-emption is expressly conferred by statute, the right cannot arise in respect of involuntary sales.

In the present case the right is claimed by virtue of an enactment, viz., the Berar Land Revenue Code, 1896. Then the party claiming it must point out a specific provision in the Code.

Section 205, Berar Land Revenue Code, runs as follows:

" When the interest or any part of the interest, of a co-occupant in any survey number is transferred by sale, foreclosure of mortgage or relinquishment in favour of a specified person for valuable consideration, every other co-occupant in the same survey-number shall have a right of pre-emption."

The question is whether the word "sale" is comprehensive enough to cover an execution sale. This has to be gathered from the succeeding provisions which regulate the exercise of that right. Ss. 206 and 207 dealt with voluntary sales, or relinquishment in favour of a specified person; S. 208 with foreclosure of mortgage and S. 213 with sales held for realization of revenue. There is no such provision respecting civil Court sales. The omission is significant to show that the framers of the Code did not intend to interfere with the procedure prescribed for the civil Court sales in the Civil Procedure Code. It is noticeable that the right of pre-emption is recognized in a restricted form in O. 21, R. 88, Civil P. C. If the legislature intended to vary the general law in so far as it affected the co-occupants in Berar, one would expect to find a provision similar to S. 151, Central Provinces Land Revenue Act, 1917, in the Berar Land Revenue Code. Although theoretically it is possible to read an extended signification in the word "sale" used in S. 205, it can have no legal effect in the absence of some express provision to effectuate that right. S. 205 purports to declare a right but in the absence of a provision directing its exercise in respect of judicial sales, it can hardly be called a legal right. The conclusion is inevitable that the word "sale" occurring in S. 205 is not comprehensive enough to embrace a judicial sale. For these reasons I am in agreement with the view taken in *Maidabi* v. *Tejabai* (9).

I may incidentally notice that Ss. 205 and 213 of the old Code of 1896 are omitted from the Code of 1928 and this will serve to set at rest any controversy which was likely to arise respecting the meaning of the word "sale."

Reference is made to *Kesheo* v. *Pandurang*, *A. I. R.* 1929 *Nag.* 353, but that case is distinguishable. A sale by an Official Receiver is virtually a sale by the insolvent (owner) because " that official is by force of the statute invested in the bankrupt's property " *Sheobaran Singh* v. *Kulsumunnissa* (10). Their Lordships of the Privy Council have given their assent to the proposition that a sale in execution of a decree transfers the property free from a claim of pre-emption.

In conclusion as I have held that the sale held under the order of the Bombay High Court was an involuntary sale, it follows that it is incompetent for the plaintiffs to found their claim for pre-emption on that sale.

The appeals are allowed and the suits are dismissed with costs.

K.N./R.K. *Appeals allowed.*

(6) [1918] 41 Mad. 582=45 I. C. 46 (F.B.).
(7) A. I. R. 1929 Bom. 206=118 I. C. 548=53 Bom. 525.
(8) [1878] 3 Cal. 806=5 I. A. 116=3 Suth. 519=3 Sar. 818 (P.C.).
(9) [1908] 4 N. L. R. 138.
(10) A. I. R. 1927 P. C. 113=101 I. C. 368=54 I. A. 204=49 All. 367 (P.C.).

A. I. R. 1932 Nagpur 47

GRILLE, A. J. C.

Irshedali and *others*—Defendants—Appellants.

v,

Dashrath and *others*—Plaintiffs—Respondents.

First Appeal No. 104 of 1930, Decided on 12th Septemher 1931, against decision of Sub-Judge, First Class, Khandwa, in C. S. No. 83 of 1928, D/- 27th March 1930.

(a) C. P. Tenancy Act (1898), S. 41 — Where proprietor has no notice of mortgage and consequently takes no action, his right to claim that mortgage is void as against him is not lost.

If a proprietor has notice of a mortgage of absolute occupancy holding, he is put on his election whether he will pre-empt or not immediately. But the fact that the proprietor has not received any notice and consequently has not taken any action for ten years cannot cause his right to lapse and he can still claim that the mortgage is void as against him. [P 48 C 1]

(b) C. P. Tenancy Act (1920), S. 6. (5)— Right of pre-emption exercised by proprietor —Money deposited—Mortgage debt becomes charge on purchase-money—Pre-empted land is to be excluded from sale in suit on mortgage.

When proprietor exercises his right of pre-emption and deposits the amount which has been fixed by the revenue officer as the value of the land free from encumbrances, the mortgage debt becomes a charge on the purchase-money in exoneration of the lien, and in any suit brought on the basis of a mortgage, such pre-empted land must be excluded when the mortgaged property is brought to sale: *A.I.R.* 1930 *Nag.* 199, *Foll.* [P 48 C 1]

S. B. Gokhale—for Appellants.

W. R. Puranik—for Respondents.

Judgment.—Defendants 1 to 4 had in 1916, executed a mortgage in favour of the plaintiffs and among the property mortgaged were certain absolute occupancy fields with Jamunia. Subsequent to this mortgage defendant 5, Dewaji, in execution of a simple money decree against the defendants had part of this mortgage property brought to sale in the civil Court. Defendants 6 to 8 who are co-malguzars of the village (defendant 6 Irshadali the lambardar at the time of the mortgage), and defendants 9 to 11 who are also co-malguzars of the village exercised their right of pre-emption under S. 6, Tenancy Act, 1920, and defendants 6 to 8 in exercise of their right purchased the half share of the absolute occupancy field No. 256 for which they paid Rs. 840, and defendants 9 to 11 purchased half of the absolute occupancy field No. 264 for which they paid Rupees 512. All these defendants including Dewaji have been made parties to the suit, Dewaji—because the plaintiffs alleged he has acquired mortgage lien over the money which Dewaji received from the pre-emptors and the pre-emptors themselves as being in possession of the mortgage property. The mortgagors defended the suit on various grounds which need not be considered. Their contentions failed and they have not appealed against the decision. In the course of the judgment however the lower Court found that both sets of pre-emptors were bound by the mortgage and were not entitled to release as they claimed, but were only entitled to redeem. In respect of defendant 5 the finding is contained in para. 32 of the judgment :

"The plaintiffs can follow the mortgage property for their mortgage debt. The property is still in existence. Defendant 5 has received money for the property that has passed out of his hands. This property he had purchased subject to the plaintiff's mortgage lien. In case the property is not available, defendant 5 is liable to pay the mortgage debt out of the money received by him in exchange of the property. The plaintiffs have thus got a lien over the money received by defendant 5."

Both sets of the pre-emptors have filed separate appeals. They were represented by the same pleader. The appeals were heard together and this judgment will cover them both. The grounds of appeal were that the mortgage of 1916 was not binding on the pre-emptors, that they were not the representatives of the tenant mortgagors and the equity of redemption did not vest in them, and that after the pre-emption any mortgage lien on the property was transferred to the purchase money which they had deposited in the Revenue Court.

The appeals must succeed. The relevant portions of the judgment against the appellants run as follows :

"defendanes 6 to 8 have purchased the property on payment of the amount fixed for pre-emption by the revenue officer. The property was in possession of defendant 5 who purchased it in auction subject to the mortgage of the plaintiff. The mortgage of the field was effected in 1916. It was voidable at the option of the malguzars. They did not exercise their right till 1926. I do not think they can impeach the mortgage now. It was not a mortgage with possession. No third person has come into possession of the property in pursuance of the mortgage. Defendants 6 to 8 have come into possession of the property under their right of pre-emption from a person who purchased the property subject to the plaintiff's mortgage. I should think

that the mortgage deed sued upon is binding on defendants 6 to 8 and I decide Issue No. 4 accordingly. Defendants 9 to 11 have not shown how they are not liable to redeem the mortgage. They are liable to redeem the mortgage like defendants 6 to 8."

With respect to the remark that the mortgage was voidable as against the malguzars in 1916, and that they are debarred from impeaching the mortgage now since they have made no claim in respect of it for ten years, the plaintiffs have uot shown that the landlord's right to avoid the mortgage under S. 41, Tenancy Act, 1898, has ceased to exist ; it is assumed that it was so since the landlords had not exercised their right for 10 years. The landlords have however pleaded lack of notice of the mortgage, that the mortgage was not one with possession and the mortgagee had taken no steps during these years to enforce his lien and the plaintiffs have not shown that the proprietors had any notice whatsoever of the mortgage. If a proprietor has notice of a mortgage of absolute occupancy holding he is put on his election whether he will pre-empt or not immediately. But the fact that they had not received any notice and consequently had taken no action for ten years cannot cause their right to lapse. They can still claim that the mortgage is void as against them. But apart from the considerations which arisɔ under the Tenancy Act of 1898, the appeal must succeed by virtue of the provisions of S. 6, sub-S. (5), Tenancy Act, of 1920.

It is clear that when the proprietor exercises his right of pre-emption and deposits the amount which has been fixed by the revenue officer as the value of the land free from incumbrances, the mortgage debt becomes a charge on the purchase money in exoneration of the lien. This provision of the law appears to have been entirely overlooked by the learned Subordinate Judge. The sum obtained at the auction sale by Dewaji was with full knowledge of the mortgage lien subsisting on the land. He had the land sold at the full value irrespective of any incumbrances, that is to say, far more than the land would have fetched if sold, had not the proprietors exercised their right of pre-emption. The proprietors in purchasing the land have also paid the full value clear from incumbrances. It is by the simplest process of reasoning clear that the mortgage lien passes on to the purchase money and that the land becomes entirely exempt from it.

The respondents in appeal could advance no better argument than that the exoneration of the lien from the mortgage is limited to the fixation of the price alone and that the purchaser is bound to see that the money deposited reached the mortgagee and that otherwise the lien subsists on the land. There is no provision to that effect in the Tenancy Act nor is there in existence so far as I am aware, any proposition of law to that effect. It is further contended that in respect of S. 41, Tenancy Act, 1898, the malguzar is bound to get a declaration that the mortgage was voidable as against him and as he failed to do so within the statutory period of six years he is unable to impeach the mortgage now. This argument is equally invalid since no proof has been brought forward that the malguzar had any knowledge of the mortgage at all. It is perfectly clear from the terms of S. 6 (5), C. P. Tenancy Act 1920, that any mortgage lien on an absolute occupancy holding is transferred from the holding to the purchase money when the malguzar pre-empts, and that in any suit brought on the basis of a mortgage, such pre-empted land must be excluded when the mortgaged property is brought to sale; vide *Mahadeo* v. *Zingru* (1).

The appeal succeeds and the decree of the lower Court will be modified by excluding from the description of the mortgaged property which is to be brought to sale half-share in the fields Nos. 259 and 264 in the possession of Irshad Ali, Abidali and Faridunnisa and Thakur, Onkar and Narayan respectively. I would not hold that the claim by the latter appellants was made in respect of a half-share of field No. 295/1 as well. The field as correctly pointed out by the pleader for the respondent was not claimed by these appellants as having been purchased by them, and it is admitted on their behalf that the inclusion of this field is a mistake. The respondents will pay the appellants' costs in this Court and their costs in the Court below. There will be only one set of pleader's fee in this Court.

R.M./R.K. *Appeal allowed.*

(1) A.I.R. 1930 Nag. 199=124 I.C. 246=26 N. L.R. 187.

A. I. R. 1932 Nagpur 49

MACNAIR, J. C.

Vithoba—Applicant.

v.

Karim—Non-Applicant.

Civil Revn. No. 560 of 1930, Decided on 23rd March 1931, from order of Dist. Judge, Nagpur, D/- 15th November 1930.

(a) Civil P. C. (1908), S. 24—District Court is authorized to transfer small cause case to another Court which is not competent to try such case.

Under S. 24 it is quite competent for a District Court to transfer a suit from the Court of Small Causes to another Court, which but for such transfer is not competent to try such suit. [P 49 C 2]

(b) Civil P. C. (1908), S 24—Suits relating to same transaction and involving common questions of fact and desirable to be heard by one Judge—Suits can be transferred to one Court.

Where the two suits filed in different Courts relate to the same transaction and involve common questions of fact, and it is desirable that they should be heard by the same Judge, it is not proper ground for refusing transfer that the party opposing the application for transfer to one Judge may not act in a manner in which reasonable litigants would act. In such cases the convenience of the parties is a good reason for the transfer of a suit to another Court : 41 *All.* 381, *Diss. from* and *A. I. R.* 1922 *All.* 65, *Foll.* [P 49 C 2]

R. N. Padhye—for Applicant.

B. R. Mandlekar—for Non-Applicant.

Judgment. — The applicant sent a notice to the non-applicants demanding the balance of the amount due for supply of baskets. On receipt of this notice non-applicant 1, who is the father of the other non-applicants, filed a suit against the applicant in the Court of Small Causes, Nagpur, alleging that the applicant had received more than the price of the baskets. The applicant then filed his suit. As his claim was for more than Rs. 1,000, his suit had to be filed in a regular Court. Subsequently the applicant asked that the suit of non-applicants should be transferred to the Court of the Subordinate Judge who was dealing with the applicant's case. The non-applicants opposed the transfer on the ground that S. 24, Civil P. C. did not allow such transfer. The learned District Judge held that he had power to transfer the case, but refused the application on the ground that transfer of the suit would involve difficulties and that the applicant had another remedy. The applicant applies for revision of this order.

It appears to me that since both the suits relate to the same transaction and involve common questions of fact, it is desirable that they should be heard by the same Judge. If they were heard by one Judge, the parties, if they acted reasonably, would agree that evidence in the applicant's case should be treated as evidence in the other case. It does not seem to be a proper ground for refusing transfer that the non-applicants may not act in the manner in which reasonable litigants would act. In *Madho Prasad* v. *Moti Chand* (1) Knox, J., held that the mere convenience of the parties is not a good reason for the transfer of a suit to another Court; but in *Inayatullah Khan* v. *Nisar Ahmad Khan* (2) two Judges of the same Court overruled that decision. I agree with their statement at p. 280 (of 44 *All.*), which is as follows :

"After all, the convenience of the parties in the conduct of litigation is certainly a relevant consideration, and it is perhaps not too much to say that it is the basis of nearly all statutory jurisdiction on the civil side."

The non-applicants give no intelligible reason for objecting to the transfer from one Court in Nagpur to another. It is said that proceedings will terminate more quickly in the Small Cause Court, but the matter in dispute will not really be decided until both suits terminate. The learned District Judge has stated that the applicant might ask the Judge of the Small Cause Court to exercise his extraordinary powers under S. 151, Civil P. C., but the Judge may doubt whether he can exercise such powers.

I think the transfer is advantageous even if after the transfer one of the decisions will be subject to appeal and the other will not be : the transfer will at least secure that the judgments of the original tribunal will not be contradictory.

I am therefore of opinion, that transfer is desirable. Mr. Mandlekar for the non-applicants again urges that the law does not permit transfer. I agree with the learned District Judge that S. 24, Civil P. C. authorizes the transfer, as the Court to which the case is transferred will be deemed to be a Small Cause Court. It seems quite clear that the Court, to which the case is transferred, will be deemed to be a Court of Small Causes competent to try the case in that capacity : it is then not material that most Courts of Small Causes cannot try suits of which the value exceeds Rs. 500.

(1) [1919] 41 All. 381=50 I. C. 368.

(2) A. I. R. 1922 All. 65=65 I. C. 782=44 All. 278.

I therefore set aside the order of the learned District Judge and direct that the suit filed by non-applicant 1 be transferred to the Court before which the suit of the applicant is pending. Costs before the District Judge and in this Court will be borne by the non-applicants. Counsel's fee in this Court Rs. 20.

V.B./R.K. *Order set aside.*

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* A. I. R. 1932 Nagpur 50

JACKSON, J. C.

Yeshwant Rao—Applicant.

v.

Secretary, High Court Bar Association, Nagpur—Non-Applicant.

Civil Revn. No. 578 of 1930, Decided on 14th July 1931, against order of Addl. Dist. Judge, Nagpur, D/- 8th November 1930.

*** Civil P. C. (1908), S. 115—Judicial Commissioner's Court's power of revision can be exercised judicially in cases under Legal Practitioners Act, S. 36—Central Provinces Courts Act (1917), S. 21.**

Although the power of the Judicial Commissioner's Court to interfere in cases under S. 36, Legal Practitioners Act, is only its general power of superintendence and control over subordinate Courts given to it by S. 21, Central Provinces Courts Act, and is very limited in extent, yet a power of interference and revision certainly exists and the Court's power however limited, can be exercised judicially. The nature of such cases seems to be to require it to be so exercised: (*Case law discussed*). [P 51 C 1]

T. J. Kedar—for Applicant.

Hari Singh Gour, M. Y. Sharif, G. V. Deshmukh, S. Y. Deshmukh and *N. T. Mangalmurti*—for Non-Applicant.

Order.—This order will govern Civil Revisions Nos. 582 to 587 of 1930 and No. 3 of 1931 also.

This application has been filed by a person who has been declared to be a tout by the First Additional District Judge, Nagpur, under S. 36, Legal Practitioners Act. Action was taken at the instance of the High Court Bar Association, Nagpur, and that Association, through its Secretary, has been made the opposite party to this application and has raised a preliminary objection that no application for revision lies. It is contended that proceedings under S. 36, Legal Practitioners Act, are neither civil nor criminal in their nature; that this Court can only interfere under the general power of superintendence and control given to it by S. 21, Central Provinces Courts Act, and that any action that this Court can take will be merely administrative.

The power of superintendence and control given to this Court by S. 21, Central Provinces Courts Act, is similar to that given to the chartered High Courts by S. 15, High Courts Act, 1861, and now by S. 107, Government of India Act. It has been held in *In re Madho Ram* (1), *In re Kedar Nath* (2) and *Kashi Nath* v. *Emperor* (3), that it is only this power of superintendence that enables the High Court to interfere in cases in which a person has been declared to be a tout under S. 36, Legal Practitioners Act, and that the power of interference is very limited in extent. A similar view has been taken in *Man Singh* v. *Emperor* (4), the power of superintendence in that case being conferred by S. 13, Punjab Courts Act.

Kalka Prasad v. *Emperor* (5) is a decision to the contrary, in which it has been held that the High Court can entertain an application in revision against an order passed under S. 36, Legal Practitioners Act, without invoking the aid of S. 107, Government of India Act. That decision professes to follow *Bavu Sahib* v. *Dist. Judge of Madura* (6) and *Hari Charan Sircar* v. *Dist. Judge of Dacca* (7), and expressly differs from the view taken in *In re Madho Ram* (1) and *In re Kedar Nath* (2). In the Madras case however the question now before me was not raised and it seems to have been assumed that the High Court could exercise the power of revision given by the Civil Procedure Code. In *Hari Charan* v. *Dist. Judge of Dacca* (7), Mookerjee, J., though he speaks of "the revisional jurisdiction" under which the High Court can interfere with an order under S. 36, Legal Practitioners Act, makes it clear that, in his opinion, it is not exercised under the Codes of Criminal and Civil Procedure and refers, with approval, to *In re Madho Ram* (1) and *In re Kedar Nath* (2). In *Ugam Prasad* v. *Emperor* (8)

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(1) [1899] 21 All. 181=(1899) A. W. N. 15.
(2) [1909] 31 All. 59=1 I. C. 143.
(3) A. I. R. 1924 All. 69=74 I. C. 11=45 All. 676.
(4) [1909] 11 P. R. 1909 Cr.=3 I. C. 977.
(5) [1918] 40 All. 153=19 Cr. L. J. 269=44 I. C. 125.
(6) [1903] 26 Mad. 596.
(7) [1910] 11 Cr. L. J. 320=6 I. C. 327.
(8) A. I. R. 1927 Pat. 282=102 I. C. 340=28 Cr. L. J. 532=6 Pat. 567.

and in *Debidin Nai* v. *Emperor* (9), decided by Staples, A. J. C., as in *Bava Sahib* v. *Dist. Judge of Madura* (6), the question of jurisdiction was not raised.

The weight of authority is clearly in favour of the view that the High Court's power to interfere in cases under S. 36, Legal Practitioners Act, is only its general power of superintendence and control over subordinate Courts and is very limited in extent; but a power of interference or revision certainly exists; and in none of the cases cited before me, except, perhaps one to which I shall now refer, does the High Court treat the exercise of this power as anything but a judicial matter. The possible exception is a decision of the Judicial Commissioner's Court of Sind: *In re Mulchand* (10). There is no reference made to the general power of superintendence which presumably is given to the Judicial Commissioner's Court by the Sind Courts Act. It is merely held that there is no power to interfere under S. 115, Civil P. C. I see no reason why this Court's power however limited, to deal with an application like the one now before me, should not be exercised judicially, and the nature of such cases seems to require it to be so exercised.

I overrule the preliminary objection. I shall hear the application on its merits; and a date will now be fixed for further hearing.

R.M./R.K. *Objection overruled.*

(9) A. I. R. 1931 Nag 187=135 I. C. 411=27 N. L. R. 393.

(10) [1919] 13 S. L. R. 212=56 I. C. 433.

A. I. R. 1932 Nagpur 51

NIYOGI, A. J. C.

Fouzmal—Plaintiff—Appellant.

v.

Rajaram and *others*—Defendants—Respondents.

Appeal No. 261-B of 1929, Decided on 3rd March 1931, against appellate decree of Second Addl. Dist. Judge, Amraoti, D/- 3rd August 1929.

(a) Berar Land Revenue Code (1896), S 69 and Ch. 8-A—Objects are entirely different.

When an occupant transfers his holding he has to take steps to get the name of his transferee entered in the register of mutation in accordance with Ch. 8-A. On the other hand, when he desires to relinquish or surrender his right to occupy the land he has to do so in accordance with S. 69.

[P 52 C 1]

(b) Berar Land Revenue Code (1896), Ss. 72, 73 and 96 (d)—Oral gift by occupant of his holding is void.

In the absence of rajinama and kabuliyat it cannot be presumed that there was a relinquishment by the occupant in favour of the Government and that the Government granted the land to the person to whom the occupant desired to transfer his holding; nor can mere substitution of a person in the register of occupants cannot prevail against the regular modes of transfer of property. It is well settled that title to land cannot pass by admission when the statute requires a deed. An oral gift therefore by an occupant of his holding is void and mere entry of donee's name in the Record of Rights under S. 96 (d) does not create any title in him.

[P 52 C 2; P 53 C 1]

M. R. Bobde—for Appellant.

T. L. Sheode—for Respondents.

Judgment.—This appeal arises out of a suit for possession of a field and for recovery of mesne profits on the strength of the sale deed dated 10th December 1927 executed by appellant 2 deceased in favour of appellant 1 after he made a gift of the same to Rajaram, respondent 1. The trial Court decreed the claim, but in appeal the suit was dismissed.

The field in suit along with other property belonged to Laxman the deceased appellant 2 and his sons. There was a partition of the joint family property on 23rd March 1918 in the course of which Laxman gifted the field to Rajaram, respondent 1. The gift was oral. Laxman however got the field mutated in favour of the donee Rajaram. Rajaram continued to be in possession since 1918. Laxman then sold the field to the plaintiff on 10th December 1927. Rajaram pleaded that the field was transferred to him by Laxman at a partition as he was Laxman's daughter's son, and that he gave effect to it by relinquishing it under S. 59 (1), Berar Land Revenue Code, 1896. He also pleaded that he made a report of the gift to the village patwari under S. 96 (c), Berar Land Revenue Code, 1896, and had Rajaram's name substituted for that of Laxman in the Record of Rights under S. 96 (d) of the same enactment. The Court of first instance held that the oral gift was void and that mere entry of Rajaram's name in the Record of Rights under S. 96 (d), Berar Land Revenue Code, did not create any title in him. It therefore decreed the suit. The lower appellate Court was of the opinion that since the promulgation of the Record of Rights the procedure of transfer by way of rajinama and kabuliyat has become defunct, and held that the effect of the mutation was the same as that of rajinama and kabuliyat. It therefore dismissed the suit.

It is contended for the appellant that the field could be validly gifted only by a registered deed and that mere entry of the donee's name in the Record of Rights does not create any title in favour of the donee. On the other hand, it is contended that since the introduction of Ch. 8-A in the Berar Land Revenue Code, the procedure provided for in that chapter for mutation supplanted altogether the one provided in S. 69 and that the effect of the mutation entry is exactly the same as that of S. 69. It appears to me that the objects of S. 69 and of Ch. 8-A are entirely different. It is no doubt true that before Ch. 8-A was enacted and inserted in the Berar Land Revenue Code the only procedure available for mutation of names was the one provided in S. 69. It however does not follow that S. 69 is altogether negatived. When an occupant transfers his holding he has to take steps to get the name of his transferee entered in the register of mutation in accordance with Ch. 8-A. On the other hand, when he desires to relinquish or surrender his right to occupy the land he has to do so in accordance with S. 69. In case of assignment, devolution or partition, the right of the occupant subsists and it is only transferred to the person who becomes entitled to the field by any of the recognized modes of acquisition of title.

The transferee or the heir does not derive a new right but only enjoys the right already existing in the previous occupant. Where an occupant relinquishes or surrenders his land his right comes to an end and the person to whom he desires to transfer his holding gets a fresh right in the land which is derived not from the transferor directly but from the Government who is the landlord. The transfer by so-called rajinama and kabuliyat is not strictly an assignment of a right although in effect it is so. Under S. 123, T. P. Act, a gift of immovable property can be effected only by a registered instrument signed by the donor and attested by at least two witnesses. There is no such instrument to support the gift in favour of Rajaram : consequently the gift is void and cannot be recognized as an assignment of Laxman's right in the land to Rajaram. The respondents rely on *Zingu* v. *Gosawi* (1) for the proposition that the introduction of the Transfer of Property Act in Berar has not abrogated S. 69, Berar Land Revenue Code, 1896. This is no doubt true because the Transfer of Property Act does not deal with surrenders of agricultural lands. That case affords no guidance in the present case wherein there is no relinquishment as such. The decision reported in *Zingu* v. *Gosawi* (1) cannot be interpreted as laying down a rule that rajinama and kabuliyat effect an assignment of the occupant's interest in the land. The Bombay High Court has gone so far as to hold that mere execution of rajinama and kabuliyat does not by itself amount to a transfer of property, but that they only serve as documentary evidence of transfer if that transfer can properly be inferred from the facts proved : *Chandanmal* v. *Bhaskar* (2). In any case in the absence of rajinama and kabuliyat it cannot be presumed that there was a relinquishment by Laxman in favour of the Government and that the Government granted the land to Rajaram so as to make him an occupant.

To circumvent the difficulty caused by the absence of rajinama and kabuliyat the learned counsel for the respondents endeavoured to establish that the mutation under S. 96 (d) was tantamount to rajinama and kabuliyat. I fail to see how mutation of names is identical with surrender and lease. A surrender can be only to the landlord and has to be made in a prescribed manner. It is for this reason that S. 69, Berar Land Revenue Code, provides a special procedure, namely a notice to the Tahsildar preliminary to the relinquishment of the occupancy. When such relinquishment is in favour of a specified person it is the Deputy Commissioner who can recognize the person in whose favour the occupancy has been relinquished as the registered occupant of the land. It is apparent that a person can be recognized as a registered occupant only by the Deputy Commissioner who acts as the landlord. In this case all that is proved is that there was a report made to the patwari about the gift and that both Laxman and Rajaram's guardian appeared before the certifying officer and admitted the transaction of gift.

It is next argued that the procedure which resulted in the mutation entry being made in favour of the donee has the same effect as the recognition by the Deputy Commissioner within the meaning of S. 72, Cl. 5, Berar Land Revenue Code.

(1) A. I. R. 1914 Nag. 3=10 N. L. R. 78.

(2) [1919] 59 I. C. 114.

If the procedure is understood as meaning simply a substitution of the donee's name for the donor's in the Record of Rights, then it would neither extinguish Laxman's title nor create one in favour of Rajaram : *Nirman Singh* v. *Rudra Partab Narain Singh* (3). But if it implies a relinquishment by the original occupant, then his right would be extinguished. The question is whether the recognition by the Deputy Commissioner under S. 72 (5), Berar Land Revenue Code, 1896, operates to destroy the rights of the person who consents to another person being recognized as a registered occupant. There are no provisions in the Berar Land Rvenue Code analogous to the implied surrender or abandonment found in the Central Provinces Tenancy Act. Mere recognition of a certain person as a registered occupant with the consent of the previous registered occupant cannot be regarded as extinguishing the latter's title, although under S. 71, Berar Land Revenue Code, 1896, the previous registered occupant would not be liable for payment of revenue. The fact that S. 72 is qualified and controlled by S. 73 indicates that the recognition by the Deputy Commissioner has no bearing on the questions of title, which are exclu sively within the competence of the civil Courts. The two sections read together unmistakably show that mere substitution of a person in the register of occupants cannot prevail against the regular modes of transfer of property. It is well settled that title to land cannot pass by admission when the statute requires a deed: see *Jadu Nath Poddar* v. *Rup Lal Poddar* (4) and *Mathura Mohan Saha* v. *Ram Kumar Saha* (5).

It is evident that in the absence of a registered instrument Laxman's interest in the field did not pass to Rajaram. It was therefore open to him to transfer that interest by sale, as he did, in favour of appellant 1, Fouzmal. His title must prevail against the respondents' possession. The appeal is therefore allowed with costs of this Court and the lower appellate Court; the costs of the trial will be paid as ordered by that Court.

K.N./R.K. *Appeal allowed.*

(3) A. I. R. 1926 P. C. 100=98 I. C. 1013=53 I. A. 220=48 All. 529 (P.C.).
(4) [1906] 33 Cal. 967=4 C.L.J. 22=10 C.W.N. 650.
(5) [1916] 43 Cal. 790=35 I. C. 305.

* A. I. R. 1932 Nagpur 53

STAPLES, A. J. C.

Pannalal—Appellant.

v.

B. N. Ry. Co.—Respondent.

Second Appeal No. 319 of 1929, Decided on 30th July 1931, against appellate decree of Dist. Judge, Jubbulpore, D/- 11th March 1929.

*** Railways Act (1870), Ss. 3 (2), 51 (f) and 41—Transhipment charges for carrying goods over temporary pontoon bridge are terminals and not tools.**

Transhipment charges, which are special charges levied for the service of unloading goods, taking them across a pontoon bridge constructed temporarily on account of breach in the railway line and reloading them on the other side until the line is repaired, although designated by a special name come within the definition of terminals and can only be levied as such and are not charges or tolls for using a ferry within the meaning of S. 51 (f). The jurisdiction of the civil Courts therefore in respect of claim relating to such charges is barred under S. 41 : 15 *Bom.* 537 and 16 *Bom.* 434, *Foll.* [P 54 C 1, 2]

N. G. Bose—for Appellant.

S. C. Dutt Chaudhry—for Respondent.

Judgment.—The appellant brought a suit for recovery of charges, called "transhipment charges," recovered from him by the respondent B. N. Ry. Co., for transhipping his goods across a portion of the line between Birsinghpore and Karkeli, which had been breached. These additional transhipment charges were levied at the rate of six annas per maund. Both the lower Courts have held that the charges recovered by the railway company were in the nature of terminal charges, and the lower appellate Court has held that that being so the jurisdiction of the civil Court is barred by S. 41, Railways Act.

The only point argued in this appeal is whether the transhipment charges are terminals within the meaning of S. 3 (14), or whether the charges were tolls for using a ferry within the meaning of S. 51 (f) of the Act.

It is true that a pontoon bridge, which was erected over the river, where the line had been washed away, would technically be a ferry within the meaning of S. 3 (2) of the Act, but at the same time it is clear that the pontoon bridge was only meant to be a temporary measure in the emergency that had arisen and that it would be removed and the service of transhipment would be discontinued as soon as the line had been repaired. There was no case, then, of levying a regular toll

under S. 51 (f), and the charges, "transhipment charges" as they were called, were only special charges levied for the service of unloading the goods, taking them across the pontoon bridge and reloading them on the other side, which had to be performed until the line was repaired.

I am of opinion that the term "transhipment charges" which nowhere appears in the Act, is technically incorrect and that such charges can only be recovered as terminals or not at all. The services, for instance, for which such charges are levied, are of the same nature as those rendered at stations and other places where terminals are expressly allowed. The definition of "terminals" in S. 3 (14) is as follows :

"'Terminals' includes charges in respect of stations, sidings, wharves, depots, warehouses, cranes and other similar matters, and of any services rendered thereat."

Under S. 45, Railways Act, a railway administration may charge reasonable terminals. Under that section railway companies in India used to levy terminal charges at junction stations, but this was forbidden by a resolution of the Governor-General in Council, dated 28th October 1891. Subsequently however by a resolution of the Governor-General in Council, dated 17th October 1893, although it was held that terminal charges were inadmissible at junction stations, it was laid down that a railway administration had the right to levy reasonable charges for any service of transhipment performed by them where a break of gauge occurs. This resolution was in conformity with orders passed in England, according to which transhipment charges and terminal charges were distinguished, but both were allowed. In the Indian Act however there is no distinction between terminal charges and transhipment charges, but transhipment charges are now allowed by the resolution of the Governor-General in Council quoted above and must be considered terminals. In the Goods Tariff of the B. N. Ry. Co., to which I have been referred by the learned counsel who appeared for the appellant, at pp. 271 and 272, a number of transhipment charges are specified, whilst terminal charges are given at pp. 267, 268 and 269. I am of opinion however that, as already stated above, transhipment charges, although designated by a special name, must come within the general definition of "terminals" and can only be levied as such. As already noted above, the services rendered at stations or other places where a break of gauge occurs and goods are transhipped are of the same nature, namely, unloading, reloading and transport, as are performed at regular terminal stations. The fact that the break of gauge is only a temporary one and that the charges for transhipment at the place where the break of gauge occurs is therefore only a temporary charge levied, while the break continues, will not make the charges any the less terminals. On the contrary I am of opinion that the fact that the break of gauge was of a temporary character goes to show that the charges levied at the place where the break occurred were terminal charges and were not charges or tolls under S. 51 (f) of the Act, which, from the wording of the section, it would appear, are meant to be permanent charges or tolls on ferries, roadways, roads or means of transport permanently provided under that section by a railway company. As to what constitute terminal charges, I would refer to *Laljibhai Shamji* v. *G. I. P. Ry. Co.* (1) and *Hall & Co.* v. *London Brighton and South Coast Ry. Co.* (2).

I would point out that in England there is a distinction between service terminals and station terminals, whilst in India no such distinction has been made. Charges however that would be considered service terminals in England are allowed in India as indicated above, and those charges have come to be designated "transhipment charges." Although called "transhipment charges," they are, in my opinion, included in the general definition of "terminals."

The lower appellate Court has rightly followed *Laljibhai Shamji* v. *G. I. P. Ry. Co.* (1), and has held that the civil Court had no jurisdiction to consider or entertain the claim relating to terminal charges. I hold therefore that the decision of the lower appellate Court is correct and dismiss the appeal. Costs of the appeal will be borne by the appellant. Other costs as ordered by the lower appellate Court.

R.M./R.K. *Appeal dismissed.*

(1) [1891] 15 Bom. 537 affirmed in (1892) 16 Bom. 434.
(2) [1885] 15 Q. B. D. 505.

* A. I. R. 1932 Nagpur 55

SUBHEDAR AND GRILLE, A.J.Cs.

Shridhar Balwant and *another* — Defendants—Appellants.

v.

Baxiram Rodmal Shop, Akola and *others* —Plaintiffs—Respondents.

First Appeal No. 60-B of 1928, Decided on 28th November 1931.

*** (a) Negotiable Instruments Act (1881), S. 66—In case of indorser presentment for payment is necessary.**

Where the drawer of a hundi is also the drawee presentment for payment is unnecessary. This rule however does not apply in the case of the indorser of a hundi : 15 *N. L. R.* 128, *Dist.* [P 60 C 1]

*** (b) Negotiable Instruments Act (1881), Ss. 64 and 98 - Effect of nonpresentment is to absolve other parties from liability — No notice of dishonour—Onus to prove that party charged could not suffer damage is on person claiming nonpresentment.**

No dishonour can possibly occur unless the instrument is presented for payment by the holder to the drawee as required by the first part of S. 64 of the Act, which is mandatory The second part of the same section provides the penalty for nonpresentment by stating in unequivocal terms that in default of such presentment the other parties thereto are not liable thereon to such holder. Where however it is alleged that no notice of dishonour was necessary as the party charged could not suffer damages for want of it the onus of proving that the other party could not suffer damage is on the party who wants to excuse himself for the nonpresentation : 33 *All.* 4 ; 39 *All.* 364 and 10 *I. C.* 405, *Ref.* [P 60 C 1]

G. G. Hatvalne—for Appellants.

M. R. Bobde—for Respondents.

Judgment. — The plaintiffs who are the owners of the shop Bakshi Ram Rodmal at Akola sued defendants : (1) The Berar Oil Works Co., Ltd. of Akola and (2) Balwant Narsinha Mudholkar, on the basis of two hundis for Rs. 5,000 each, of which the plaintiffs were the holders and which were drawn by the Berar Oil Works Co., on itself and endorsed by defendant 2. Defendant 2 died during the pendency of the suit and his son has been substituted in his place. Reference in this judgment to defendant 2 will be for the sake of convenience to the deceased father unless otherwise stated. The execution and nonsatisfaction of the hundis is not denied but it was strenuously contended in the Court below that the hundis were obtained by the plaintiffs by means of undue influence and coercion and also that the subsequent financial arrangements between the plaintiffs' firm and the Berar Oil Mills, which were at the time of the execution of the hundis in a precarious financial condition, have resulted in the extinction of the plaintiffs' claim. There was a further contention that the hundis were not unconditional hundis by reason of the appearance of the word 'jawalun' instead of the normal phrase 'jawal' in the body of the documents, and it was also alleged that since there had been no presentation of the hundis at maturity to either of the defendants who are now being sued in respect of them, no suit based on them could be successfully maintained against either of the defendants. There were other contentions raised by the defence but since they have been given up in appeal although mentioned in the memorandum of appeal there is no need to refer to them further. A decree was passed against both the defendants, the decree against the son of defendant 2 being limited to the assets of his father in his hands. A joint appeal is now preferred both by the Berar Oil Works Co., and by Shridhar Balwant Mudholkar, the son of the original endorser.

The appeal was argued by Mr. Chandorkar on behalf of appellant 1 (defendant 2) and Mr. Sindekar the counsel for the other appellant merely adopted the arguments of his colleague so far as they concerned defendant 1. The contentions raised in appeal were those which had been raised by the defence and have been enumerated in the preceding paragraph except that the questions of the non-presentment of the hundis, the non-receipt of notice of dishonour and want of consideration were especially argued on behalf of defendant 2.

The first contention centres round the circumstances in which the hundis came to be executed. It is undisputed that at the time when the execution took place, namely 10th May 1921, the Berar Oil Mills had to make an urgent payment of Rs. 5,000 in Bombay and failure to make this payment would have jeopardized their financial position, which was already precarious, very seriously. They had considerable difficulty in raising this money' since their indebtedness in Akola was already known although their credit outside does not appear to have been doubted. The matter was an urgent one and the plaintiffs were approached for a loan of Rs. 5,000. The company was already indebted to them to the extent of some Rs. 80,000 and the plaintiffs state

that they refused to advance this money. The defendants then, according to the plaintiffs, offered to draw hundis in favour of defendant 2, who was a man of position and incidentally one of the directors of the company. The plaintiffs alleged that they considered defendant 2's credit only good up to Rs. 10,000 and agreed to advance the Rs. 5,000 required if a hundi for that amount were endorsed by some other person of undoubted solvency, and on these conditions they eventually accepted the hundis and became the holders of the hundis to the extent of Rs. 10,000 payable to defendant 2 endorsed to themselves and another hundi for Rs. 5,000 also payable to defendant 2 but bearing an intermediate endorsement of the firm of Tansukhrai Bansidhar of Murtizapur and subsequently endorsed to themselves. On the receipt of this the plaintiffs arranged for the payment of defendant 1's debt in Bombay. The defendants, on the other hand, alleged that the plaintiffs had agreed to discharge the Bombay debt on their being given a hundi for Rs. 5,000 duly endorsed by Tansukhrai, a firm of the financial status which the plaintiffs demanded. Having obtained this hundi however they declined to carry out their part of the bargain unless two further hundis for Rs. 10,000 were executed, made payable to defendant 2 by defendant 1, and endorsed in their favour. Defendant 1 being in a helpless position owing to the extreme necessity of having the Bombay debt paid and their credit saved, had no option but to agree to this; whereas the plaintiffs claim that all the three hundis were executed at the same time the defendants' contention is that the hundi for Rs. 5,000 was executed first and others later on the same day on the plaintiff's refusal to discharge the Bombay debt unless further hundis were drawn.

It is this contention of the defendants that forms the basis of the allegation of undue influence and coercion. As frequently happens in allegations of this nature the truth lies somewhere between the allegations of either party. Evidence has been given on both sides supporting the extreme contentions and the lower Court has accepted with some reservation the plaintiff's version of the case and has entirely disbelieved the defendants. There is one piece of documentary evidence, namely Ex.D-4, which was a chitthi passed by the plaintiff's agent to the Secretary to the Berar Oil Mills on 10th May 1921, while negotiations in respect of the hundis were going on. This is an immediate piece of evidence; being a document written at the same time when no dispute arising out of the transaction could be contemplated, and is therefore free from any suspicion of being written with any ulterior motive. The letter runs as follows:

"To

Anna Saheb.

(Compliments.) I asked Gajadharji (the manager of the plaintiff's firm) to tell me the manner in which the hundi should be written. His advice is this: "You should draw the hundi on yourself stating Dada Sahib (defendant 2) as the rakhya, so that Dada Sahib will assign the hundi to Murtizapurwala (the firm of Tansukhrai) and he has already assigned the same to us.

Secondly you should draw three mudati hundis for Rs. 10,000 mentioning Dada Sahib as the rakhya and he will assign them to us. We will credit the said Rs. 10,000 for the linseed which some time ago we have weighed and given to you. Be this known.

Gajadharji is at present asleep in the house. He will come after some time and then I shall send you a darshani hundi or I shall give it to your servant when he brings the mudati hundis.

With your servant you should send one letter written and addressed to the man at Poona. (This refers to the negotiations of further loan).

(Sd. Kishanlal.")

Each side wishes to interpret this letter in its own fashion. Now it is perfectly clear that the plaintiffs' own version cannot be accepted in its entirety, namely, that when they refused to advance Rs. 5,000, the defendant company offered to draw hundis for Rs. 15,000 in favour of defendant 2 and get them indorsed in the plaintiffs' favour. The Berar Oil Mills already owed them a large sum of money; they had been the holders of hundis drawn by the defendant company to the extent of Rs. 80,000 which had been dishonoured, and it is clear that they would not trust them any further. It is also apparent that they were not prepared to advance any sum or give them credit for a further sum of Rs. 5,000 unless they were to get something in exchange. This part of the bargain was that of the debt owing to them Rs. 10,000 should be converted from an unsecured debt to a secured one by means of hundis made payable to a respectable person, defendant 2, and indorsed by him to the plaintiff who would be the holders. But for the actual Rs. 5,000 which was to be paid in Bombay the endorsement of a

person of undoubted solvency was necessary. It is clear that these were the terms and Ishwardas (P. W. 4) who is the owner of the firm of Tansukhrai Bansidhar was sent for and he agreed to make the necessary endorsement. The defendants-appellants have invited us to examine the hundis and laid stress on the fact that the two hundis in suit Exs. P-1 and P-2 are on a different coloured paper from that of Ex. P-10 making it clear that the hundi forms are not of the same batch since one is more faded than the other. This is true; and lends support to the defendants' theory that the hundi endorsed by Tansukhrai was endorsed before the hundi itself was written. There is oral evidence that this was done and it also finds support from Ex. D-4. That the endorsement by Tansukhrai was made before the endorsement by defendant 2 is proved by Ramchandra (P. W. 3) whose evidence, in our opinion, has been discredited in the trial Court without sufficient reason, and this part of the statement is certainly borne out by the letter to which we have referred. It is apparent that Ishwardas, representing the firm of Tansukhrai Bansidhar, having done what was required of him on a blank hundi, went away. Then in pursuance of the agreement which had undoubtedly been reached between the plaintiffs and the defendants, that credit for Rs. 5,000 would not be given unless Rs. 10,000 of the debt owing were replaced by negotiable instruments, the question arose as to how it was actually to be carried out, and Ex. D-4 represents Gajadhar's instructions.

What may be called the essential hundi of Rs. 5,000 had already been pre endorsed, as the letter says, by Ishwardas in the plaintiffs' favour. The body was now to be filled in by the Berar Oil Mills itself making it payable to defendant 2. Then the remaining hundis, on which the plaintiffs insisted, were to be drawn in the like manner and made payable to defendant 2 who was to assign them to the plaintiffs direct. It mentions three mudati hundis covering Rupees 10,000 instead of two which were actually drawn and signed in the manner specified, including apparently the hundi mentioned in the previous sentence. There is no doubt that the instructions contained in this letter meant that three hundis were to be written and that Dadasahib was to be the payee in respect of them all; one o them was to be endorsed in favour of Ishwardas who had already endorsed it to the plaintiffs, and the others were to be endorsed to the plaintiffs direct. These were the instructions, and we have no doubt that they were duly carried out. The defendants' contention that the hundi for Rs 5,000 had already been fully executed and all the endorsements made and was in the plaintiffs' possession when they demanded for the first time that two other hundis of Rs. 5,000 each should be drawn cannot be believed in the face of this document. The blank form with Tansukhrai's endorsement existed when this letter was written and nothing more. That blank hundi with the endorsement must have been in defendant's possession or else was sent along with the letter, otherwise the body of it could not possibly be scribed as directed. That it should have been retained by the plaintiffs is impossible.

The argument of coercion and undue influence can then relate only to the bargain which was made before this, namely, that Rs. 5,000 will not be paid in Bombay unless Rs. 10,000 of the debt is converted into hundis. We fail to see how there can be any question of undue influence. The plaintiffs were not in a fiduciary position as regards either of the defendants and were certainly not in a position to dominate their will. There is no evidence of any such mental capacity which is postulated in S. 16, Contract Act, as a condition for the domination of one person's will over another's. The fact that one party was a creditor of the other does not affect the position. The defendants required money and the plaintiffs were willing to give it on certain terms. The defendants were free to accept or reject these terms as they pleased. They accepted them. They could have rejected them and sought the money elsewhere. Money could no doubt be obtainable elsewhere at a heavier price than they had to pay to the plaintiffs but there is no doubt that the conditions were freely accepted and there can have been no question of dominating their will or coercion. In fact the plea of coercion can only rest on the supposition that the hundi which has been endorsed in favour of Tansukhrai had been deliberately withheld by the plaintiffs as we have shown this was not possible

even had it been withheld it was no longer the property of the defendants and so the detention would not come within the definition of "coercion" in S. 15, Contract Act. The attack on the hundis as having been wrongfully obtained fails entirely.

It has also been urged that as far as defendant 2 is concerned there was no consideration received by him in respect of his endorsement of the hundis. This matter has been dealt with by the learned Sub-Judge in para. 12 of his judgment and the conclusion that there was ample consideration to both parties is unchallangeable. As far as the Berar Oil Mills is concerned the hundis were drawn in consideration of past debts and as far as defandant 2 is concerned apart from the fact that he was credited in the Company's account books with the amount of the hundis in suit there is the fact that as a result of the payment of Rs. 5,000 in Bombay the credit of the Berar Oil Mills of which he was a director and in whose welfare he was closely interested was maintained instead of being allowed to collapse which would undoubtedly have happened if the negotiations between the plaintiffs and defendant 2 had not been carried through. The contention that there was no consideration must therefore fail.

The question next to be considered is as regards the liability of defendant 2 under the hundis sued on. It was contended on his behalf that defendant 2 being only an indorser his liability for payment to the plaintiff who is a subsequent holder would under S. 35, Negotiable Instruments Act, arise only upon proof

(a) that the hundis upon maturity, were in fact, presented for payment to the drawee who was defendant 1 as required by Ss. 64 and 66 of the Act; (b) that the same were dishonoured by defendant 1 as per provisions of S. 91 or S. 92 ibid and (c) that due notice of dishonour was given by the plaintiffs to defendant 2 under S. 93 in the manner provided by Ss. 94 and 106, Negotiable Instruments Act.

It was submitted that in the absence of proof of any of the above facts defendant 2 is discharged from his liability as the indorser and the plaintiffs' claim against him ought to have been dismissed. There is undoubtedly considerable force in this contention. The relevant issue in connexion with this point was No. 12 which ran as under:

"Whether the hundis were presented at any time between 6th July 1921 and 6th August 1921 if not whether plaintiff is not entitled to sue for the amount thereof?"

The finding of the lower Court on this issue is contained in para. 17 of its judgment in these words:

"*Laxmanprasad* v. *Ramchandra* (1) is a clear authority for the proposition that whereas in the present case the drawer and drawee are one and the same person no presentment either for acceptance or for payment is necessary. If it were otherwise, I do not think Exs. P. 4 and 5 would have saved the situation for both these documents bear date 6th August 1921 and this was long after the date of maturity of the hundis and under S. 66, Negotiable Instruments Act, the presentment was to be made at maturity. However this point does not arise in view of the ruling which dispenses with the necessity of presentment in a case like the present. I find that in the present case plaintiff is entitled to recover the amount of the suit hundis even though it be held that there was no valid presentation. Exs. P-4 and 5 are letters of demand and not evidence of presentment."

This decision, so far as the first defendant is concerned is perfectly correct both on the question of fact and law, but it omits to determine the question raised in argument before us: viz., the liability of defendant 2 to the plaintiffs' claim, as the indorser of the hundis in suit. It was not and could not be seriously disputed by the counsel for the plaintiffs-respondents that the case relied on by the lower Court has no applicability in determining the right and liability of a holder in due course and his immediate indorser of a negotiable instrument, because this question did neither arise for decision nor was decided in that case.

Before proceeding further it is necessary, at this stage, to dispose of certain points raised by Mr. Bobde for the plaintiffs-respondents. It was very seriously urged by him that since defendant 2 did not, in his pleadings, raise the points of nonpresentation and absence of notice of dishonour, he is precluded, under O. 8, R. 2, Civil P. C., from putting forward these pleas here. This argument has however no force, since it completely ignores the obligations which the Code of Civil Procedure imposes upon a plaintiff in the presentation of his claim. Under O. 7, R. 1 (e) of the Code, the plaint itself must contain the facts constituting the cause of action and under R. 5 of the same order it must show that the defendant "is liable to be called upon to answer the plaintiffs' demand." Again under O. 6, R. 2 *ibid*, every pleading (which of course

(1) [1919] 15 N. L. R. 128=51 I. C. 859.

includes the plaint) shall contain a statement in concise form of all the material facts on which a party relies for his claim. It was therefore obligatory on the part of the plaintiffs to state, in the first instance, facts showing how defendant 2 was liable to them upon the hundis sued on; in other words, they should themselves have, in the first instance, stated clearly the time when the presentation of the hundis for payment was made by them to defendant 1, the fact that they were dishonoured and the reason why no notice of dishonour was given to defendant 2. On 18th June 1925, when defendant 1 alleged that the hundis in suit were not presented to him by the plaintiffs for payment at any time, the plaintiffs' pleader made the following obviously vague and untenable statement:

"I deny that the hundis were never presented for payment. They were presented on maturity some time between 9th July 1921 and 6th August 1921, but were dishonoured. Under the law however defendant 1 being the drawer and defendant 2 being the indorser no presentation was necessary."

Upon these pleadings issue 12 was settled for trial and incorrectly decided against defendant 2.

It was next urged that the documents sued on are not "hundis" coming within the purview of the Negotiable Instruments Act, but what was their exact nature, could not, unfortunately, be defined by Mr. Bobde. The parties admittedly drew up the documents as hundis with due formality and treated them as negotiable instruments. It therefore matters little if the instruments in question could also be treated as promissory notes, because the drawer and drawee are the same. At the most the instruments were ambiguous, but under S. 17, Negotiable Instruments Act, the plaintiffs, who are the holders of the documents, having treated them as hundis, the instruments must for the purpose of the present suit be treated as hundis liable to be dealt with under the Negotiable Instruments Act.

An apparently unnecessary discussion was raised by the learned counsel on both sides with a view to determine whether under Ss. 37 and 38, Negotiable Instruments Act with reference to the plaintiffs defendant 2 occupied the position of a principal or a mere surety of defendant 1. But for the purposes of determining the liability of defendant 2 in the present action the question if he was a principal or a surety is absolutely immaterial for the simple reason that his liability has, primarily, to be determined with reference to his position as an indorser under the Negotiable Instruments Act, and not as a principal or surety under the Contract Act. Dalip Singh, in his Commentary on the Negotiable Instruments Act, at p 189, dealing with Ss. 37 and 38 of the Act makes the following pertinent observations:

"Every prior party to a negotiable instrument is to the holder either as a principal debtor or as a surety. The relation of a principal debtor and a surety *subject to the provisions of this Act* is regulated by the Contract Act."

The words underlined (here italicized) by us are significant.

On the findings of the lower Court that the hundis in question were, after maturity, not presented by the plaintiffs to defendant 1 for payment—a finding with which we fully agree—it has to be seen if under the law defendant 2 as the indorser is still liable to the plaintiffs' claim. It is not asserted by the plaintiffs that notice of dishonour was given by them to defendant 2, nor has it been explained why this statutory obligation was not discharged. Under S. 35, Negotiable Instruments Act:

"in the absence of a contract to the contrary, an indorser is liable to every subsequent holder in case of dishonour by the drawee to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to or received by such indorser as hereinafter provided. The contract of the indorser of a hundi being thus conditional, his liability can only arise, in the first instance, upon proof of (a) dishonour of the instrument by the drawee and (b) of the giving of notice of dishonour to him. No dishonour can possibly occur unless the instrument is presented for payment by the holder to the drawee as required by Part 1, S. 64 of the Act which is mandatory. Part 2 of the same section provides the penalty for non-presentation by stating in unequivocal terms that in default of such presentment the other parties thereto are not liable thereon to such holder."

Bhashyam and Adiga in their Commentary on the Negotiable Instruments Act (4th Edn., p. 273) explain the provisions of Ss. 35 and 64 in the following words and cite appropriate authorities in support of their exposition of the law:

"There is a distinction between the liability of the maker and the acceptor, and that of drawer or the indorser. The contract or engagement of the maker or acceptor is to pay the amount specified in the instrument upon due presentment of the instrument at its maturity, or when it becomes due, at the place designated thereon; while the engagement of the indorser or the drawer after acceptance is that if.

upon such due presentment the amount is not paid by the maker or acceptor, he will pay the same upon demand, on due notice of dishonour being given to him. The liability of the maker or the acceptor is an absolute liability, while the liability of the indorser and the drawer is conditional. In the case of the drawer and the indorser, if presentment for payment is not made they are discharged from liability. The mere fact of the holder having notice, before the bill or note became due that it will not be paid up when presented on the due date, or a suspicion to that effect will not excuse the necessity for presentment. Not even the fact that the drawer had such notice and promised the holder that he would try to pay on such date will excuse nonpresentment to the acceptor. Neither the receipt of money by the drawer from the acceptor to meet the bill, nor a declaration of the acceptor in the presence of the holder and the drawer that he cannot provide for the bill, dispenses with the necessity of presentment at maturity. It has been held that countermand of payment by the drawer does not excuse nonpresentment, but Chitty doubts the accuracy of the report. Neither bankruptcy nor death of the party dispenses with presentment under the section. Even the loss of the bill or the note does not excuse nonpresentment."

As noticed already, the plaintiffs definitely pleaded that since defendant 2, was only an indorser, no presentation was necessary to make him liable for the claim. They did not seek the protection of the provisions of S. 76-(a), (b) or (c) which provide cases where presentment for payment is dispensed with to make the indorser liable. It is therefore clear that on account of the plaintiff's default in presenting the hundis for payment, defendant 2. is discharged from liability thereon to the plaintiffs.

The plaintiffs' claim against defendant 2, is equally untenable on ground 2, that no notice of dishonour was given by the plaintiffs to him as required by S. 93, read with Ss. 94 and 106, Negotiable Instruments Act. They did not either seek the protection of the provisions S. 98 (a) or (c) which provides that no notice of dishonour is necessary when it is dispensed with by the party entitled thereto or when the party charged could not suffer damages for want of it. In such a case it is laid down that the onus of proving that the other party could not suffer damage is on the party who wants to excuse himself for the nonpresentation: see *Madho Ram* v. *Durga Prasad* (2); *Gaya Din* v. *Sri Ram* (3); *Jhanda Ram* v. *Toda Mal* (4).

The next point arises for consideration is the contention that the claims of the plaintiffs were extinguished by reason of the subsequent financial transactions between the plaintiffs and the defendants. Shortly after these transactions the company went into voluntary liquidation. The order of voluntary liquidation was subsequently annulled and a scheme was arranged and sanctioned by the High Court whereby a company in which the plaintiffs were partners was to manage the concern. This scheme admittedly was not carried into effect, and the appellants' contention is that the failure to carry the scheme into effect was deliberate on the part of the plaintiffs in order to ruin the company. Of this there is no evidence at all and the plaintiffs' statement that the scheme was not carried out owing to inherent financial and commercial difficulties must be accepted. The argument is that the scheme postponed the payment of all debts and that the appellants were entitled to the benefit of the scheme. We fail to see how this can be so since the scheme, although undoubtedly approved by the shareholders and creditors of the company, was never carried into effect and, as stated above, the failure to carry out this scheme into effect cannot be attached to the plaintiffs. This argument would apply to either of the defendants as principal debtors, but it is further contended on behalf of defendant 2 that he is discharged from his position as surety by virtue of S. 135, Contract Act, in that time had been given to the principal debtor, that is to say, defendant 1, without the consent of the surety and consequently the surety was discharged. Without discussing the cogency of this argument it suffices to say that it will not be available to defendant 2 since the proposal to extend time for the payment of the debts, which was essential to the scheme, was never carried out.

A minor point which has arisen is as to the interpretation of the word '*jawaloon*". On this we accept the finding of the lower Court on issues 10 and 11. The discrepancy between the evidence of Madhorao (P.W. 5) and the pleadings has been properly accounted for since the pleadings could be no more than a deduction from the context, in which the words occur, and the current practice in drawing hundis. The explanation afforded by the scribe of the hundis as P.W. 5 appears to be quite correct and it is in

(2) [1911] 33 All. 4=6 I. C. 793.
(3) [1917] 39 All. 364=39 I.C. 649.
(4) [1911] 10 I.C. 405.

evidence that he has used the same phrase and the same meaning on other hundis, the validity of which as unconditional hundis was never questioned. This point has no force.

The other minor point mentioned in ground 4 of the memorandum of appeal that the lower Court ought to have held that Mr. N. R. Madholkar had no authority to draw the hundis is sufficiently disposed of by the evidence of Ramchandra (P.W. 3) and the proof that Mr. N. R. Mudholkar was a properly constituted Secretary of the Company and that the hundis which issued on behalf of the Berar Oil Mills had always been issued by him. The company may not have been engaged in active business at the time but there was still a company whose business had not ceased and they were in full financial activity although the mills may not have been actually running.

The result is that the appeal succeeds in part and appellant 1 has established that his deceased father defendant 2, Balwant Narsinha Mudholkar, was not liable to the claim of the plaintiffs. In view of this finding it is not necessary to enter into the merits of the cross-objection which has been filed by the respondents against the decision that the appellant Shridhar Balwant Mudholkar is liable only to the extent of the assets of his deceased father in his hands The cross objection must, therefore fail and is dismissed.

The appeal has succeeded to a limited extent, only namely that the deceased Balwant Narsinha Mudholkar was not liable at all on the hundis. The plaintiff's claim against defendant 2 is therefore dismissed and the decree passed by the lower Court against him set aside. The appeal as regards defendant 1, the Berar Oil Works Company fails entirely. Appellant 1, Shridhar Balwant Mudholkar, will get half the costs in the appeal and full costs incurred by him in the lower Court from the plaintiffs. Appellant 2, the Berar Oil Works Co., Ltd. will bear their own costs in this and the lower Court and pay to the plaintiffs their full costs of the lower Court and half the costs of this appeal.

K.N./R.K. *Order accordingly.*

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* A. I. R. 1932 Nagpur 61

FINDLAY, J. C. AND MACNAIR, A. J. C.

Sheolal Ramlal—Assessee.

v.

Commr. of Income-tax, C. P. & Berar—Referring Officer.

Misc. Judicial Case No. 20 of 1929, Decided on 29th January 1930.

*** (a) Income-tax Act (1922). S. 2 (1) (b) (2) —"Process ordinarily employed by a cultivator"—Meaning explained—Cotton ginning is not essential to make cotton fit to be taken to market.**

The process "ordinarily employed by a cultivator" must mean one in ordinary use amongst cultivators generally. The Income-tax Act so far as agricultural income is concerned only relieves the producer from liability to income-tax so long as he is a bona fide agriculturist carrying on that business in the ordinary course of good husbandry. Where cotton is first ginned and then sold in market, then although it may be distinctly advantageous even from the mere point of view of transport to do so it cannot be said that ginning is essential in order to enable the produce to be fit to be taken to market. [P 62 C 1]

*** (b) Income-tax Act (1922), S. 2 (1) (b) (2) —Profits earned by ginning cotton and selling it in market—Such profits are assessable.**

The Income-tax Officer is entitled to calculate profits on the cotton which is the agricultural produce of the assessee's own villages where he gets it ginned in the ginning factory before he takes it to market for sale, and assess tax on such profits under the Act. [P 62 C 2]

M. B. Kinkhede and *V. R. Dhoke*—for Assessee.

D. N. Choudhiri—for the Crown.

Judgment. — This is a reference by the Commissioner of Income-tax, Central Provinces and Berar, under S. 66 (2), Income tax Act, 1922. The applicant, Seth Sheolal Ramlal, Banker, owns various villages in the Chhindwara District. Amongst his crops he grows cotton and it is apparently his practice, instead of selling the cotton in a crude state, to send it to a ginning factory at Pandharkeoda, another village in the same district Having had the cotton ginned there, he sells it in Bombay at a price naturally much higher than he would have obtained if he had sold the crude produce in its original state. The Commissioner of Income-tax accordingly assessed him on a profit of Rs. 1,010 assumed to have been made in this way, and thus the following question has been referred to us for decision:

"Whether the Income-tax Officer is entitled to calculate profits on the cotton which is the agricultural produce of the assessee's own villages simply because he gets it ginned in the ginning factory before he takes it to market for sale and assess tax on such profits under the Indian Income-tax Act."

On behalf of the applicant it has been urged before us that it is in every way an advantageous matter to have the raw cotton ginned straightaway; when the cotton seed has been extracted, the danger of fire is much lessened, much space is saved and a great reduction in transport charges occurs. S. 2, sub-S. (1) (b) (2), Income-tax Act, lays down that agricultural income will also include

"any income derived from land by the performance by a cultivator of any process ordinarily employed by a cultivator to render the produce raised or received by him fit to be taken to market."

It has been suggested on behalf of the applicant that, even assuming that it is not the general practice amongst the cultivators to have their cotton ginned in the first instance, as he does, the subsection quoted should be taken as implying that the process in question should be postulated to be one "ordinarily employed by an agriculturist" in the position and standing of the applicant. We do not think however that this interpretation is the correct one. The process "ordinarily employed by a cultivator" must, in our opinion, mean one in ordinary use amongst cultivators generally, and the Income-tax Act, so far as agricultural income is concerned, only relieves the producer from liability to income-tax so long as he is a bona fide agriculturist carrying on that business in the ordinary course of good husbandry. Again, although it may be distinctly advantageous, even from the mere point of view of transport to have the cotton ginned first, we are not prepared to hold that this process was essential in order to enable the produce to be "fit to be taken to market." Any such interpretation would, in our opinion, involve an undue straining of the subsection quoted above.

It is not disputed that the applicant did obtain a profit of Rs. 1,010 by adopting the course he did adopt instead of selling the unginned cotton. The Commissioner of Income tax has given a definite finding that the ginning of agricultural cotton is not at present the process ordinarily employed by growers of cotton to render it fit to be taken to the market. We cannot go behind that finding of fact which was, as a matter of fact, largely based on an admission made by the assessee himself. On the question of law we have held that the Commissioner's interpretation of S. 2, sub-S. (1) (b) (2), Income-tax Act is correct.

We are of opinion therefore that the position of the applicant cannot be upheld and we therefore answer the question referred to us in the affirmative. The applicant must bear the costs of the Commissioner of Income-tax We fix these at Rs. 75.

B.V./R.K. *Reference answered.*

A. I. R. 1932 Nagpur 62

SUBHEDAR AND STAPLES, A. J. Cs.

Nandlal Chogalal—Appellant.

v.

Surajmal Gangaram and *others*—Respondents.

First Appeal No. 105-B of 1930, Decided on 18th Jannary 1932, against decree of 3rd Addl. Dist. Judge, Akola, D/- 27th September 1930.

(a) Contract Act (1872), Ss. 126 and 128—Person agreeing to pay amount of bond on failure to pay it by other persons—It is contract of guarantee—Contract held did not come within qualifying clause of S. 128.

Where a bond provides that in case defendants 1—3 fail to pay the amount borrowed under the bond by them, defendant 4 would pay it, such a contract as regards defendant 4 is a contract of guarantee and not one of indemnity. And even in contract of indemnity the plaintiff is entitled to recover from the defendant the amount guaranteed by him on the occurrence of default if payment by third party: *Dane* v. *The Mortgage Insurance Corporation*, (1894) 1 *Q. B. D.* 54 and *A. I. R.* 1929 *Cal.* 208, *Ref.* [P 64 C 2]

The words "if the aforesaid persons fail to pay the amount thereof, I will pay it in accordance with the bond" do not limit the liability of the surety within the meaning of S. 128. As the operative words in the definition given in S. 126 practically correspond with the above words, they make the liability of the surety co-extensive with that of the principal debtors and do not come within the purview of the qualifying clause of S. 128 and limit his liability in any way: *A. I. R.* 1930 *Cal.* 17 and 20 *I. C.* 497, *Dist.* [P 64 C 1]

(b) Evidence Act (1872), S. 92—Person described in bond as principal debtor cannot be proved to be surety.

Under S. 92 it is not open to the obligee of a bond to prove that the position of one of three persons described in the bond as principal debtor was that of a surety for the remaining two principal debtors. [P 65 C 1]

J. R Mudholkar, *D. T. Mangalmurti*, *N. T. Mangalmurti* and *R. R. Dhandigey*—for Appellant.

V. K. Rajwade—for Respondent 1.

Judgment.—The facts leading to this appeal are shortly these: On 28th January 1926 the first two defendants and Yadorao, the original defendant 3,

who having died during the pendency of the suit is now represented by his son Vasantrao, executed a simple money bond (Ex. P-1) for Rs. 10,000 in favour of the plaintiff, agreeing to repay the debt on 18th March 1927 together with interest at 1 per cent per mensem; in default interest at Rs. 1-8-0 per cent per mensem compound was agreed to be paid. Simultaneously with the execution of the bond, defendant 4, Nandlal, executed a chit (Ex. P-2) in favour of the plaintiff agreeing to repay the debt if the three principal debtors failed to pay the amount due under it. This chit was executed on one anna stamp only, but has since been validated as an agreement after recovery of the deficit stamp duty and penalty. Nothing having been repaid the plaintiff brought the suit against all the four defendants to recover Rs. 15,449-6-6 charging interest as per terms of the bond.

Defendant 1 admitted the execution and the consideration of the bond in suit but pleaded to be relieved against the extremely exorbitant and penal rate of interest charged by the plaintiff. Defendant 2, who is the son of defendant 1, did not appear and the case proceeded ex parte against him. On behalf of defendant 3, the execution and the receipt of the consideration of the bond were admitted, but at a later stage of the case it was pleaded that Yadorao was not the principal debtor but only a surety and this plea was accepted by the plaintiff in his reply. Defendant 4 really contested the claim. While admitting that he had executed the chit (Ex. P-2) he pleaded that since the same was executed long after the agreement between the first three defendants and the plaintiff was completed and consideration paid to them, he was not liable even as a surety. Alternatively he also pleaded that since the contract evidenced by Ex. P-2 was not that of a guarantee or suretyship but that of an indemity, he was not liable to the plaintiff's claim. It was also pleaded that the contract of suretyship, if any, was extinguished by the delay in bringing the present suit, the more so, because the plaintiff did not make a demand for payment immediately after the alleged default.

The lower Court overruled the contentions of the defendants excepting that of the penal nature of interest and passed a decree against all the defendants for Rs. 15,310-3-0 allowing Re. 1 per cent per mensem simple rate of interest from the date of the default. Against this decree defendant 4, has alone come up to this Court in appeal.

Although as many as 14 grounds are formulated in the memorandum of appeal Mr. Mangalmurti for the appellant confined his arguments to the three following points only:

(1) That assuming that the contract evidenced by Ex. P-2 was that of suretyship the same was void because it was entered into after the original contract under Ex. P-1 was over; (2) that even if the contract of suretyship was not void the terms thereof exclude the liability of the appellant being co-extensive with that of the principal debtors; and (3) that the contract itself was not that of a guarantee falling within the purview of S. 126, Contract Act, but that of an indemnity falling under S. 124 *ibid*.

We will examine each of these contentions seriatim.

The argument of the first point is apparently based on Illus. (c), S. 127, Contract Act. But the facts on which this plea was based have, in our opinion, not been established by the appellant. Having examined the whole of the evidence bearing on this point we have no hesitation in concurring with the trial Court's finding that the plaintiff advanced the loan to the first three defendants on the distinct understanding that defendant 4 was to stand surety for them. It is undoubtedly true that the plaintiff originally agreed to advance the loan only on the assurance of Shankarlal (P. W. 1) and defendant 2 that defendant 4 would stand surety. Shankerlal also stated that before he went with defendant 2 to the plaintiff to ask for the loan, they had gone first to defendant 4 for the same purpose and that at that time defendant had given his assurance that he would stand surety. The plaintiff himself, as P. W. 2 stated that before the writing of the bond (Ex. P-1) commenced defendant 4 took him aside and said that since it was derogatory for him to sign the bond as an ordinary debtor, he would give a separate chit and that after the bond was completed the chit was executed by the appellant. The appellant's story of the circumstances under which he executed the chit as given out by him from the witness box is so highly

improbable that we have no hesitation in rejecting it as untrue. We hold then that Ex. P-2 is not void as contended.

In order to appreciate the argument on the second point it is necessary to reproduce Ex. P-2. The official translation of the document is as under :

"*To*

Meghraj Gangarom at Adgaon.

From

Jethmal Chhogulal at Telhara.

Compliments. You have this day advanced from yourself Rs. 10,000 to Baijnathji, Maneklal and Yadavrao, son of Pundlik, of Barbat, (You) have taken a bond therefor. If the aforesaid persons fail to pay the amount thereof, I will pay it, in accordance with the bond, Mitti Magh Shudh 15, Samvat 1982. By the pen of Nandlal now at Paturda."

The appellant's contention is that the words :

" If the aforesaid persons fail to pay the amount thereof, I will pay it in accordance with the bond"

limit the liability of the appellant within the meaning of the last part of S. 128, Contract Act. In other words it is urged that unless the creditor respondent exhausts all his remedies to recover the decretal amount in the first instance from the principal debtors he could not recover it from the appellant. In our opinion, this contention is untenable. Under S. 126, Contract Act :

" a contract of guarantee is defined to be contract to perform the promise, or discharge the liability, of a third person in case of his default."

Since the operative words in the definition practically correspond with those in Ex. P-2 we have no hesitation in holding that on a proper interpretation thereof they make the liability of the surety coextensive with that of the principal debtors and do not come within the purview of the qualifying clause of S. 128, Contract Act, and limit his liability in any way. Reliance was placed for the appellant on *C. L. Phillips* v. *A. E. Mitchell* (1) and *Khunni Lal* v. *Raghunandan Prasad* (2), but both these cases have no applicability to the present one and are easily distinguishable. In both the cases the surety's liability was limited and restricted by the terms of the contracts themselves. In the Calcutta case it was held that the surety's liability was limited to the maximum mentioned in the bond which shall remain due after realising the debt, in the first instance, from the mortgage securities. Likewise in the Allahabad case on an interpretation of the document it was held that the surety's liability would only accrue if the embezzlement of the principal debtor was proved in a Court of law.

On the third point it was urged that since all that the appellant agreed to do under the chit (Ex. P-2) was to promise to save the plaintiff from the loss caused to him by the conduct of the first two defendants and Yadorao in not repaying the debt, the contract was one of indemnity only as defined in S. 124, Contract Act, and that therefore unless the plaintiff proved that actual loss has resulted to him under the bond (Ex. P-1) he had no right of suit against the appellant. Even assuming that the appellant's contract was one of indemnity only it does not follow that his liability to indemnify the plaintiff could legally be postponed till the plaintiff had actually suffered a loss by nonrecovery of the debt from the principal debtors after exhausting all his remedies against them. In *Dane* v. *The Mortgage Insurance Corporation* (3), it was held that even under a contract of indemnity the plaintiff is entitled to recover from the defendant the amount guaranteed by him on the occurrence of default in payment by a third party. The same view was also taken in *Osman Jamal & Sons Ltd.* v. *Gopal Purshattam* (4).

The distinction between a contract of guarantee and that of an indemnity has been very forcibly pointed out by Kumarswami Sastri, J., in *K. V. Periamanna Marakkayar & Sons* v. *Banians & Co.* (5) at 172 (of 49 *Mad.*) in the following words:

" I think that the Contract Act draws a distinction between a contracts of indemnity and contracts of suretyship and that contracts of suretyship, unlike contracts of indemnity, requires the concurrence of three persons, namely, the principal debtor, the creditor and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor. Reading Ss. 126 and 145 together it seems to me that there can be no contract of guarantee, as distinguished from a contract of indemnity, unless there is privity between the principal debtor nd the surety as it is difficult to speak of an implied promise between persons between whom there is no privity of contract. S. 126 refers to contract of guarantee and speaks of three persons with reference to that contract, namely, the person who gives the guarantee, the person in respect of whose default the guarantee

(1) A.I.R. 1930 Cal. 17=126 I.C. 138=57 Cal. 764.

(2) [1913] 20 I.C. 497.

(3) [1894] 1 Q.B.D. 54=63 L.J.Q.B. 144=9 R. 96=70 L.T. 83=42 W.R. 227.

(4) A.I.R. 1929 Cal. 208=118 I.C. 882=56 Cal. 262.

(5) A.I.R. 1926 Mad. 544=95 I.C. 154=49 Mad. 156.

is given and the person to whom the guarantee is given."

The evidence of Shankarlal (P. W. 1) and the plaintiff himself (as P. W. 2) which we prefer to that of appellant 4 (D. W. 2) as to the circumstances under which the bond (Ex. P-1) and the chit (Ex. P-2) were executed, and a correct interpretation of these two documents leave no room for doubt that the appellant's contract falls within the purview of S. 126, Contract Act, and not under S. 124 ibid, as explained in the aforesaid quotation, and we hold accordingly.

In the course of the argument one minor point was also touched which requires consideration. It was urged that since in his pleadings the plaintiff admitted that Yadorao, the original defendant 3, was a mere surety and not a principal debtor, the appellant, if he was compelled to make the payment of the decretal amount, in the first instances would not be able to sue defendant 3 for contribution. But this apprehension appears to us groundless, for in para. 9 of his judgment the learned Additional District Judge, has in spite of the above pleadings, held as follows :

"As between defendants 3 and 4 there is no doubt that defendant 4 is a surety, and defendant 3 would be the principal debtor. In terms of the chiti executed, defendant 4 was a surety for not only defendants 1 and 2 but also for the father of defendant 3 and defendant 3 cannot be allowed to get defendant 4 to equally share the responsibility with him."

There is no doubt that some confusion of ideas are expressed in the latter part of this paragraph of the lower Court's judgment, and therefore it is necessary that we should make the point clear.

Under the terms of the bond (Ex. P-1) it is clear to us that defendants 1 and 2 and Yadorao, the father of defendant 3, are all principal debtors and therefore under S. 92, Evidence Act, it was not open to the plaintiff either to plead or try to prove that the position of Yadorao was that of a mere surety for defendants 1 and 2. Under Ex. P-2 also all of them have been given their correct position of the principal debtors. We hold then that the first two defendants and Yadorao are the principal debtors in the transaction and the appellant a surety for all of them.

For the reasons given above we uphold the decree appealed against and dismiss the present appeal with costs.

K.N./R.K. *Appeal dismissed.*

1932 N/9 & 10

✲ A. I. R. 1932 Nagpur 65

MACNAIR, OFFG. J. C. AND JACKSON, A. J. C.

Ramakrishna-Ramnath—Assessees.

v.

Commissioner of Income-tax, Central Provinces and Berar.

Misc. Judicial Case No. 32 of 1927, Decided on 14th August 1929.

✲ **(a) Income-tax Act (1922), S. 66 (3)—High Court has no jurisdiction to decide point already decided by it although it doubts correctness of that decision.**

Where the High Court after hearing both the sides directs the Commissioner to state and refer the case, it cannot subsequently go back on that decision and have jurisdiction to decide a point which has already been decided after a full hearing, although it may doubt the correctness of the previous order. The validity of that order cannot therefore be questioned subsequently after the case has been referred: *A. I. R.* 1925 *Pat.* 352, *Ref.*; *A.I.R.* 1928 *Mad.* 889, *Dist.* [P 66 C 2]

✲ **(b) Income-tax Act (1922), Ss. 22 and 23—When notice issued is illegal, return does not become due and application by partnership firm for registration is within time—Action of assessee does not give jurisdiction to be assessed to income-tax officer which law does not give him.**

In the case of an assessee, liable to be assessed to income-tax by the Assistant Commissioner and not by the Income-tax Officer, the proper authority to issue notice under S. 22 (2) is the Assistant Commissioner and not the Income-tax Officer. Notice issued to such an assessee by the Income-tax Officer under S. 22 (2) is illegal. The fact that the assessee has received the notice issued by the Income-tax Officer and applied to him for extension of time cannot be treated as a waiver on his part of his right to object to the jurisdiction of the Income-tax Officer; for no action of the assessee can give the Income-tax Officer jurisdiction that the law does not give him. The effect of the illegality of the notice issued by the Income-tax Officer is that it does not cause the return to which S. 22 (2) refers to become due and hence where the assessee is a partnership firm, constituted under an instrument of partnership, an application by such assessee for the registration of the partnership firm, which is required to be made under the rules, by the partners or by any of them on or before the date on which a return is due under sub-S. (2), S. 22 of the Act is within time.

[P 67 C 1]

R. N. Padhey—for Assessees.

D. N. Chaudhri—for Govt.

Judgment.—The Income-tax Officer, Bhandara, served on the non-applicants on 13th April 1925 a notice under S. 22, (2), Income-tax Act, calling on them to furnish in the prescribed form on or before 13th May 1925, a return of their income for the year ending with the Diwali in the calendar year 1924. The time for filing this return was extended by the Income-tax Officer up to 26th June

1925. On 10th July 1925 an application was made to the Income-tax Officer for the registration of the firm under S. 14 (2), Income-tax Act: this application was considered by the Assistant Commissioner and was rejected on the ground that it was not made in time. An application for revision of this order was made to the Commissioner of Income-tax but was rejected.

The non-applicants submitted a return under S. 22 (2), Income-tax Act, and an assessment order was passed by the Assistant Commissioner; an appeal to the Commissioner of Income-tax was filed, but was successful only to a small extent. The assessees then presented an application for a reference to the High Court on the following points:

(1) Whether in view of the C. P. Gazette Notification No. 97, dated 28th March 1923, by the Commissioner of Income-tax, the Income-tax Officer's jurisdiction in cases of assessees who were at any time assessed to Rs. 40,000 and above since 1919-'20 is taken away, and if so, whether the notice under S. 22 (2) issued by him is legal.

(2) Whether the Assistant Commissioner of Income-tax is empowered under any of the provisions of the Income-tax Act to delegate his powers of issue of notices under S. 22 (2) to the Income-tax Officer in general or in special cases and if so, whether that authorization can have any retrospective effect.

(3) Whether the words 'the case is now fixed for 27th July 1925, when necessary action will be taken if default further continues' in the warning notice issued by the Income-tax Officer precluded extension of time for filing a return under S. 22 (2).

(4) Whether the return so filed before 27th July 1925 could not be deemed to be a proper return under S. 22 (2).

(5) Whether the commission for sale of bidis manufactured in partnership is allowable to a partner under S. 10 (2) (ix) of the Act when the expenditure so incurred is solely for earning the profits of the business, when the same is paid as per the registered deed of the agreement of partnership, when the partner who so sells Bidis has to maintain a separate establishment for this purpose and specially for the reason that the sale of bidis is retail and that such sale is not in the usual course of business of the firm and that agencies for such sale are usually given to others in other places.

(6) In the same way whether pagdi money which is in the nature of bonus is allowable under S. 10 (2) (ix).

(7) Whether goushala levy and Rashtriya fund levy on sales of bidis effected and charged to the account of the above two funds can be held to be the income of the assessee under any section of the Income-tax Act.

This application was rejected; the assessees applied to the High Court under S. 66 (3), Income tax Act and Kinkhede, A. J. C., after hearing counsel on both sides stated that he was not satisfied of the correctness of the Commissioner's decision on the points on which reference was sought and required the Commissioner to state the case to this Court. The assessees do not desire reference on the 7th point and the Commissioner has referred to the High Court the first six questions.

Rai Bahadur D. N. Chaudhuri urges a preliminary objection that no question of law arises out of the order passed by the Commissioner of Income-tax in an appeal under the provisions of S. 32, Income-tax Act; his main contention is that in that order the correctness of the refusal to register the firm was not considered. But this Court, after hearing both sides, directed the Commissioner to state and refer the case. We consider that we have no jurisdiction to decide a point which has already been decided after a full hearing by this Court. If authority for this proposition is needed, we may refer to *Trikamji Jiwan Das* v. *Commissioner of Income-tax, Bihar and Orissa* (1). The counsel for the Commissioner of Income-tax refers us to *P. Thiruvengada Mudaliar* v. *Commissioner of Income-tax, Madras* (2), but in that case the Commissioner had not been given an opportunity to oppose the application that he should state a case and the Court was clearly competent to revise an order passed behind the back of one of the parties. We doubt the correctness of the order of this Court but cannot now question its validity.

The first four questions as stated before us refer to the correctness of the refusal to register the firm. The Income-

(1) A. I. R. 1925 Pat. 352=86 I.C. 170=4 Pat. 224.

(2) A. I. R. 1928 Mad. 889=110 I.C. 742 (S.B.).

tax Officer, Bhandara, and the Assistant Commissioner of Income-tax obtained jurisdiction to assess income-tax from the provisions of S. 5, Cl. (4) of the Act: this is as follows:

"Assistant Commissioners of Income-tax and Income-tax Officers shall, subject to the control of the Governor-General in Council, be appointed by the Commissioner of Income-tax by order in writing. They shall perform their functions in respect of such classes of persons and such classes of income and in respect of such areas as the Commissioner of Income-tax may direct. The Commissioner may, by general or special order in writing, direct that the powers conferred on the Income-tax Officer and the Assistant Commissioner by or under this Act shall, in respect of any specified case or class of cases, be exercised by the Assistant Commissioner and the Commissioner respectively, and, for the purposes of any case in respect of which such order applies, references in this Act or in any rules made hereunder to the Income-tax Officer and the Assistant Commissioner shall be deemed to be references to the Assistant Commissioner and the Commissioner, respectively."

It is not disputed that by C. P. Gazette Notification No. 97/98, dated 28th March 1923, it was directed that the powers conferred on the Income-tax Officer and the Assistant Commissioner under the Act should be exercised in respect of the class of cases to which the case of the assessee belongs, by the Assistant Commissioner and Commissioner of Income-tax respectively. S. 22 (2) which directs the Income-tax Officer to serve a notice upon the assessees must then be read as if the Assistant Commissioner was so directed. The Income-tax Officer Bhandara, then had no authority to serve a notice on the assessee. We answer the first part of question No. 1 in the affirmative.

It is urged on behalf of the Commissioner that the Income-tax Officer may have acted on behalf of the Assistant Commissioner. The notice does not show that he so acted and the Commissioner, when stating the case, does not suggest that this is so. It is next urged that the assessee who accepted the notice from the Income-tax Officer and applied for extension of time waived the right to object to the jurisdiction of the Income-tax Officer: no action of the assessee can give the Income-tax Officer jurisdiction that the law does not give him. The answer to the second part of question 1 is that the notice was illegal.

The second question is couched in general terms and has not been argued before us. It appears that an opinion on this question is not now desired.

On the third question it is sufficient to state that the words quoted indicate that default has occurred. The notice then does not vary the date on which the return was due. But this is immaterial as our answer to the next question raised before us must be that the notice did not make the return due. That question was not exactly question No. 4: what was urged was that the application for registration of the firm, in order to make applicable provisions of the Act relating to a registered firm as defined in S. 2(14) of the Act, was made within the period allowed by law. The rule then in force was R. 2, Income-tax Rules of 1922, which is as follows:

"Any firm constituted under an instrument of partnership specifying the individual shares of the partners may, for the purposes of Cl. (14), S. 2, Income-tax Act, 1922 (hereinafter in these rules referred to as the Act), register with the Income-tax Officer the particulars contained in the said instrument on application in this behalf made by the partners or by any of them on or before the date on which a return is due under sub-S. (2), S. 22 of the Act."

We are of opinion that as the notice issued by the Income-tax Officer was illegal, it did not cause the return, to which sub-S. (2), S. 22 refers, to become due. Our answer to the question argued is that the application for registration was within time.

There does not seem to be any dispute on any question of law raised in questions 5 and 6. As the Commissioner of Income-tax remarks:

"A partner might conceivably do business in his individual capacity and in that capacity might render services to the firm in consideration of which the firm might pay him a remuneration which would be a legitimate deduction from the assessable income of the firm."

But even if the terms of the partnership deed indicated that one partner was so to do business, the Commissioner is not bound to hold that this is the case; a statement in the partnership deed may be intended to assist escape from the provisions of the Income tax Act. We cannot interfere with the decision of fact that the assessees have not proved that the arrangement to which the Commissioner refers really existed. The only answer which we can give to questions 5 and 6 is the statement of the law made by the Commissioner of Income-tax.

In order to avoid misapprehension it is necessary to add that our decision of

the questions raised does not necessarily affect the assessment of income-tax with which the order of the Commissioner dealt. The assessees were not a registered firm, even if their application for registration was wrongly considered to be barred by time. The cost of this reference will be borne as incurred.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Nagpur 68

FINDLAY, J. C.

M. E. R. Malak—Assessee.

v.

Commissioner of Income-tax, C. P. & Berar.

Misc. Judicial Case No. 75 of 1929, Decided on 4th March 1930.

Income-tax Act (1922), S. 66 (3)—Assessee cannot require Commissioner to state case and refer to High Court on point already decided by High Court.

Where the matter in issue in the income-tax assessment proceedings for the year 1928-29 had already been decided by the High Court on a reference made by the Commissioner at the instance of the assessee in connexion with the assessment for the previous year, it is not open to the assessee to have the same matter agitated and decided over again before the income-tax authorities and he cannot also apply to the High Court requesting it to require the Commissioner to state the case on the same point over again and to refer it to the High Court for decision.

[P 69 C 1]

Judgment.—This is an application under S. 66 (3), Income-tax Act, requesting this Court to require the Commissioner of Income-tax to state the case and refer it to this Court. The order of the Income-tax Commissioner in question is dated 13th August 1929, and this order, in turn, arose out of his proceedings for the assessment of the Atba-e-malak Badar community to income-tax for the year 1928-29.

The question the Income-tax Commissioner was asked and refused to refer was couched in the following terms:

"Whether in view of the affidavits made by the members of the staff employed in Mehdi Bagh shops disclaiming any interest in the said shops, the Assistant Commissioner of Income-tax was justified in law in disallowing deductions of their salaries from the income assessed to income-tax."

An appeal to the Assistant Commissioner of Income-tax was filed on 21st March 1929 and in that appeal the question of the disallowance of the amount disbursed for salaries was agitated. On 23rd May 1929 an affidavit signed by eleven alleged servants of the community was filed; on the two following days further affidavits were filed. These were to the effect that the signatories were merely hired servants of Moulana Malak Sahib of Mehdi Bagh and that they had no right or interest in the property. The Assistant Commissioner, in his order, dated 25th June 1929, did not refer to these affidavits because, in his opinion, the point as regards salaries had already been agitated in this Court and decided on 18th April 1929. The Assistant Commissioner of Income-tax accordingly did not refer at all to the affidavits in his order in question. As, however, the Commissioner of Income-tax points out the filing of the affidavits, in reality, amounted to an attempt to introduce new evidence before the Assistant Commissioner at a time when limitation had expired for the filing even of objections. The Commissioner of Income-tax very properly points out, that it was only when the applicant had lost his case on the point involved in this Court that the affidavits in question were introduced, presumably as a kind of counterblast, in the hope that they might benefit his case as regards the assessment for the year 1928-29.

The extraordinary procedure of the applicant (assessee) in the matter is only too obvious and I am wholly unable to see that there is, in reality, any question of law which can be referred to this Court for an answer in this connexion. It is little less than extraordinary to note that the decision of this Court in *M. E. R. Malak* v. *Commissioner of Income-tax, C. P.* (1) was passed on 18th April 1929 and then it was only thereafter that these affidavits were filed. In view of the decision of this Court, their evidential value obviously could amount to nothing and I am of opinion that the Assistant Commissioner of Income-tax was perfectly justified in rejecting them or ignoring them, which was, in effect, what he did. It is quite rightly pointed out that the matter in issue had already been decided by this Court and, if the assessee feels aggrieved by that decision, his remedy is by way of an appeal to their Lordships of the Privy Council.

I am therefore of opinion that the affidavits were utterly ineffective and deserve to be ignored and that, in view of the decision of this Court, the income-

(1) [1929] 3 I. T. C. 468.

tax authorities were correct in refusing to take any action on them. The plea that a different year's assessment is now involved, is obviously a futile one because it is not urged that the constitution of the community has, in the meantime, changed. I am unable therefore to see that there is any question of law whatever involved which could be referred to this Court. The affidavits in question, on the contrary, only suggest a somewhat stupid attempt to get round or render nugatory the decision of this Court already given on the question involved.

There is no ground therefore for the present application and it is dismissed. The applicant must bear the costs of the Income-tax Commisssioner. I fix these at Rs. 100.

K.N./R.K. *Application dismissed.*

A. I. R. 1932 Nagpur 69

STAPLES, A. J. C.

Bahore and *another*—Appellants.

v.

Lookain—Respondent.

Appeal No. 397 of 1929, Decided on 31st July 1931, against appellate decree of Addl. Dist. Judge, Damoh, D/- 31st January 1929.

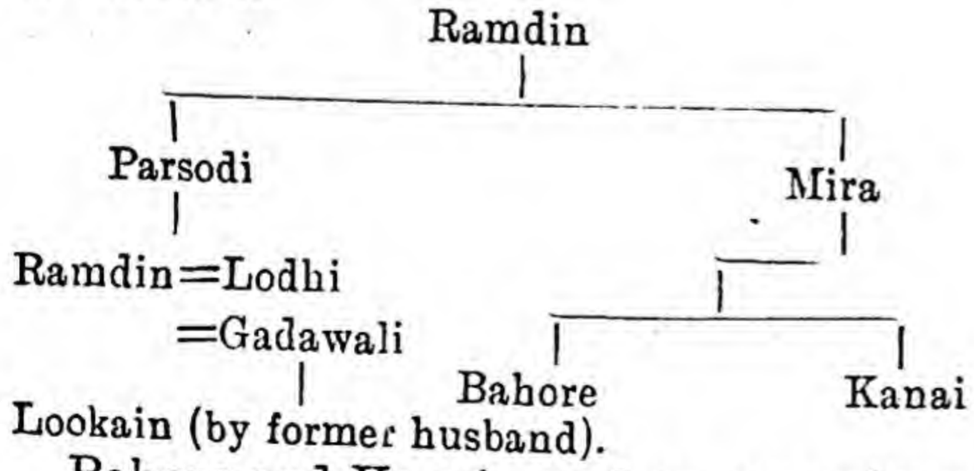
Hindu Law—Adoption—Widow may give only son in adoption without consent of her husband after his death.

A widow may, after the death of her husband and before her remarriage give her only son in adoption without the consent of her husband: 30 *Cal.* 965, *Rel. on.*; *A.I.R.* 1925 *Nag.* 1 (*F.B.*), *Dist.* [P 70 C 1]

M. D. Khandekar—for Appellants.

K. V. Deoskar—for Respondent.

Judgment.—The appellants Bahore and Kanai brought a suit against the respondent Lookain for possession of land and other property which belonged to one Ramdin, who died en 21st December 1926. The following genealogical tree will show how the parties were related to Ramdin:



Bahore and Kanai sued as reversioners of the deceased Ramdin, whilst the respondent Lookain claimed to be his adopted son and therefore entitled to his property. Bahore and Kanai denied the adoption and further pleaded that, if any adoption took place it was illegal. Both Courts below have held that Lookain was validly adopted by Ramdin and therefore the suit was dismissed, and the appeal preferred by Bahore and Kanai was dismissed by the Additional District Judge. They have now preferred this second appeal.

The two questions put in issue in the trial Court were whether Lookain was adopted and, secondly, whether he was adopted by Ramdin before he married Lookain's mother Gadawali by *pat*. It has been found by both Courts below that Lookain was adopted by Ramdin, and it has been further found by the lower appellate Court that that adoption took place before Ramdin married Lookain's mother Gadawali by *pat*. The property in suit admittedly belonged to Ramdin and the appellants are cousins of Ramdin and claim it as reversioners. If however the adoption of Lookain by Ramdin is held valid, it is of course admitted that their claim as reversioners would be inferior to that of the adopted son and that the adopted son would take the property.

The stand now taken by the learned counsel who appeared for the appellants was that the adoption was invalid because a widow could not give her son in adoption without the consent of her husband given before his death. It may be noted that this plea was not taken in the lower Courts. The plea taken by the plaintiffs-appellants in the lower Courts was that there was no adoption or, if the adoption did take place, it was performed after the *pat* marriage of Ramdin and Gadawali and therefore was invalid and illegal because there was no one who could validly give Lookain in adoption. It seems to have been conceded in the lower Courts that, if the adoption took place before the *pat* marriage, Lookain's mother Gadawali was competent to give her son in adoption and that the adoption would be valid. Now however the plea raised is that Gadawali as a Hindu widow could not give her son in adoption without the consent of her husband.

I am of opinion however that this contention must be rejected and the matter has been considered at some length in *Jogesh Chandra* v. *Nrityakali Debi* (1). I would refer to pp. 970 to 973 of that

(1) [1903] 30 Cal. 965=7 C. W. N. 871.

ruling and would hold that a Hindu widow may, after the death of her husband, give her son in adoption. It may be noted that in *Mt. Sheokabai* v. *Ganpat* (2), another question was considered, namely, whether a Hindu widow had power after remarriage to give her son by her former husband in adoption, and it was held that she had not. The reason for that decision was that after remarriage the widow's connexion with the family of her former husband ceased and that such a connexion was necessary for the act of adoption. It has however I think been tacitly understood throughout in that case that, if a widow did not remarry—or prior to her remarriage—she would have power to give her son in adoption. Nor do I think the fact that Lookain was an only son would render her incapable of giving him in adoption and I would again refer to *Jogesh Chandra* v. *Nrityakali Debi* (1).

I am of opinion then that the matter has been rightly decided and that there is no force in the appeal. The appeal is therefore dismissed. Costs of the appeal will be borne by the appellants. Other costs as ordered by the lower appellate Court.

P.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1925. Nag. 1=79 I.C. 142=20 N.L. R. 57 (F.B.).

A. I. R. 1932 Nagpur 70

STAPLES, A. J. C.

The Cantonment Board, Jubbulpore—Applicant.

v.

Phulchand—Non-Applicant.

Civil Revn. No. 28 of 1931, Decided on 14th September 1931, against order of Dist. Judge, Jubbulpore, D/- 5th December 1930.

Civil P. C. (1908), O. 46, R. 7—District Judge in failing to take action under O. 46, R. 7, fails to exercise jurisdiction vested in him—Apart from O. 46, R. 7, order of original Court can be revised—Suit for recovery of rent due under lease sold by auction held suit due for rent and hence triable by Sub-Judge.

A suit for recovery of balance of rent due on an agreement of lease sold by auction was returned by Sub-Judge holding that suit was not for rent and was not triable by him, but by Small Cause Court. On presentation of the plaint in the Small Cause Court, the Judge held that the suit was not triable by it. Plaintiff applied under O. 46, R. 7, but the District Judge rejected the application holding that the last order being by the Small Cause Court the correct procedure was to apply in revision to the High Court. Applicant then applied to High Court in revision and the question was whether the High Court had power of revision.

Held: that whether the last order was by the Small Cause Court or by the Sub-Judge, the District Judge was bound to submit the case under O. 46, R. 7 and the District Judge, in failing to take action under O. 46, R. 7, had failed to exercise jurisdiction vested in him by law and that in any case the High Court had power to revise the order of the original Court returning plaint. [P 71 C 1]

Held further: that the mere fact that what may be called a lease was sold by auction did not prevent the lease money being rent and consequently the case was triable by the Sub-Judge: 39 *Mad.* 195 (*F. B.*) and 32 *Cal.* 116, *Rel. on*; 8 *All.* 111 (*F. B.*); 46 *I. C.* 99 and *A. I. R.* 1926 *All.* 58, *Ref.* [P 71 C 1]

J. Sen—for Applicant.

G. R. Pradhan—for Non-Applicant.

Judgment.—The applicant, the Cantonment Board, Jubbulpore, brought a suit against the non-applicant for the recovery of the balance of rent due on an agreement, in the Court of the Additional Sub-Judge, Second Class, Jubbulpore. The Sub-Judge returned the plaint for presentation to the proper Court on 26th March 1930, holding that the suit was not one for rent and therefore was not triable by him, but was triable by the Small Cause Court. The applicant then presented his plaint in the Court of Small Causes, but the Judge of the Small Cause Court held on 26th September 1930 that the suit was one for rent and was not triable by the Small Cause Court, and again returned the plaint. The applicant then made an application under O. 46, R. 7, in the Court of the District Judge, but the District Judge held that, as the order of the Small Cause Court was the last order, the correct procedure was for the applicant to file an application for revision in this Court against the order of the Small Cause Court. The District Judge further remarked that the applicant could have made an appeal against the order of the Additional Sub-Judge before presenting his plaint in the Small Cause Court. He therefore rejected the application. The applicant has now preferred an application to this Court.

A preliminary objection was taken by the learned counsel who appeared for the non-applicant that this Court had no power of revision in such a case, and he

relied upon *Badami Kuar* v. *Dinu Bai* (1) and *Jwala Prasad* v. *E. I. Ry. Co.* (2). On the other hand a contrary view has been taken in *Atchayya* v. *Seetharamachandra Rao* (3) and *Zamiran* v. *Fateh Ali* (4), whilst in *Bisheshar Prasad* v. *Raghubir* (5), it has been held that the High Court has power to revise the order of the original Court, even though it cannot revise the order of the lower appellate Court. I do not however think that this objection is of much importance, because in any case it appears to me that the District Judge, in failing to take action under O. 46, R. 7, has failed to exercise jurisdiction vested in him by law. Under O. 46, R. 7, the District Judge is bound, if required by a party, to submit the record to the High Court with a statement of its reasons, and therefore whether the last order was by the Small Cause Court or by the Sub-Judge, the District Judge was bound to submit the case under O. 46, R. 7. Apart from that I prefer the view taken by the Madras and Calcutta High Courts, and in any case it is clear that the order of the original Court can be revised.

On merits I am of opinion that the view taken by the Additional Sub-Judge is clearly wrong and that the case was triable by him and not by the Judge of the Small Cause Court. The fact that what may be termed a lease was sold by auction does not prevent the amount of lease-money being rent. I have also been referred in this connexion by the learned counsel who appeared for the applicant to *Sitaram* v. *Petia* (6). I may note that in this Court the learned counsel who appeared for the non-applicant admitted that the case was one triable by the Additional Sub-Judge and not by the Small Cause Court.

I therefore set aside the order of the Additional Sub-Judge returning the plaint for presentation to the Small Cause Court and direct that the Additional Sub-Judge re-admit the plaint under its original number and try the suit and dispose of it according to law. The non-applicant, who has without justification opposed the admission of the plaint both in the Court of the Additional Sub-Judge and in the Small Cause Court, will pay all costs of this application and will pay all costs in the District Judge's Court. I fix pleader's fees in this Court at Rs. 25.

P.N./R.K. *Revision allowed.*

(1) [1886] 8 All. 111=1886 A. W. N. 28 (F. B.).
(2) [1918] 46 I. C. 99.
(3) [1916] 39 Mad. 195=18 I. C. 555 (F. B.).
(4) [1905] 32 Cal. 146.
(5) A. I. R. 1926 All. 58=90 I. C. 353=48 All. 168.
(6) [1916] 14 N. L. R. 35=43 I. C. 962.

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STAPLES, A. J. C.

Chamru and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 16 of 1932, Decided on 12th March 1932, against order of Dist. Magistrate, Balaghat, D/- 12th January 1932.

Criminal P. C. (1898), S. 257—Magistrate refusing adjournment for cross-examination of prosecution witness when defence counsel absent—Magistrate held to have acted unreasonably.

Where a Magistrate has refused an adjournment for the cross-examination of the prosecution witnesses, when the defence counsel is absent and although the defence counsel has prayed for such adjournment, having been engaged in a Sessions trial, the Magistrate has acted hastily and unreasonably in refusing such adjournment. [P 72 C 1]

R. R. Dandige—for Applicants.

Order.—Without going into the merits of this case I am of opinion that it must go back for the simple reason that the witnesses for the prosecution have not been cross-examined. The Magistrate has acted somewhat hastily in the matter. The witnesses for the prosecution were examined on 23rd November and the accused were examined and the charge framed under S. 454, I. P. C. on the same day. On the 25th the accused were asked if they wished to cross-examine the prosecution witnesses and they stated that they did not wish to cross-examine. The prosecution witnesses were therefore recalled for cross-examination on 4th December. It appears however that one of the accused, Sheocharan had engaged Mr. Sharda Prasad, Pleader of Balaghat to defend him, but that Mr. Sharda Prasad was unable to appear on 23rd and sent a telegram to the Court asking for an adjournment until 10th December.

On 4th December he wrote a letter, which is in the B file of the Magistrate's record in which he stated that he was unable to appear on the 23rd, and had requested in his telegram that an adjournment be granted to him until the 10th, as he knew that he would be busy conducting a murder case in the Sessions

Court from the 3rd to the 9th. He again requested that the witnesses might be re-summoned for cross-examination under S. 257, Criminal P. C. The Magistrate however rejected that application, stating that the accused had been given an opportunity to cross-examine the prosecution witnesses and that the application was filed with the motive of delaying the case. I again repeat that the Magistrate has acted hastily and, I think unreasonably in the matter. There is no ground for believing that Mr. Sharda Prasad's application was otherwise than bona fide and he has given an excellent reason, viz., that he was in the Sessions Court, for not being able to appear before 10th December. The adjournment asked for was not a long one and by rejecting the application the Magistrate practically denied the accused the benefit of cross-examination.

I therefore set aside the convictions and sentences and direct that the accused be now given an opportunity of cross-examining the prosecution witnesses. After such cross-examination the Magistrate should again deliver judgment after ascertaining whether the accused wish to call any further witnesses in their defence.

B.V./R.K. *Order accordingly.*

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* A. I. R. 1932 Nagpur 72

JACKSON, J. C.

Anand Rao—Applicant.

v.

Gadi—Non-Applicant.

Criminal Revn. No. 232 of 1931, Decided on 28th August 1931, against order of Extra Asst. Commr. and Magistrate, First Class, Nagpur, D/- 18th June 1931.

*** Criminal P. C. (1898), S. 247 — Complainant dying—Court has power to continue trial.**

It is doubtful whether S. 247 applies in a case where the complainant dies. But even if it applies there is nothing in S. 247 to prevent an adjournment of the case to enable another complainant to be substituted. Consequently where in a summons case the complainant's son appears and states that his father is dead but asks that the case should be proceeded with, the Court can properly grant his request : 1 *Pat. L. J.* 264 and *A. I. R.* 1926 *Bom.* 178, *Appr.* ; *A. I. R.* 1928 *Mad.* 167, *not Foll.* ; 26 *I. C.* 174 and 28 *I. C.* 658, *Ref.* [P 73 C 1]

R. G. Rao—for Applicant.

V. N. Herlekar—for Non-Applicant.

Judgment.—This application for revision arises from a case instituted on complaint by one Laxman. On 27th September 1930 the complainant's son appeared before the Court and stated that his father was dead, but asked that the case should be allowed to proceed. His request was granted and in the end the accused were convicted. In appeal it was held that S. 247, Criminal P. C., applied and that on the failure of the complainant to appear the accused should have been acquitted. An order of acquittal was therefore passed by the appellate Court. The complainant's son applies for revision of that order.

A number of cases in which the effect of the death of the complainant in a summons case has been considered have been cited before me. In *Madho Chowdhury* v. *Turab Mian* (1), the complaint had been made by a servant on behalf of his master ; when the servant died the accused were acquitted ; but the High Court held that the acquittal was wholly without jurisdiction ; no reason was given for this finding, and it was probably influenced by the fact that the servant who died was not the real complainant. In *Purna Chandra Moulik* v. *Dengkar Chandra Pal* (2), S. 247 was applied, but it was held that under that section the Court could have adjourned the case if good ground was shown. It was also held that there was no good ground for adjournment, but clearly the view taken was that the death of the complainant did not necessarily result in the acquittal of the accused in a summons case. In *Damoo Sahu* v. *Jitan Dusadh* (3), it was considered open to doubt whether S. 247 applied to a case in which the complainant has died, as the section seems to apply primarily to the case of a complainant who is alive but does not appear.

It was held that in that particular case, in any view, the trying Magistrate should have proceeded with it. In *In re Mahomed Azam* (4), the view expressed by the Patna High Court in the last mentioned case was accepted that it is open to doubt whether S. 247 was intended to apply to a case in which the complainant has died. It was held that the trying Magistrate has a discretion in proper cases to allow the com-

(1) [1915] 15 Cr. L.J. 726=26 I.C. 174.
(2) [1915] 16 Cr. L.J. 322=28 I.C. 658.
(3) [1916] 1 Pat. L.J. 264=18 Cr. L.J. 151=37 I.C. 519.
(4) A.I.R. 1926 Bom. 178=93 I.C. 891=27 Cr. L.J. 491.

plaint to be continued by a proper and fit complainant. The last case that I have to consider is *Appala Naidu, In re* (5), which is the ruling that the appellate Court has followed. There it was held that on the death of a complainant in a summons case the Magistrate should, under S. 247, Criminal P. C., dismiss the complaint, and that it would be illegal for him to grant an adjournment to enable the deceased complainant's son to come on the record and to proceed further with the inquiry. *Purna Chandra Moulik* v. *Dengar Chandra Pal* (2), is referred to, but, in my opinion, that decision does not support the view taken in *In re Appala Naidu* (5).

I agree with the view taken in *Damoo Sahu* v. *Jitan Dusadh* (3) and *In re Mahomed Azam* (4), that it is open to doubt whether S. 247 applies in a case like the one before me. If it does not, then, as the first of those two decisions points out, there is nothing to prevent the Magistrate from going on with the proceedings ; but, even if it does apply, I do not think that there is anything in the section to prevent an adjournment of the case to enable another complainant to be substituted. *Appala Naidu In re* (5) is the only decision before me in which the contrary view has been taken ; but I cannot agree with the reasoning therein that leads to the conclusion that the words in S. 247

"unless for some reason he thinks proper to adjourn the hearing of the case to some other day"

cannot apply when the complainant is dead.

I hold that the trial Court in the present case had power to continue the trial after the death of the complainant and that the appellate Court was wrong in holding that the accused should have been acquitted. I therefore set aside the order of the appellate Court and direct it to hear the appeal on its merits.

P.N./R.K. *Order set aside.*

(5) A.I.R. 1928 Mad. 167=107 I.C. 512=29 Cr. L.J. 257=51 Mad. 339.

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* A. I. R. 1932 Nagpur 73

SUBHEDAR AND STAPLES, A. J. Cs.

Emperor

v.

Modkia.

Criminal Appeal No. 203 of 1931, Decided on 21st October 1931, against order of Sess. Judge, Bhandara, D/- 18-4-1931.

*** Criminal P. C. (1898), Ss. 417 and 439—Order of acquittal on graver charge and conviction on lesser—Accused's appeal on conviction to High Court decided—Local Government cannot prefer appeal against acquittal, but can apply under S. 439 for enhancement of sentence.**

No appeal under S. 417 can be preferred by the Local Government against an order of acquittal when an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. The proper course would be for the Standing Counsel, when an appeal has been preferred by an accused person in such a case to ask that proceedings be stayed to enable the Local Government to prefer an appeal under S. 417, if so advised. This difficulty can only arise in cases where an accused person is acquitted of a graver charge, but convicted of a lesser charge, on the same facts. In such a case, both Local Government and the accused person have a right to appeal, the Local Government having a right of appeal under S. 417 and the accused person a right of appeal against conviction. Ordinarily the two appeals should be heard together, but if the appeal of accused person is heard and decided by a High Court before the Local Government has appealed, under S. 417, the appeal by the Local Government is barred and cannot be entertained by the High Court, as there has been a pronouncement by that Court, which is final under S. 430 of the Code. Although there can be no appeal against the acquittal after the appeal against the conviction has been heard and decided, there can be an application for enhancement of the sentence under S. 439 of the Code: 2 *Cal.* 437 (*F.B.*); *A. I. R.* 1925 *Bom.* 268 and *A.I.R.* 1926 *Bom.* 555, *Ref.* [P 74 C 1, 2]

Vivian Bose, Govt. Advocate—for the Crown.

Judgment. — Four persons, Modkia, Surajlal, Parasram and Jaglal were convicted by the Sessions Judge, Bhandara, under the latter part of S. 304, I. P. C., and were sentenced to rigorous imprisonment for four years. Three of them, Parasram, Modkia and Jaglal, appealed to this Court and their appeals were dismissed by one of us on 27th June 1931. In that judgment it was stated that Modkia, the appellant, should have been found guilty of murder, but it was added that it is not the practice of this Court to call on an accused person proprio motu to show cause why his sentence should not be enhanced, but to leave it to the Local Government to apply in revision for enhancement of the sentence, if so advised. The Local Government has now preferred an appeal as regards Modkia under S. 417, Criminal P. C., asking that the order of the acquittal by the Sessions Judge under S. 302, I. P. C., be set aside, that he should be convicted of murder and that his sentence be enhanced to transportation for life.

An objection has been raised that the appeal is incompetent because the appeal has already been heard and decided by this Court and therefore the judgment in appeal is final and cannot be set aside. The learned Standing Counsel has referred to S. 430, Criminal P. C., and contended that the judgment passed in appeal by this Court was not final because this was an exception provided for in S. 417. We are of opinion however that his contention cannot be sustained because in S. 417 it is definitely laid down that an appeal may be presented to the High Court from an original or appellate order of acquittal passed by any Court other than High Court. In the present case the order of acquittal must be held to have been passed by this Court as the order of the lower Court has been maintained on appeal. We are of opinion then that no appeal under S. 417 can be preferred by the Local Government against an order of acquittal when an appeal preferred by the accused against his conviction has already been heard and decided by this Court. The proper course would be for the Standing Counsel, when an appeal has been preferred by an accused person in such a case, to ask that proceedings be stayed to enable the Local Government to prefer an appeal under S. 417, if so advised. The difficulty arises from the fact that the limitation provided for preferring an appeal against a conviction in the case of an accused person is 30 days while the limitation for the Local Government to appeal against an acquittal is six months. It is possible therefore that an appeal by an accused person may be heard and decided before the Local Government has determined whether to prefer an appeal or not. This difficulty however can be overcome, as indicated above, by the Standing Counsel asking the Court to stay proceedings in the case of an appeal preferred by an accused person.

This difficulty can only arise in cases where an accused person is acquitted of a graver charge, but convicted of a lesser charge on the same facts. That there is an appeal against acquittal in such cases within the meaning of S. 417 has been laid down in *Empress* v. *Jyadulla* (1), and this is not disputed. At the same time it is clear that S. 417 is primarily meant to apply to cases of acquittal, that is where, in the words of the Code, an accused person has been acquitted and set at liberty. In such cases there can of course be no difficulty and there is no question of accused person appealing. We are of opinion however that in a case where there has been an acquittal on a graver charge, but a conviction on a lesser charge, both Local Government and the accused person have a right to appeal: the Local Government having a right of appeal under S. 417, Criminal P. C., and the accused person a right of appeal against conviction. Ordinarily the two appeals should be heard together, but if the appeal of accused person is heard and decided by a High Court before the Local Government has appealed under S. 417, we hold that the appeal by the Local Government is barred and cannot be entertained by the High Court, as there has been a pronouncement by that Court, which is final under S. 430 of the Code.

We would point out however that although there can be no appeal against the acquittal after the appeal against the conviction has been heard and decided, there can be an application for enhancement of the sentence under S. 439 of the Code. It is the usual practice of this Court, before calling upon a convicted person to show cause why his sentence should not be enhanced, to hear and dismiss the appeal. It stands to reason that sentence cannot be enhanced if the appeal is to be allowed and the accused person to be acquitted. The appeal therefore is first heard and decided, and after the conviction is maintained the prisoner is then called upon to show cause why his sentence should not be enhanced. It might be argued by analogy that, when the appeal is dismissed and the conviction is maintained the sentence is also maintained; but we do not think that this argument has much force. The conviction is no doubt maintained by the dismissal of the appeal and the sentence to a certain extent is also maintained, but the fact that the conviction and the sentence are maintained will not debar this Court from enhancing the sentence under S. 439 when it has expressed its intention of so doing and has issued a notice to the prisoner to show cause against such action or when the Local Government makes an application for enhancement. We would refer to *Emperor* v. *Mangal Narayan* (2)

(1) [1876] 2 Cal. 437 (F.B.).

(2) A. I. R. 1925 Bom. 268=87 I. C. 424=26 Cr. L. J. 968=49 Bom. 450.

and *Emperor* v. *Jorabhai Kisanbhai* (3). In both cases it has been held that the appeal should first be heard and decided on merits and then notice should issue to the accused. In *Emperor* v. *Jorabhai Kisanbhai* (3) it has been held that, where an application for enhancement has been made by the Local Government under S. 439 of the Code after an appeal had been heard and dismissed by the High Court, the appeal could not be again heard on the merits of the conviction, but an application for enhancement was competent. With this view we respectfully agree.

As we are of opinion that the appeal under S. 417, Criminal P. C., is incompetent, we dismiss it. It will be open to the Local Government to make an application under S. 439 of the Code to apply for enhancement of the sentence, if so advised.

B.V./R.K. *Appeal dismissed.*

(3) A. I. R. 1926 Bom. 555=97 I. C. 805=27 Cr. L. J. 1173=50 Bom. 783.

A. I. R. 1932 Nagpur 75
Full Bench

SUBHEDAR, NIYOGI AND GRILLE, A. J. Cs.

Laxmiprasad—Applicant.

v.

Purushottam—Non-Applicant.

Civil Revn. No. 300 of 1929, Decided on 22nd February 1932, from order of Addl. Dist. Judge, Raipur, D/- 12th April 1929.

Crown Grants Act (15 of 1895), S. 3—C. P. Land Revenue Act (18 of 1881), S. 72—C. P. Tenaney Act (1920), S. 106—Land sold hy Government under Waste Land Sale Rules (1862)—Subsequent settlements introduced—Tenants declared occupancy tenants—Suit for recovery of rent against tenants in civil Courts is barred under S. 106, Tenancy Act.

Transfer of an estate by the Crown under the Waste Land Sale Rules of 1862, selling all rights of forests, pasturage, mines, fisheries and all other proprietary rights and interest for ever free from all present and future demands on account of Government land revenue but subject to all general taxes and local rates to be hereafter imposed by law is not governed by the Crown Grants Act. In view of S. 3, Crown Grants Act, the provisions of the C. P. Land Revenue Act (18 of 1881), apply to an estate conveyed as above so as to invest the settlement officer with jurisdiction to declare the estate as a mahal and ascertain and determine under S. 72, Land Revenue Act, the status and rents of tenants therein. The C. P. Tenancy Act (1920), governs the relations between the landlord and tenants in the estate conveyed as above. Suit for recovery of rent by the landlord against tenants of the above estate in ordinary civil Courts is barred under S. 106, Tenancy Act: (*Case law ref.*). [P 78 C 1]

H. S. Gour and *D. N. Choudhury*—for Applicants.

Shridhar Rao Gokhale—for Non-Applicants.

Vivian Bose, Govt. Advocate—for the Crown.

Order of Reference

Subhedar, A. J. C.—In the year 1868 the plaintiff-applicant's predecssor-in-title had purchased from the Government 2,578 acres of waste land in the Raipur District under a sale deed dated 6th February of the year which is marked Ex. P. 1 in the case. The sale was admittedly effected under the rules for sale of waste lands in the Central Provinces, published at p. 601, Vol. 2 of Nicholls' Digest of Circular orders of the Chief Commissioner, Central Provinces. These lands were admittedly sold "with all rights of forests, pasturage, mines, fisheries, and all the other proprietary right and interest..... for ever free from all present and future demand on account of Government land revenue, but subject to all general taxes and local rates, now or hereafter to be imposed by law in respect thereof, and to all claims of the Government of India, in respect of such land other than claims of Government land revenue.

At the second settlement of 1888—1889 these lands came to be called Mauza Khauli Dabri and the settlement officer under the provisions of S. 72, C. P. Land Revenue Act (18 of 1881), made inquiries and ascertained the status of the tenants in the village and fixed their rents. At the subsequent settlement of 1910—1911 the same procedure was followed and the non-applicants were declared occupancy tenants in the village. It is alleged that at the time of these two settlements the plaintiff's estate was under the management of the Court of Wards which raised no objection on behalf of the plaintiff to the settlement operations.

On 30th March 1928 the plaintiff filed 3 suits (Civil Suits Nos. 112, 113 and 114 of 1928) for recovery of rent against three seperate defendants in the Court of the Subordinate Judge, Second Class, Raipur. One of the pleas raised by the defendant in each suit was that, since he was an occupancy tenant, the Judge of the civil Court not exercising revenue powers had no jurisdiction to entertain the suit. The piaintiff's reply to this objection was that the C. P. Land Revenue Act and the Tenancy Act

had no application to the lands sold to his predecessor under Ex. P-1 and that therefore the status of the defendant in each case was not that of an occupancy tenant as defined in the C. P. Tenancy Act and so the civil Court had jurisdiction to entertain the suits. The trial Court upheld the plea of want of jurisdiction raised by the defendant and ordered the plaint in each case to be returned for presentation to the proper Court. The plaintiff went up in appeal against these orders in all the three cases and the Additional District Judge has confirmed them. Against the appellate orders the plaintiff has filed three revision applications in this Court which are registered as Civil Revns. Nos. 300, 301 and 302 of 1929.

The principal contention advanced on behalf of the applicant is that, as according to its preamble, the Land Revenue Act of 1881 was designed merely "to consolidate and amend the law relating to land revenue" it could have no application to the properties purchased under the Waste Land Rules, or 'zarkharidi' as they are commonly called, because they were sold

> for ever free from all present or future demands on account of Government land revenue"

and that therefore it was ultra vires of the Government to subject the applicant's lands to the settlement operations at the last two settlements by declaring the village as a mahal, apparently under S. 43 of the Act, so as to bring it within the purview of the definition of "mahal" as contained in S. 2 (7) ibid and thus enable the settlement officers to ascertain and determine, under S. 72 thereof the status and rents of all tenants occupying land therein. It is therefore urged that the non-applicants defendants in the three suits cannot be said to have acquired the rights of occupancy tenants so as to oust the jurisdiction of the civil Court for entertaining the suits under the proviso to S. 106, C. P. Tenancy Act of 1920. In other words the argument is that the defendants have not acquired the rights of occupancy tenants under the Tenancy Act.

In support of the aforesaid contention reliance is placed on the provisions of the Crown Grants Act (15 of 1895) which, as its preamble shows, was designed to remove doubts that

> "have arisen as to the extent and operation of the Transfer of Property Act, 1882, and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority,"

and S. 3 whereof enacts that

> "all provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of legislature to the contrary notwithstanding."

It is therefore urged that the conditions of absolute ownership embodied in the deed of conveyance, viz., the sanad (Ex. P-1), which necessarily carried with them the right of the transferee to settle tenants on the land demised on any terms according to his choice must be held to be absolute and inviolable notwithstanding the enactment of the C. P. Land Revenue and Tenancy Acts to the contrary.

This aspect of the case has not at all been touched upon the orders of the two lower Courts apparently because it was not put forward before them. I am also assured by the counsel on both sides that the point under discussion has never so far come up for decision in civil or Revenue Courts. In the following two cases which came before the Honourable the Revenue Member the decisions seem to have been that 'zarkharidi' villages were not outside the purview of the C. P. Land Revenue and Tenancy Acts, because the terms and conditions of the sale as embodied in the conveyance (contract) could be and were, in fact, overridden by legislature though not retrospectively *Chamra* v. *Amirlal* (1) and Revenue Appeal No. 6/I-6 of 1929 filed by appellant Ramkaran. These decisions however overlook the provisions of S. 3, Crown Grants Act, and cannot therefore afford any real assistance in the decision of the point raised in the present case.

As the decisions in the present cases may possibly conflict with those of the highest revenue authority in the Province and also affect the rights of purchasers of zarkharidi villages all over the Province, and as the contention advanced on behalf of the applicant appears prima facie to carry great weight, I consider it necessary under S. 9, C. P. Courts Act to refer the following points for the decision of a Bench.

(1) Whether the transfer of the estate by the Crown under the Waste Land Sale Rules of 1862, as evidenced by the sanad (Ex. P-1) in the present case, is governed by the Crown Grants Act (15 of 1895).

(1) Rev. Appeal No. 2/V-5 of 1925.

(2) Whether in view of S. 3 of the said Act (15 of 1895) the provisions of the C. P. Land Revenue Act (18 of 1881 of the Indian Legislature) would apply to the estate conveyed as above so as to invest the Settlement Officer with jurisdiction to declare the above estate as a mahal and ascertain and determine, under S. 72 thereof, the status and rents of tenants therein.

(3) Whether the C. P. Tenancy Act would govern the relation between the landlord and tenants in the above estate.

Opinion

Subhedar, A. J. C.—The questions referred for the decision of the Bench are as follows:

(1) Whether the transfer of the estate by the Crown under the Waste Land Sale Rules of 1862, as evidenced by the sanad (Ex. P. 1) the present case is governed by the Crown Grants Act (15 of 1895).

(2) Whether in view of S. 3 of the said Act (15 of 1895) the provisions of the C. P. Land Revenue Act (18 of 1881 of the Indian Legislature) would apply to the estate conveyed as above so as to invest the Settlement Officer with jurisdiction to declare the above estate ae a mahal and ascertain and determine, under S. 72 thereof, the status and rents of tenants therein.

(3) Whether the C. P. Tenancy Act would govern the relation between the landlord and tenants in the above estate.

The nature of the applicant's case and the circumstances under which the subject-matter of the reference was raised, are already clearly stated by me in the order of reference and need not therefore be recapitulated. It should however be noted here that after the reference was made, the Secretary of State for India was also joined as a party to these proceedings at the instance of both the parties and also at his own desire, expressed through the Deputy Commissioner of Raipur. The Bench had thus the advantage of having the points under reference fully argued not only on both sides, but also on behalf of the Government.

Dr. Gour for the applicant, in the first instance, contended that since under the sanad (Ex. P-1) the Secretary of State for India as an agent of the Crown, had transferred to the applicant's predecessor all the rights of ownership which the Crown itself possessed in the lands reserving only the right to levy all general taxes, local rates and claims of a like nature—the latter became virtually the "alter ego" of the former and because the Crown could not subject its own lands to the operation of the Land Revenue and Tenancy Acts it followed that it could not do so with respect to the demised lands In other words the contention was that the applicant had by his purchase, acquired a sort of a little kingdom in the demised lands. As rightly pointed out by the learned Government Advocate for the Secretary of State for India, this contention is on the face of it untenable because it completely ignores the dual capacity of the Crown in dealing with his subjects, viz., that of a sovereign with prerogatives to govern and to legislate and that of an individual dealing commercially. This dual capacity of the Crown is now well recognized by judicial decisions in *Nobin Chunder* v. *Secy. of State* (2), *Kishen Chand* v. *Secy. of State* (3) and *Jahangir M. Cursetji* v. *Secy. of State* (4). It is clearly under the latter capacity that the Secretary of State for India, on behalf of the Crown acting through the Deputy Commissioner, Raipur, sold the lands to the applicant's predecessor under the sanad (P-1). Neither the Waste Land Sale Rules of 1862 nor the terms of Ex. P-1 even by implication purport to convey to the purchaser any sovereign rights in the lands. It therefore follows that the applicant's predecessor got no more than proprietary rights in the demised lands in perpetuity discharged only from all demands for land revenue on the part of the Crown.

It was next urged for the applicant that as there was an apparent repugnancy between the rights created under the grant, Ex. P-1, and the statutes, viz., the Land Revenue and the Tenancy Acts, because the provisions of the latter undoubtedly interfere with the right of the applicant to settle tenants on the demised lands on his own terms the terms of the grant ought to prevail under the express legislative provision to that effect contained in S. 3, Crown Grants Act (15 of 1895). This contention is indeed very plausible but equally untenable. The Act in question, as its preamble shows, was only designed to remove doubts that arose as to the extent and operation of the Transfer of Property Act, 1882 and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority and it was therefore enacted that such grants or transfers shall take effect according to their tenor notwithstanding any rule of law or statute

(2) [1875] 1 Cal. 11=24 W. R. 309.
(3) [1881] 3 All. 829=(1881) A. W. N. 87.
(4) [1905] 27 Bom. 189=5 Bom. L. R. 30.

to the contrary. S. 3 of this enactment was so interpreted by their Lordships of the Privy Council in *Sheo Singh* v. *Raghubans Kunwar* (5) where the right of primogeniture expressly created by the sanad was held to prevail over the rule of inheritance under the Hindu law.

As already noticed before, except that the ownership in the waste lands was absolutely conveyed free from the demand of land revenue there is nothing either in the Waste Lands Sales Rules or in the terms of the sanad (Ex. P-1) to indicate that the Crown agreed to exempt the predecessor of the applicant from being subject to future legislation which might possibly affect his unfettered enjoyment of the demised property. There being thus no provisions, restrictions, conditions and limitations contained in Ex. P-1. S. 3, Crown Grants Act, 1895 has no application whatsoever to the present case. The Crown in the present case did not put any restrictions or limitations on the grant but on the contrary the applicant is desirous of imposing limitations on the prerogative of the Crown in the matter of legislation. It follows then that the lands purchased by the applicant's predecessor are subject to the provisions of the Land Revenue and Tenancy Acts, provided they come within the purview of those enactments, just in the same way as land in the proprietary possession of any other of His Majesty's subjects. The case of *Dadoba* v. *Collector of Bombay* (6) cited for the applicant has no bearing upon the present question. All that was decided in that case was that where an out and out sale of property is made by the Crown subject to the payment of definite assessment the Government is estopped from enhancing the rate by virtue of a subsequent enactment. In the present case it is admitted, that the Government did not on any occasion, claim to assess the land revenue upon the lands purchased by the applicant under P-1.

It was lastly urged that as according to its preamble, the Land Revenue Act, 1881 was designed only to amend the law relating to land revenue it could not apply to the applicant's lands which were admittedly sold free from all demands of land revenue. But the Act in question is not restricted to amend the law relating to land revenue only, for it also purports to consolidate and amend the law relating to the powers of Revenue Officers and further deals with various other matters concerning the rights of proprietors and raiyats holding lands in those provinces. This would be clear even from a cursary perusal of the several chapters of the Act. It is not disputed before us that the Indian Legislature had under its delegated authority from the Crown, the power to enact the C. P. Land Revenue and Tenancy Acts. It is equally undisputed and has also been clearly pointed out by their Lordships of the Privy Council in *Dattatraya Kane* v. *Secy. of State* (7) that a particular piece of legislation may operate, as all legislations may operate to take away vested rights or to alter vested rights of anyone who is in fact, subject to that legislation unless saved by its own provisions. There was in fact, a definite provision in S. 48, Land Revenue Act, 1881 which expressly exempted land like those of the applicant from being subject to the assessment of land revenue because of their having been sold under the Waste Land Sales Rules free from all demands of land revenue.

That exemption of waste lands from payment of land revenue does not ipso facto exempt such land from the operation of the Land Revenue and Tenancy Acts was clearly recognized by this Court in *Ganpatrao* v. *Kuar Daulatsha* (8). In that case a proprietor of waste land was held not to have lost his cultivating rights in the *sir* lands which but for these enactments he would have lost, upon the transfer of the proprietary rights by sale. It was further held that the Settlement Officer had the power to declare such waste lands area as a mahal and to declare the permanent home-farm land of the proprietor as *sir* under S. 69, Land Revenue Act, and that when this was done the provisions of S. 42, Tenancy Act applied to the case.

In *Durga Patel* v. *Ganpati Patel* (9) and *Bhikaji* v. *Tukaram* (10) it was also held that the C. P. Tenancy Act applied to every sort of agricultural tenancy in these provinces, and as already noticed

(5) [1904] 27 All. 634=8 O. C. 317 (P.C.).
(6) [1901] 25 Bom. 714=3 Bom. L. R. 603.
(7) A. I. R. 1930 P. C. 267=128 I. C. 664=57 I. A. 318 (P.C.).
(8) [1920] 55 I. C. 573.
(9) [1885] 9 C. P. L. R. 27.
(10) [1911] 7 N. L. R. 17=10 I. C. 697.

before, since the terms of the applicant's sanad (P-1) do not, even by implication, exclude the applicability of future legislation in the matter of agricultural tenancies to the demised lands it follows that the relations of the appplicant with his tenants must be governed by this enactment. The case of *Gopal Hari* v. *Secy. of State* (11) cited for the applicant, has no bearing upon the questions under reference. The only point decided in that case was that when a waste land plot is sold free from the payment of land revenue, the purchaser of such land could not be made liable for the patwari's remuneration under the provisions of the C. P. Land Revenue Act.

Although the decisions of the Judicial Committee in *Dattatraya Kane* v. *Secy. of State* (7) may be distinguished on facts certain pronoucements therein have undoubtedly a great bearing on the solution of the questions in issue in the present case. In that case certain persons who had originally taken leases of waste land in Berar, under the Waste Land Sale Rules of 1895, but had subsequently purchased proprietary interest in the said land, as provided by the said rules, had sued the Secretary of State for India for a declaration that the Berar Tenancy Act was ultra vires on the ground that it encroached upon their vested rights to manage the land by settling tenants thereon upon their own terms which admittedly conflicted with the provisions of the new enactment. The suits were held not maintainable both because the terms of the grants under which the plaintiffs got their title to the land had expressly provided for their being held subject to future regulation also and for the reason that even without such a provision the legislature was competent to take away the existing vested rights of the plaintiffs. This is what their Lordships observe at p. 332 of the report:

"There is a further point which has specially impressed the appeal Court, namely, that the terms under which the plaintiffs themselves held their right expressly provide that they are subject to such regulations as may be made in future by the Government of India; that the provisions of the Berar Tenancy Act if not legislative would at any rate be regulations made by the Government of India, and that the plaintiffs therefore complain. It is unnecessary to discuss this contention, for in their Lordships' opinion, it is quite clear that this is legislation by a legislature which is competent to deal with existing rights and vary them."

(11) [1890] 3 C. P. L. R. 100.

For the reasons set forth above I would answer the first question in the negative and the last two in the affirmative.

Niyogi, A. J. C.—I agree with the opinion recorded by Subhedar, A. J. C.

Grille, A. J C.—I have nothing to add.

R. K. *Reference answered.*

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* A. I. R. 1932 Nagpur 79
Full Bench

SUBHEDAR, NIYOGI AND STAPLES, A. J. Cs.

Nilkanth and *others*—Appellants.

v.

Narayan—Respondent.

Appeal No. 391 of 1929, Decided on 3rd September 1931, against appellate decree of Addl. Dist. Judge, Wardha, D/- 29th April 1929.

*** (a) Hindu Law — Succession — Benares School—Brother's son of half blood excludes brother's grandson of full blood.**

The brother's grandsons are no doubt included in the compact series of heirs but the inheritance does not devolve on the brother's sons and brother's grandsons jointly. The brother's son therefore though of half blood excludes the brother's grandson though of full blood.

[P 82 C 1, P 83 C 1, 2]

(b) Hindu Law—Succession — Representation.

The doctrine of representation is applicable in case of agnatic lineal succession. In respect of collateral succession however the rule is different.

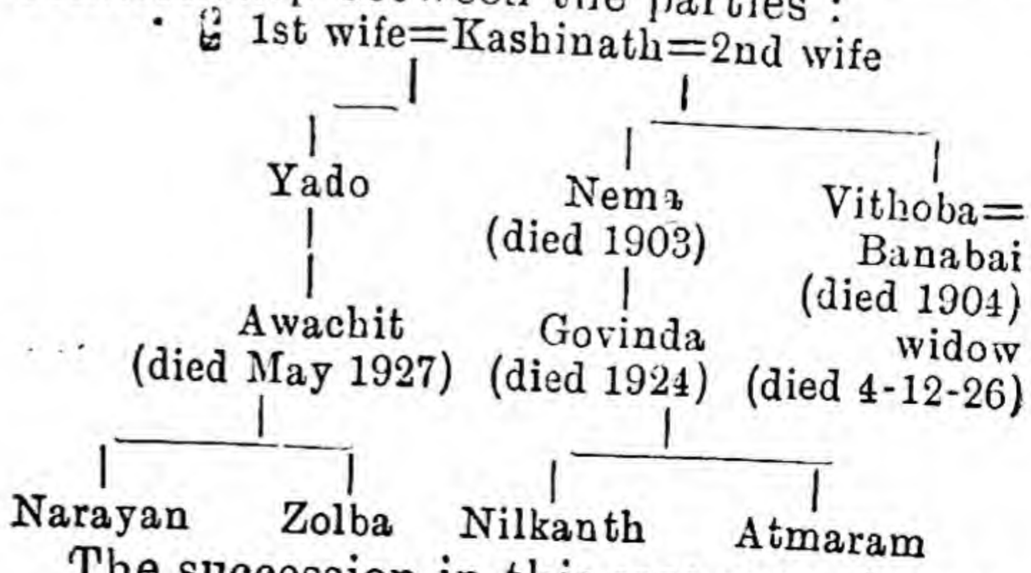
[P 82 C 2]

A. V. Khare and *W. B. Pendharkar*—for Appellants.

M. B. Kinkhede and *D. W. Kathalay* for Respondent.

Order of Reference

Staples, A. J. C.—The point to be decided in this appeal is whether the son of a half-brother is a preferential heir to the grandsons of a full brother. The following genealogical tree will show the relationship between the parties :



The succession in this case opened upon the death of Banabai, the widow of

Vithoba, on 4th December 1926. At that date Awachit, the father of the plaintiff-respondents, was alive. Both the lower Courts have held that he was a preferential heir to the defendants-appellants, who were the grandsons of Nema. It may be noted that Yado was Kashinath's son by one wife and that Nema and Vithoba were his sons by another wife. The question of succession when brothers of full-blood and half-blood are concerned has been considered in *Narain* v. *Hamraji* (1), which was however overruled by *Laldas* v. *Gurudas* (2). Both those cases have referred to *Ganga Sahai* v. *Kesri* (3), but in neither case is there any reference to *Buddha Singh* v. *Laltu Singh* (4). Now, the point which is at issue in the present case has, I think, been expressly considered in this latter case, and it has been held therein that the word "putra," or son, includes grandson and great-grandson. According to this view, then, the appellants who are the grandsons of the full brother Nema, would be preferential heirs to Awachit who was the son of the half brother Yado. This matter has again been considered in a recent case of the Bombay High Court in *Appaji Jijaji* v. *Mohanlal Raoji* (5), and a distinction has been made as regards the Bombay School of law. In the present case however the parties come from Wardha and are therefore residents of the Central Provinces and, as such, are governed by the Mitakshara as interpreted by the Benares School of law, as held in *Ganoo* v. *Beni* (6).

The learned counsel for both parties now ask that a reference may be made to a Bench, and as there is a question of law of some importance involved, I agree to their request. The question to be decided in the reference has been formulated as follows :

"Whether, for the purpose of preference between full blood and half blood, the word "putra" or "suta" includes grandson, when the competition is between the son of a half brother and the grandson of a full brother, by predeceased son."

I make the reference accordingly.

(1) A. I. R. 1926 Nag. 218 = 91 I. C. 989 = 21 N. L. R. 163.
(2) A. I. R. 1929 Nag. 2 = 113 I. C. 893 = 24 N. L. R. 172.
(3) A. I. R. 1915 P. C. 81=30 I. C. 265=42 I.A. 177=37 All. 545 (P.C.).
(4) A. I. R. 1915 P. C. 70=30 I. C. 529=42 I.A. 208=37 All. 604 (P.C.).
(5) A. I. R. 1930 Bom. 273=127 I. C. 385=54 Bom. 564 (F.B.).
(6) [1916] 14 N. L. R. 82=43 I. C. 943.

At a subsequent hearing of the case the original question was split up into three questions as set forth below :

"(1) Where, on the death of a Hindu widow, the nearest relatives of her husband are a brother's son and another brother's son's sons, do they all inherit simultaneously on the ground that all are members of the class of heirs described as " brothers' sons " (bhratrusutah) ?

(2) If not, which of them is the preferential heir to the propositus, her husband ?

(3) How would the decision of the above question be affected by the fact that the brother's son is of half blood, and brother's grandsons are of full blood ?"

Opinion

Niyogi, A. J. C.—The points referred to the Full Bench for determination are as follows :

"(1) Where, on the death of a Hindu widow, the nearest relatives of her husband are a brother's son and another brother's son's sons, do they all inherit simultaneously on the ground that all are members of the class of heirs described as "brothers' sons" (bhratrisutah) ?

(2) If not, which of them is the preferential heir to the propositus, her husband?

(3) How would the decision of the above question be affected by the fact that the brother's son is of half blood, and brothers' grandsons are of full blood?"

For elucidation of the points at issue it is necessary to refer to the following pedigree : (q. v. page 79).

The succession in this case opened upon the death of Banabai, the widow of Vithoba, on 4th December 1926, when Awachit, the father of the plaintiffs, Narayan and Zolba, was alive. The contest is between Awachit, in whom the inheritance vested on the death of Banabai, and the defendants Nilkanth and Atmaram. Awachit is Vithoba's half-brother's son and Nilkanth and Atmaram are Vithoba's full brother's grandsons. Awachit instituted the suit, but having died during the pendency of the suit his sons Narayan and Zolba were brought on record.

The controversy in this case relates to the interpretation of the word "Bhratru-

putrah" occurring in the undermentioned passage in the Mitakshara :

"On failure of brothers also, their sons share the heritage in the order of the respective fathers:" Colebrook's Mitakshara, Ch. 2, S. 47 :

"If there be not even brother's sons, gentiles share the estate:" Colebrook's Mitakshara, Ch. 2, S. 5, Vol 1.

The Yajnyawalkya's text which is the subject of commentary in the Mitakshara is as under :

"The lawful wife, and the daughters also both parents, brothers likewise, and their sons, gentiles (or agnates, cognates), a pupil or a fellow student : on failure of the first among these, the next in order would be the heir to the estate of one who departed for the heaven leaving no male issue. This rule extends to all classes:" Gopal Chandra Sarkar's Hindu Law, p. 417, 5th edition.

It is argued for the appellants that the word "Tatputrah," their sons, following the expression "on failure of brothers also," is used in an extended sense so as to include the brothers' grandsons. It must be noticed that the word used in Yajnyawalkya's text relating to brother's sons is "Tatsutah;" and not "Tatputrah" although in the Mitakshara the word used is "Tatputrah" and "Bhratruputranam." The interpretation of these words is essential mainly for the purpose of determining succession in relation to the grandmother. While dealing with this aspect of the law of inheritance Mitakashara lays down that the grandmother comes immediately after the brother's son, as will appear from the following passage :

"No place however is found for her in the compact series of heirs from the father to the nephew;"

and then says :

"She must therefore of course succeed immediately after the nephew:" Colebrook's Mitakshara, Ch. 2, S. 5, Vol. 2.

Thus it would appear that Vijnaneswara, the author of the Mitakshara, regards the compact series of heirs, to terminate with brother's son, and fixes the place of grandmother immediately after the exhaustion of the compact series ending with brother's sons. If this view is accepted, brother's grandsons are excluded from inheritance by the simple fact that while the brother's son is expressly mentioned in the compact series of heirs the brother's grandsons are not. In order to secure a place in the compact series of heirs along with the brother's sons, the learned counsel for the appellants relies on the line of reasoning followed by their Lordships of the Privy Council in considering the passage in Mitakshara relating to the order of succession among the gotrajas, that is, gentiles. Their Lordships of the Privy Council were dealing with the following text :

"On failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons:" Colebrook's Mitakshara, Ch. 2, S. 5, Vol. 4.

After an exhaustive review of the opinions of the ancient commentators and the modern scholars, like Dr. Raj Kumar Sarvadhikari and Sham Charan Sarkar, their Lordships enunciated the principle of construction at p. 623 as follows :

"In the Mitakshara, as expounded in the Benares School, the word "putra" and its synonym employed by Vijnaneswara in connexion with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the third degree before making the ascent to the line next in order of succession."

In the course of discussion their Lordships referred briefly to the opinion expressed by Shama Charan Sarkar in his Vyavastha Chandrika in these terms :

"This learned Hindu writer states in Principle 153 that 'a brother's grandson succeeds in default of a brother's son' and refers to the decision of the Calcutta High Court in *Kureem Chand Gurain* v. *Oodung Gurain* (7), without taking any exception to its correctness."

Then their Lordships referred to the question propounded and the answer given by the learned author :

"It may be asked that when in law the term "son" (put-tra) is inclusive of the grandson and great-grandson, why then the term 'brother's son' does not include also the "brother's great grandson" ?"

The answer is, he says:

"that in law calculation is made from the son of the common ancestor, which here is the father of both the deceased and his brother, consequently the term 'son' (of that ancestor) is inclusive of his great-grandson, who is the brother's grandson."

The result of this process of interpretation is that the parents and "their three successive descendants" take first ; then the paternal grandmother and the paternal grandfather and "their three successive descendants" come next, and so on : see *Buddha Singh* v. *Laltu Singh* (4). Obviously according to their Lordships' view the "brother's grandson" must be included in the compact series of heirs, contrary to what is found in the Mitakshara. On account of this conflict bet-

(7) [1866] 6 W. R. 158.

ween the Mitakshara and the view enunciated in *Buddha Singh* v. *Laltu Singh* (4) when this question arose in the Bombay High Court it was referred to a Full Bench: see *Appaji Jijaji* v. *Mohan lal Raoji* (5). Their Lordships of the Bombay High Court did not see their way to adopt the line of reasoning peculiar to the Benares School found in *Buddha Singh* v. *Laltu Singh* (4) in view of the long-standing usage and current authorities in Western India, which exclude the brother's grandson from the compact series of heirs. But inasmuch as in the present case it is admitted that the parties are governed by the Benares Law, the law enunciated in *Buddha Singh* v. *Laltu Singh* (4) must be accepted as a binding authority.

Conceding that the brother's grandsons are included in the compact series of heirs the next question which arises for determination is whether, as contended on behalf of the appellants the inheritance devolves on the brother's sons and brother's grandsons jointly? Having regard to the fact that the brother's grandson stands one degree below the brother's son they cannot be joint heirs unless the doctrine of representation is extended to the case. The Hindu law provides for two sorts of heritage as will appear from the undermentioned text of the Mitakshara:

"It is of two sorts: unobstructed (a-pratibandha) or liable to obstruction (sa-pratibandha). The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons. And that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest upon the demise of the owner, if there be no male issue: and thus the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves (on the successor) in right of his being uncle or brother. This is an inheritance subject to obstruction:" Colebrook's Mitakshara, Ch. 1, S. 1, verse 3.

The reason is that the son was considered as the father's body which was supposed to remain the same up to the great-grandson. A necessary corollary to this was that the son, grandson, and great-grandson were all equal, the only distinction being that the grandsons took their father's share and were entitled to the inheritance with the sons per capita and not per stirpes: see Ghosh's Hindu Law, Vol. 1, p. 85, Edn. 3.

The doctrine of representation is applicable only in case of agnatic lineal succession, the "a-pratibandhadaya"; in respect of collateral succession, that is "sa-pratibandhadaya," however the rule is different. It is expressed in the Mitakshara as follows:

"He who has no son of any among the twelve descriptions above stated is one having 'no male issue.' Of a man thus leaving no male progeny, and going to heaven or departing for another world, the heir or successor is that person, among such as have been here enumerated (viz., the wife and the rest) who is next in order on failure of the first mentioned respectively;" Colebrooke's Mitakshara, Ch. 2, S. 1, verse 3.

This is a comment in the Mitakshara on the Yagnawalkya's text already quoted above. The rule is "to the next sapinda the inheritance next belongs;" see Sarwadhikari's Law of Inheritance, p. 443. This rule is recognized by the Privy Council in *Ramchandra* v. *Vinayak* (8) and *Buddha Singh* v. *Laltu Singh* (4) and is beyond any challenge. The appellants rely on the opinion expressed by Sir Hari Singh Gour in his learned work on Hindu Law at p. 946, where a deduction is sought to be drawn from the principle enunciated in *Buddha Singh* v. *Laltu Siagh* (4) that the three generations, viz., the son, son's son and son's son's son must be read simultaneously, with the generic interpretation of the term "suta or putra." This conclusion would obviously be erroneous in respect of the property inherited from the collaterals "sa-pratibandhadaya," which according to the rules of Hindu law devolves per capita and never per stirpes. Reference is made to *Jagubhai* v. *Kesarlal* (9); that decision can have no application to the present case since it was given in connexion with a case governed by Mayukh. The contention was raised in *Shersingh* v. *Basdeo Singh* (10), but it was negatived. The appellants' argument consequently fails.

The next point for decision is which of the two contesting parties is the preferential heir? The rule as stated in the Mitakshara is as under:

"On failure of brothers also, their sons share the heritage in the order of the respective fathers. In case of competition between brothers and nephews, the nephews have no title to the succession; for their right of inheritance is declared to be on failure of brothers."

(8) A. I. R. 1914 P. C. 1=125 I. C. 290=41 I.A. 290=42 Cal. 384 (P.C).
(9) A. I. R. 1925 Bom. 406=94 I.C. 686=49 Bom. 282.
(10) A. I. R. 1928 All. 612=110 I. C. 712=50 All. 904.

According to Apararka the son of the nephew is more remote than the nephew himself: see Sarvadhikari's Law of Inheritance, p. 331. The same is the opinion of Nand Pandit in his commentary on Vishnu-Sanhita, styled Kesheo Vaijayanti. He expresses his opinion in these terms:

Their order is as follows:

'Among father s descendants on failure of the brother's son the brother's grandson succeeds." Ghosh's Hindu Law, Vol. 3, p. 162.

In the table of heirs found in Mayne's Hindu Law at p. 836-A, the nephew is shown as No. 10 and grandnephew as No. 11, in the order of succession among sapindas. I have already pointed out above that their Lordships of the Privy Council have accepted the view of Sham Charan Sarkar that "a brother's grandson succeeds in default of a brother's son:" see *Buddha Singh* v. *Laltu Singh* (4). It cannot be disputed that a nephew being one degree nearer in sapindaship to the propositus excludes the grand-nephew: see *Sher Singh* v. *Basdeo Singh* (10).

Next it is argued for the appellant that although grandnephews are one degree more remote than the nephew, they being the grandsons of the full brother of the propositus would exclude the nephew being the son of the half-brother of the propositus. The rule of exclusion applies only when the rival claimants stand in the same degree of propinquity to the propositus, such as half-brother and full-brother half-brother's son and full-brother's son or half-brother's grandson and full-brother's grandson. Half-brother's son being the grandson of the father of the propositus, altogether excludes the grand-nephew, who is the great-grandson of the father of the propositus, on the principle: "To the nearer sapinda the inheritance belongs." Although the half-brother's son may suffer in competition with the full-brother's son he cannot be postponed to the brother's grandson as he belongs to the next higher class of brother's son. A nearer half-blood sapinda excludes a remote full-blood sapinda: see *E. O. Muthusami Mudaliyar* v. *S. Muthukumaraswami Mudaliyar* (11). In *Kesri* v. *Ganga Sahai* (12) the contest between an uncle of the half-blood and the son of an uncle of full-blood was decided in favour of the former on the same principle. Their Lordships of the Privy Council enunciated the principle in these terms: "Preference of the whole-blood to the half-blood is confined to members of the same class;" or, to use the language of the Judges of the High Court in *Suba Singh* v. *Sarfaraz Kunwar* (13), to "sapindas of the same degrees of descent from the common ancestor:" see *Ganga Sahai* v. *Kesri* (3). In this case their Lordships held that:

"where the choice of heirs lay between sapindas of different degrees, an uncle of the half-blood, as being less remote from the common ancestor is a preferential heir to the sons of an uncle of the whole-blood."

Thus, the appellants' last contention is also devoid of any force.

I would therefore answer the question referred to the Full Bench as follows:

(1) The brother's son and another brother's son's son do not inherit simultaneously.

(2) The brother's son is the preferential heir.

(3) The brother's son, though of half-blood, excludes the brother's grandson, though of full-blood.

Subhedar, A.J.C.—I fully agree with the learned opinion recorded by Niyogi, A. J. C. and have nothing to add.

Staples, A. J. C. — I agree on all points.

R.K. *Reference answered.*

(11) [1896] 19 Mad. 405=23 I. A. 83=7 Sar 45 (P.C.).

(12) [1910] 32 All. 541=6 I.C. 364.

(13) [1897] 19 All. 215=(1897) A. W. N. 53 (F.B.).

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SUBHEDAR, A. J. C.

Ramchandra—Applicant.

v.

Shankarrao—Opposite Party.

Criminal Revn. No. 408 of 1931, Decided on 6th January 1932.

(a) Criminal P. C. (1898), S. 147 — Interlocutory orders must not in substance amount to final orders.

An interlocutory order that till the decision of the case the non-applicant should not interfere with the alleged right of the applicant (obstruction to door) amount to a final order in favour of one of the parties ; such order cannot be passed under S. 147, and is illegal. [P 84 C 1]

(b) Criminal P. C. (1898), S. 146 — Pendency of civil suit—Proceedings under S. 145 should be dropped.

On filing of a civil suit the proceedings under S. 145 should be dropped as no danger of the breach of peace exists any more. [P 84 C 2]

(c) Criminal P. C. (1898), S. 145—Breach of peace—Breach of peace possible only if applicant acts illegally—Order in his favour should not be passed.

Where the possible breach of peace can arise only on an illegal act of the applicant himself order in his favour should not be passed.

The abatement of an obstruction of alleged easement by the dominant owner himself, being illegal under S. 36, Easements Act, order under S. 147, Criminal P. C., should not be passed in his favour as it is he who should approach the civil Court. [P 84 C 2]

P. S. Kotval—for Applicant.

M. R. Bobde—for Opposite Party.

Order.—This is an application for revision of the order passed by the Subdivisional Magistrate, Chanda, under S. 147, Criminal P. C., directing the second party, Ramchandrarao, to remove the obstruction put up by him to the door in the compound wall of the first party Dr. Shankarrao so as to ensure the exercise by the latter of his right to use the well which is situate in the compound of the former. The order also directed that in default

"such steps as will be deemed necessary to execute this order will be taken."

The case of the first party, as disclosed in the original application, his examination on oath and the written statement submitted by him, was that he had acquired a right of easement, by prescription, to use the water in the well belonging to the second party, and that a day previous to the filing of the application the second party had blocked up the door through which he used to pass upon the land of the second party to go to the well and draw water therefrom. It was also alleged that in case the first party asserted his right to use the pathway to go to the well by removing the obstruction there was apprehension of a breach of the peace because of the menacing attitude of the other party.

On 19th October 1931 the Subdivisional Magistrate passed a preliminary order calling upon the parties to file their written statements on 23rd October 1931. The Magistrate also ordered

"that till the decision of this case the non-applicant Ramchandrarao shall not in any way interfere with the exercise of the alleged right by the applicant."

Since there is no provision under S. 147, Criminal P. C., for passing such an interlocutory order which in terms is nothing short of the final order contemplated by sub-S. 2 of the section, the same was obviously illegal and although the District Magistrate was moved by the second party to take steps to have it cancelled it is regrettable that he did not interfere in the matter.

On 5th November 1931 the second party brought to the notice of the Subdivisional Magistrate that he had already filed a civil suit about this dispute and prayed that the proceedings be dropped. The Magistrate thereupon recorded the following in his order sheet :

"Obviously then there is no point in proceeding with this case but the difficulty is about the interlocutory order passed by me. Mr. Hastak says that he will move the civil Court or any other competent authority to have the interlocutory order cancelled. In the meantime I adjourn the case to 7th November 1931."

These observations clearly go to show that but for the interlocutory order which he had illegally passed along with his preliminary order, the Magistrate would have dropped the proceedings, apparently on the ground that since the matter had gone to the civil Court there was no likelihood of a breach of the peace. However after the rejection of the revision petition by the District Magistrate the Subdivisional Magistrate proceeded to examine the witnesses and passed the order which is the subject of the present revision.

After hearing the learned counsel on both sides at considerable length I am clearly of opinion that the order sought to be revised is unsustainable for more reasons than one. In the first place, under the circumstances brought to his notice on 5th November 1931 the Magistrate should have felt no difficulty in dropping the proceedings as obviously after the filing of the civil suit any danger of breach of the peace that may have existed at the time of the filing of the application had ceased to exist then. In the next place, on the admissions of the first party it was clear that any breach of the peace that may have ensued would have been the result of his own illegal action in removing the obstruction, for under S. 36, Easements Act, notwithstanding the provisions of S 24, the dominant owner could not himself abate a wrongful obstruction of an easement. Under the admitted circumstances of the case Dr. Shankar Rao should himself have gone to the civil Court to enforce his alleged right of easement even though the same was illegally obstructed by the second party instead of attempting to abate the

obstruction himself by taking the law in his own hands. Thirdly since after the preliminary order he himself did not choose to enter the witness-box at the evidence stage, the first party failed to establish the prescriptive easement claimed by him. None of the witnesses examined on his behalf prove that the right claimed had been peaceably and openly enjoyed by him as an easement and as of right without interruption and for 20 years as pleaded by him.

For all these reasons I set aside the order sought to be revised and order the dismissal of the application presented by the first party on 19th October 1931.

W.D./R.K. *Revision allowed.*

A. I. R. 1932 Nagpur 85 (1)

SUBHEDAR, A. J. C.

Ramrao—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 148-B of 1931, Decided on 24th November 1931, against order of Sess. Judge, Akola, D/- 25th August 1931.

Criminal P. C. (1898), Ss. 437 and 439—Accused charged under S. 366, Penal Code—Prosecution evidence disclosing offence under S. 376—Application by accused to amend charge rejected—Order amounts to discharge under S. 376, and can be revised.

Where persons are charged under S. 366, Penal Code, but the offence disclosed by the prosecution evidence itself is one not only under S. 366 but also one under S. 376, the order of the trying Magistrate rejecting the accused's application to amend the charge amounts in substance to an order discharging the accused in respect of an offence under S. 376 and the same can be revised both by the High Court and Sessions Court: 24 *Mad.* 130, *Foll.*; 41 *I. C.* 658, *not Foll.*

[P 85 C 2]

W. B. Pendharkar—for Applicants.

V. Bose—for the Crown.

Order.—One Govinda was convicted under S. 366, I. P. C., in Criminal Case No. 199 of 1930, on the file of the Subdivisional Magistrate, Basim, for kidnapping Mt. Vithi. The Magistrate who tried that case came to the conclusion that along with Govinda there were certain other persons involved in the case who should also have been proceeded against along with Govinda. After further investigation the police presented a challan under S. 366, I. P. C., against Ramrao, Sahebrao and Dhullbarao. The case is pending in the Court of Mr. Alay Hassan, Subdivisional Magistrate, Basim. After the prosecution evidence was concluded the accused were examined on 3rd July 1931 and were charged under S. 366, I. P. C. On 20th July 1931 the accused presented an application to the trying Magistrate for amendment of the charge to one under S. 376, I. P. C., as the evidence of Mt. Vithi (P. W. 3) and Govinda (P. W. 14) clearly disclosed an offence that two of the accused also had sexual intercourse with Mt. Vithi. This application was summarily rejected by the Magistrate.

The accused thereupon moved the Sessions Judge, Akola, asking him to order the Magistrate to commit the case to the Court of Session for trial of the offence under S. 376, I. P. C. This application was also rejected by the Sessions Judge, and the accused therefore have come to this Court in revision.

After hearing the applicant's counsel and the learned Government Advocate, I am clear that the offence disclosed by the prosecution evidence itself is one not only under S. 366, I. P. C., but also one under S. 376, I. P. C. The order of the trying Magistrate was in substance an order discharging the accused in respect of the alleged offence under S. 376, I. P. C. It follows then that both the Sessions Court as well as this Court have got powers to revise it: *Krishna Reddi* v. *Subbamma* (1). I am aware that a contrary view was taken in *Abdul Hakim* v. *Bazbuk Ali* (2) but in my opinion the view propounded in the Madras case is more sound. I therefore direct the Subdivisional Magistrate to commit the accused for trial before the Court of Session on charges under Ss. 366 and 376, I. P. C.

W.D./R.K. *Revision allowed.*

(1) [1901] 24 Mad. 136=2 Weir 544.
(2) [1918] 18 Cr. L. J. 834=41 I. C. 658.

A. I. R. 1932 Nagpur 85 (2)

SUBHEDAR, A. J. C.

Emperor

v.

Janki and *another*—Opposite Parties.

Criminal Revn. No. 172-B of 1931, Decided on 12th January 1932, case referred by the Sessions Judge, Akola.

Criminal P. C. (1898), S. 488—Court where temporary residence takes place has jurisdiction.

Where temporary residence extends to a period of about two months the Court where such tem-

porary residence takes place last will have jurisdiction to entertain the application for maintenance. [P 86 C 2]

V. G. Tambe and *V. K. Rajwade*—for the Crown.

V. B. Sapre— for Opposite Parties.

Order—This is a reference under S. 438, Criminal P. C., made by the Sessions Judge, Akola, recommending that the view of Mr. Shamrao Ramchandra, Honorary Magistrate, First Class, Akola, that he had no jurisdiction to entertain the application under S. 488, Criminal P. C., was wrong and that he be directed to dispose of the case on merits.

The facts found are that Mt. Janki and her husband Ratan who are dhobis by caste are residents of Mauza Anjangaon, Tahsil Daryapur, District Amraoti. In March last they came to Akola and put up with a common relative and stayed with him for two months, the husband occasionally going to his village. The object of their visit was to be treated at Akola for some ailment common to both. After his return home Ratan married another wife and therefore Mt. Janki applied for maintenance under S. 488, Criminal P. C.

The Session Judge held that even temporary residence at Akola of the husband who had a permanent residence in the Amraoti District did confer jurisdiction upon the Akola Courts to entertain the application within the meaning of S. 488 (8), Criminal P. C. This is no doubt against the view expressed by Patkar, J., in *Khairunissa* v. *Bashir Ahmed* (1), but in that case the parties had no permanent residence anywhere. In *Sama Jetha* v. *Bai Wali* (2) it was however held by a Bench of the same Court that the expression "last resided" in Cl. (8), S. 488, Criminal P. C., meant both a permanent as well as a temporary residence. The principle laid down in *Sher Singh* v. *Amir Kuer* (3) and *Mrs. E. H. Jolly* v. *St. J. W. Jolly* (4) was approved in this case. The case of *Ram Dei* v. *Jhunnilal* (5), cited for the non-applicant is easily distinguishable on facts from the present case. There the husband who had been living for a number of years at Lahore took his wife at Lucknow and left her there declaring that he would support her no longer and the question arose on a claim for maintenance being brought by the wife at Lucknow, whether the Lucknow Court had jurisdiction to award her a maintenance under the section in question. The mere casual stay of the husband at Lucknow was held not to give jurisdiction to the Lncknow Court. The weight of authority then appears to be in favour of the view that the case of the present type where temporary residence extends to a period of about two months the Court where such temporary residence takes place last, will have jurisdiction on to entertain the application for maintenance.

For these reasons I accept the reference and remand the case for disposal to the trying Magistrate on merits.

K.N./R.K. *Reference accepted.*

(1) A. I. R 1929 Bom. 410=(1929) Cr. C. 462=122 I. C. 59=53 Bom. 781.
(2) A. I. R. 1930 Bom. 348=127 I. C. 179=31 Cr L. J. 1157=54 Bom. 548.
(3) A. I. R. 1927 All. 291 = 101 I. C. 670=28 Cr. L. J. 494=49 All. 479.
(4) [1917] 18 Cr. L. J. 706=40 I. C. 706.
(5) A. I. R. 1926 Oudh 268=95 I. C. 596= 27 Cr. L. J. 820.

A. I. R. 1932 Nagpur 86

SUBHEDAR, A. J. C.

Jhummaklal—Applicant.

v.

Sunderlal—Opposite Party.

Criminal Revns. Nos. 384 and 385 of 1931, Decided on 11th January 1932, against order of Subdivisional Magistrate, Mahasamund.

Criminal Trial—Stay of pending civil suit—Rule enunciated.

When the very constitution of the committee of trustees which authorized a particular individual from amongst them to lodge on its behalf a criminal complaint against the manager of the trust property, is challenged as invalid in a previously instituted civil suit, the trial of the criminal cases should be kept pending till the decision of the civil suit as the fundamental question of the legal constitution of the trust committee is common for decision in both the Courts. If it is held that there was no proper committee of trustees in existence, at the date of the alleged authorization, the person authorized will have no right to lodge the complaints under S. 409, Penal Code, in respect of the temple properties in charge of the applicants. The criminal Court is undoubtedly not precluded from deciding this important preliminary question but since the civil suit was already filed before the criminal proceedings were lodged, it is but just and expedient that, in order to avoid a possible conflict of decision on the point between civil and criminal Courts, and more especially for the reason that the trial of the civil suit may not be prejudiced in any way that the earlier instituted civil proceedings should have precedence of trial and the crlminal proceedings stayed.

[P 87 C 2, P 88 C 1]

H. S. Gour and *J. Sen*—for Applicants.

D. N. Choudhry—for Opposite Party.

Order.—This and the other Criminal Revision No. 385 of 1931 are directed against two orders passed by Mr. Dwivedi, Subdivisional Magistrate, Mahasamund refusing to stay the trial of Criminal Cases Nos. 90 and 91 of 1931 on his file instituted by the non-applicant Sundarlal against the applicants pending the disposal of the civil suit wdich the applicant Jhummaklal has filed against Sundarlal and certain other persons. Since the Sessions Judge declined to interfere in the matter the applicants have moved this Court in revision.

Sundarlal, the complainant in both the cases, is one of the sixteen persons who were originally appointed as trustees of Rajim Lochan Temple under the decree of this Court passed in First Appeal No. 76 of 1920, dated 19th March 1921. In both the cases it is alleged that the accused who were in charge of the temple properties pledged some ornaments of the idol and misappropriated the proceeds for their own use, thus committed offences under S. 409, I. P. C. Both the complaints were filed on 12th October 1931.

On 4th September 1931 the applicant Jhummaklal, who as the Sarbarakar managed the trust properties through the applicant Kashiram, had received a notice from the trustees of the temple terminating his appointment as the Sarbarakar. Thereupon, on 12th October 1931,he filed Civil Suit No. 70 of 1931 in the Court of the Additional District Judge, Raipur, alleging that the Board of Trustees which passed the order of dismissal against him was not duly constituted and prayed for a declaration that he was the Sarbarakar and that the defendants including the present complainant Kashiram had no right to interfere with him. He also prayed for a permanent injunction against the defendants not to interfere with his management of the temple properties.

Last year the present non-applicant Sundarlal had filed a complaint against the applicant Kashiram charging him with an offence under S. 406, I. P. C., in respect of misappropriation of rents amounting to about Rs. 5,000 belonging to the temple. That complaint was dismissed by the trying Magistrate who discharged the accused, but the Additional Sessions Judge, having directed further inquiry, the matter came up to this Court in revision. I then held that since no individual trustee of the temple under its constitution was competent either to ask for renditon of accounts from the accused as to his management, or to file a complaint against him charging him with criminal breach of trust, the order discharging the accused was valid. In disposing of the revision I had further observed as follows:

"But it is perfectly open to the complainant, to have the committee of trustees reconstituted under the terms of the decree and to get such committee, when constituted, to call upon the accused to render account and on the latter's failure to do so to take such steps civil or criminal on behalf of the committee as he may be advised to take."

It is alleged in the last paragraphs of both the present petitions of complaints that

"by the special meeting of the panch committee held on 10th October 1931 the complainant has been authorized to file a complaint against the accused."

This alleged special authorization by the trustees appears to have been made in compliance with the direction which I have given in the last criminal revision with a view to validate the initiation of the present criminal proceeding against the Sarbarakar and his agent. But when the very constitution of the committee of the trustees is challenged as invalid in Civil Suit No. 70 of 1931 referred to above, the applicants contend that the trial of the criminal cases should pend till the decision of the civil suit as the fundamental question of the legal constitution of the trust committee is common for decision in both the Courts.

In the view I have already expressed in the last criminal revision, if it is held that there was no proper committee of trustees in existence, as per terms of the decree passed in First Appeal No. 76 of 1920 at the date of the alleged authorization of the non-applicant Sundarlal, he will have no right to lodge the present complaints under S. 409, I. P. C., in respect of the temple properties in charge of the applicants. The criminal Court is undoubtedly not precluded from deciding this important preliminary question, but since the civil suit was already filed before the criminal proceedings were lodged, it is but just and expedient that, in order to avoid a possible conflict of de-

cision on the point between the Civil and criminal Courts, and more especially for the reason that the trial of the civil suit may not be prejudiced in any way that the earlier instituted civil proceedings should have precedence of trial and the criminal proceedings stayed. There is considerable force in the suggestion of the learned counsel for the applicants that the present criminal proceedings were designedly started by the non-applicant to prejudice the trial of the civil suit. I therefore direct that both the criminal cases should pend until the decision of the civil suit.

In order however that the evidence in the criminal cases which the complainant wishes to adduce may not disappear by delay, I accede to the suggestion of Rai Bahadur Choudhry for the non-applicant that such evidence should be duly recorded by the trying Magistrate in both the cases and order accordingly. If the civil Court holds that in October 1931 the committee of the trustees of the temple was validly constituted, the non-applicant Sundarlal should move the criminal Court to dispose of the present criminal cases. The civil Court is directed to take special steps to dispose of Civil Suit No. 70 of 1931 with the least possible delay. A copy of this order will be forwarded to the Additional District Judge, Raipur, for compliance and necessary action.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Nagpur 88

JACKSON, J. C. AND SUBHEDAR, A. J. C.

Mohamad Ibrahim Riza Malak—Appellant.

v.

Sunder Rao—Respondent.

First Appeal No. 64 of 1929, Decided on 5th November 1931, against decree of Addl. Dist. Judge, Nagpur, D/- 11th April 1929.

C. P. Courts Act (1917), S 10 (b) applies to all cases, while S. 98. Civil P. C, applies to appeals only—Civil P. C. (1908), S. 98 (2).

Section 98 Civil P. C., applies only to appeals while S. 10, C. P. Courts Act, applies to all cases.

Among the parts of a statute which must be considered in arriving at its true meaning are the sections or parts of sections known as provisos, exceptions and saving clauses. Any interpretation which requires the saving clause of S. 10, Courts Act, to be ignored, must therefore be incorrect; and hence there is no need to refer a case to a third Judge where the difference of opinion between the two Judges of the High Court is only on a question of fact. In such a case the decree of the lower Court should be confirmed. [P 89 C 1]

M. R. Bobde—for Appellant.

A. V. Wazalwar—for Respondent 1.

Facts.—On the basis of a deed of agreement, dated the 9th August 1927, alleged to have been executed by defendants 1 and 2 the plaintiff brought a suit for specific performance of a contract of sale of a house which exclusively belonged to defendant 1 as her stridhan. Defendant 2, who was the brother of the deceased husband of defendant 1, joined in the execution of the agreement sued on by way of precaution. The same property was, on 22nd October 1927 purchased by defendant 3 from defendant 1, allegedly with notice of prior agreement of the sale in favour of the plaintiff. The suit was contested by defendants 1 and 3 only who denied the execution of the agreement sued on and characterized it as a forgery committed by the plaintiff and defendant 2.

The main issue settled for trial was whether defendant 1 entered into the agreement of sale with the plaintiff and executed the deed of agreement sued on. The trial Judge found both parts of the issue in the negative and dismissed the suit. Against the first Court's decree the plaintiff preferred an appeal to the Court of the Judicial Commissioner and defendant 2 filed cross-objections. Both the appeal and the cross-objections were heard by a Bench of two Judges, who differed in their opinions on the sole question of fact involved in the case. On the contention of the plaintiff-appellant and respondent 1, that the case should be referred to a third Judge under S. 10 (b), C. P. Courts Act, 1917, the Court delivered the following

Judgment.—As we have delivered dissenting opinions, the appellant and respondent 1 asked to be heard on the question of the right course to pursue. We have therefore heard them without issuing notice to the other parties.

The appellant and respondent 1 urge that the case is governed by S. 10 (b) (ii) C. P. Courts Act, 1917, and not by S. 98 (2), Civil P. C. If their contention is correct the difference of opinion must be referred to another Judge, while under S. 98 (2), Civil P. C., the difference being on a question of fact, the decree of the lower Court will have to be confirmed. Reference has been made to certain de-

cisions in which it has been held that, by reason of S. 4, Civil P. C., S. 98 (2) of the Code does not affect the provision made in the Letters Patent of the various Chartered High Courts for settlement of differences of opinion among the Judges. This has now been provided in S. 98 itself, but it was held the correct view of the law even before sub-S. 3 was enacted. The provision made in the Letters Patent however is distinguishable from that made in S. 10, C. P. Courts Act, in that S. 10 opens with the following saving clause:

"Except as otherwise provided by any enactment for the time being in force."

The question arises whether that is a "specific provision to the contrary" appearing in S. 4, Civil P. C., which section provides that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special form of procedure prescribed, by or under any other law for the time being in force. In our opinion it is a specific provision, as the expression in S. 10, Courts Act "any enactment for the time being in force" must include the Code of Civil Procedure and having regard to the subject-matter of S. 10 must include S. 98 of that Code. It is argued that such a view will make S. 10, Courts Act, a nullity, but this is far from being the case. There are many cases other than criminal that may be heard by a Bench of this Court which would not be governed by S. 98, Civil P. C., which applies to appeals only, while S. 10, Courts Act, applies to all cases. On the other hand the view put forward on behalf of the appellant and respondent 1 would make the saving clause with which S. 10, Courts Act, opens a nullity, and the following rule of interpretation appears in Halsbury's Laws of England, Vol. 27, para. 247, p. 137:

"Among the parts of a statute which must be considered in arriving at its true meaning are the sections or parts of sections known as provisos, exceptions and saving clauses."

Any interpretation which requires the saving clause of S. 10, Courts Act, to be ignored must therefore be incorrect.

As S. 98 (2), Civil P. C., applies, the lower Court's decree will be confirmed, subject to the modification of costs proposed by Subhedar, A. J. C. In other respects the appeal and the cross-objections are dismissed with costs.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Nagpur 89

STAPLES, A. J. C.

Chhunilal Seth—Appellant.

v.

Gulabchand—Respondent.

Second Appeal No. 217 of 1931, Decided on 21st October 1931, against appellate decree of Dist. Judge, Jubbulpore, D/- 21st January 1931.

Decree—Execution of—Objection by judgment-debtor to partial execution should be raised at once—Partial execution does not however bar subsequent application for executing balance—Civil P. C. (1908), O. 2, R. 2.

Usually there cannot be a separate or piecemeal execution of a decree, except where there are distinct reliefs, such as possession and costs, which may be executed separately. Where there is only one homogeneous relief such as money or costs, execution should be taken out for the whole sum due. If however an application for execution of part of the sum due is made, the judgment-debtor should raise an objection to such an application at once, and if he fails to do so, the execution of part of the decretal amount will not be invalid nor can the judgment-debtor be heard in a subsequent application for execution to say that the application is incompetent as being only for a part of the decree. In other words, O. 2, R. 2, Civil P. C., does not apply to applications for execution and if an application for partial execution has been allowed and has been successful, a subsequent application for executing the balance of the decretal amount will not be barred: *A. I. R.* 1926 *Cal.* 1019 *Appr.*

[P 90 C 2]

W. R. Puranik—for Appellant.

Judgment.—The appellant Chunnilal had filed a suit against the respondent and obtained a decree. That decree was upheld by the District Judge in appeal, but on a second appeal to this Court the decree was reversed and the suit of the appellant was dismissed with costs. The respondent Gulabchand, on 30th April 1929, applied for execution for the costs of this Court only, amounting to Rupees 251-8-0. The amount was paid by the appellant and then on 21st November 1929, some seven months later, Gulabchand made an application for execution for the costs of the trial Court, of the appeal in the District Judge's Court and of the application for leave to appeal to the Privy Council, which had been refused. Objection was made by the appellant on the ground that partial execution was not allowed and that, as Gulabchand in his first application had only asked for the costs of this Court, he must be presumed to have given up his right to claim the costs in the other Courts. The executing Court by its order dated 27th

March 1930 held that the application was maintainable.

The learned counsel for the appellant again raises the contention that a decree cannot be executed in part and that, as the previous execution was taken out only for part of the decree, the decree-holder must be held to have admitted satisfaction of the remaining amount and that his subsequent application for execution of the balance of the decree is barred. In support of his contention he cited *Huro Sunkur* v. *Taruck Chunder* (1), *Abdul Alim* v. *Abdul Hafez* (2), and *Shoharat Singh* v. *Bridgman* (3). Of these cases the first is no doubt an authority for the view put forward by the appellant, whilst the other two cases are concerned chiefly with the execution of an appellate decree. On the other hand, the case cited by the District Judge, *Upendra Nath Bose* v. *K. B. Dutt* (4), is a direct authority in an exactly similar case, where there were costs awarded against the judgment-debtor, both of the High Court and of the trial Court. In that case moreover *Huro Sunkur Sandyal* v. *Taruck Chunder Bhuttacharjee* (1) has been discussed and distinguished if not dissented from and I think the District Judge was right in following the later ruling.

Apart from this, I am clearly of opinion that the objection, if any, should have been made at the time of the first execution, i. e., when the decree-holder respondent applied for execution of the costs of this Court. He could then have objected that the application was only for part of the decree, but he did not raise any such objection at that time. As he did not do so, it seems to me that he cannot now raise any objection to the subsequent application, which is, strictly speaking, not an application for execution of part of the decree but an application for execution of the whole balance remaining due; i. e., the previous application was no doubt an application for partial execution, but the subsequent application was an application for total execution.

In my opinion the law relating to this branch of execution procedure may be formulated as follows: Usually there cannot be a separate or piecemeal execution of a decree, except where there are distinct reliefs, such as possession and costs, which may be executed separately. Where there is only one homogeneous relief, such as money or costs, execution should be taken out for the whole sum due. If however an application for execution of part of the sum due is made, the judgment-debtor should raise an objection to such an application at once and if he fails to do so, the execution of part of the decretal amount will not be invalid nor can the judgment-debtor be heard in a subsequent application for execution to say that the application is incompetent as being only for a part of the decree: in other words O. 2, R. 2, Civil P. C., does not apply to applications for execution and if an application for partial execution has been allowed and has been successful, a subsequent application for executing the balance of the decretal amount will not be barred.

I am of opinion that the view taken by the District Judge is correct and I therefore dismiss the appeal without notice to the respondent under O. 41, R. 11, Civil P. C.

K.N./R.K. *Appeal dismissed.*

(1) [1869] 11 W. R. 488 = 3 B. L. R. A. C. 114.
(2) A. I. R. 1927 Cal. 89 = 97 I. C. 838 = 53 Cal. 901.
(3) [1882] 4 All. 376 (F B.).
(4) A. I. R. 1926 Cal. 1019 = 96 I. C. 562 = 53 Cal. 582.

A. I. R. 1932 Nagpur 90

JACKSON, A. J. C.

Madhorao—Appellant.

v.

Hiralal and *another*—Respondents.

Second Appeal No. 264 of 1928, Decided on 12th January 1931, against decree of Dist. Judge, Bhandara, D/- 2nd February 1928.

(a) Civil P. C. (1908), S. 11—S. 11 does not require causes of action to be same and makes no distinction between questions of fact and questions of law.

Section 11 does not require the causes of action to be the same nor the reliefs claimed to be the same before the doctrine of res judicata can come into operation : what it requires is that the matter in issue shall be the same and it makes no distinction between questions of fact and questions of law : *A. I. R.* 1921 *Bom.* 87 (*F. B.*) and *A. I. R.* 1930 *Cal.* 57, *Rel. on.*; *A. I. R.* 1928 *Cal* 717 and 39 *Cal.* 848, *Ref.* [P 91 C 2]

(b) Civil P. C. (1908), S. 11—Failure by joint Hindu father to take possible plea does not entitle son to plead that he was not properly represented.

The mere failure by a father of a joint Hindu family to take a possible plea will not entitle his son, in a subsequent suit, to plead that he had not been properly represented in the previous

suit : 12 *N. L. R.* 45 ; *A. I. R.* 1927 *P. C.* 56 and 9 *N. L. R.* 1, *Foll.* ; 5 *N. L. R.* 181. *Ref.*

[P 92 C 2]

R. N. Padhye—for Appellants.

W. R. Pandit—for Respondents.

Judgment. —The appellant in this case is the minor son of one Pema Kunbi. Pema and his father Holu, executed a possessory mortgage deed on 20th May 1913 mortgaging their two annas share in patti No. 4 of Mauza Chopa and a tiled house and two kothas standing on a *sir* field No. 46/1. The defendants are assignees of the mortgage deed and they brought a suit upon it in the year 1921 against Pema, Holu being then dead and the present plaintiff being about seven months old. A final decree for foreclosure was passed on 12th August 1922. The plaintiff now seeks to recover possession of the mortgaged property on the grounds that the mortgage deed was invalid and that, even if it was valid, it and the foreclosure decree passed upon it are not binding upon him. Both the lower Courts have concurred in holding that the plaintiff's suit must fail. One of the pleas taken in the Courts below on behalf of the plaintiff was that the mortgage deed was not binding on him because it was not executed for legal necessity. As he was not born at the time of execution of the mortgage deed, this plea was not open to him and it has been abandoned in argument before me.

The validity of the mortgage deed is attacked on the ground that it was registered in contravention of the law because it covers a *sir* field among other property. The lower appellate Court has held that it is not open to the plaintiff to question the validity of the mortgage on this ground because in the suit for foreclosure he was represented by his father, the only surviving adult member of the family and the plea as to the invalidity of the registration not having been taken by Pema in that suit, Expls. 4 and 6, S. 11, Civil P. C., debarred the plaintiff from raising the plea in the suit out of which this appeal arises.

It has been argued on behalf of the plaintiff that there can be no res judicata on a point of law. *Baij Nath Goenka* v. *Padmanand Singh* (1), has been cited, in which it has been held that a decision in a previous execution proceeding which merely lays down what the law is and is found to be erroneous, cannot have the force of res judicata in a subsequent proceeding for a different relief. *Ayetonnessa Bibi* v *Amjad Ali* (2), has also been cited, in which it has been held that an erroneous decision on a question of law may not operate as res judicata in cases where the causes of action are different S. 11, Civil P. C., however does not require the cause of action to be the same nor the reliefs claimed to be the same before the doctrine of res judicata can come into operation : what it requires is that the matter in issue shall be the same and it makes no distinction between questions of fact and questions of law. This has been pointed out by Shah, J., in *Sitaram Sakharam* v. *Laxman Vishnu* (3) ; and in *Abdul Gani* v. *Nabendra Kishore Ray* (4), it has been made clear that the rule of res judicata requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different.

In the Bombay case cited the learned Chief Justice has drawn a distinction between an abstract question of law such as the proper construction to be placed on an enactment, and a concrete question such as the construction of a document entered into between the parties to a suit. Fawcett, J., the third member of the Bench, doubted the validity of this distinction and, I think, with reason ; and Shah, J., obviously, did not accept it. It seems to me that a decision on a point of law will not operate as res judicata only if the matter in issue in the two suits is not the same or if the parties are not litigating under the title, that is, when the requirements of S. 11 have not all been satisfied. In the present case the common question to the two suits is whether the registration of the mortgage deed in suit is invalid because it affects a portion of *sir* land ; and, in my opinion, the matter in issue is the same in both suits, the parties are litigating under the same title and Pema's failure to plead the invalidity of the registration of the mortgage deed in the earlier suit has the effect, under Expln. 4, S. 11, of debarring him and anyone whom he re-

(1) [1912] 39 Cal. 848=14 I. C. 124.

(2) A. I. R. 1928 Cal. 717=115 I. C. 588.

(3) A. I. R. 1921 Bom. 87 = 64 I. C. 162 = 45 Bom. 1260 (F. B.).

(4) A I. R. 1930 Cal. 47 = 124 I. C. 161 = 57 Cal. 258.

presented from raising it in a subsequent suit.

The question then arises whether the plaintiff in the present case was represented by Pema in the mortgage suit. Pema was the only adult member of the family at the time of the mortgage suit and prima facie he would represent the family. I need only refer on this point to *Rameshwar* v *Bhangilal* (5), and the rulings cited therein. Reference has however been made, on behalf of the plaintiff, to *Moti* v. *Kanhya* (6), in which it has been said that the manager of a joint family represents the whole co-parcenary in litigations affecting the family property where his act is bona fide and in the interest of the family, and *Lingangowda* v. *Basangowda* (7), in which it is laid down that a decree obtained by or against the managing member of a joint Hindu family is binding upon minor members of the family under Expln. 6, S. 11, Civil P. C., if the manager acted in the former litigation on behalf of the minors and in their interests. It is argued that in the mortgage suit Pema did not act bona fide or in the interests of his son because he failed to raise the plea regarding the invalidity of the registration of the mortgage deed ; but it is clear from the finding of the lower appellate Court that there was no lack of bona fides on Pema's part as both parties to the mortgage were under the belief that the *sir* land covered by the deed had become abadi ; and there is nothing to show that Pema did not in the previous suit do all that seemed possible to him to protect the interests of himself and his son.

In *Gore* v. *Kashiram* (8), it is pointed out that the sons who were held to have been represented by their father could have taken no action beyond what their father had done ; but I do not think that that was a determining factor in the case ; for in *Motiram* v. *Ramgopal* (9), it has been held that :

" in regard to a plea that was open to the father equally with the sons, that is a plea available to the joint family, whether expressly or constructively decided, the decision is binding on the sons."

It is clear, then, that the mere failure by a father to take a possible plea will not entitle his son, in a subsequent suit, to plead that he had not been properly represented in the previous one, and I think it must be held that Pema did represent the present plaintiff in the previous suit and that, as Pema would be debarred from raising the plea regarding the invalidity of the registration, the present plaintiff is also debarred.

I dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(5) [1916] 12 N. L. R. 45=32 I. C. 996.
(6) [1909] 5 N. L. R. 181=4 I. C. 797.
(7) A. I. R. 1927 P. C. 56 = 101 I. C. 44 = 54 I. A. 122=51 Bom. 450 (P. C.).
(8) [1913] 9 N. L. R. 1=18 I. C. 848.
(9) [1920] 16 N. L. R. 64=53 I. C. 776.

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GRILLE, A. J. C.

Gapulal—Appellant.

v.

Gajasa and *others*—Respondents.

Second Appeal No. 188 of 1930, Decided on 8th December 1931, against decree of Dist. Judge, Nimar, D/- 11th December 1929.

Hindu Law—Partition—Suit for—Property inadvertently omitted—Subsequent suit lies.

After a decree has been passed in a suit for partition of the family property a subsequent suit may be brought in respect of any portion of that property which had inadvertently been omitted in the former suit : *A. I. R.* 1923 *Mad.* 584, *Diss. from.* ; 11 *M. I. A.* 551 (*P. C.*) and 45 *Cal.* 305, *Dist.* ; 35 *Cal.* 961 ; *A. I. R.* 1928 *Cal.* 459 ; *A. I. R.* 1923 *Bom.* 85 ; *A. I. R.* 1931 *Sind* 27 and *A. I. R.* 1924 *Nag.* 89. *Rel. on.* [P 92 C 2 ; P 93 C 2]

W. R. Puranik—for Appellant.

S. B. Gokhale and *Abdul Razak* — for Respondents.

Judgment.—The point for determination in this second appeal is whether after a decree has been passed in a suit for partition of the family property a subsequent suit may be brought in respect of any portion of that property which had inadvertently been omitted in the former suit. The District Judge, Nimar, had held that such a suit is barred by O. 2, R. 2, Civil P. C., and cites with approval a decision of the Madras High Court, *Basavana Gowd* v. *Doddlingappa*, *A. I. R.* 1923 *Mad.* 584, where a Bench of the Madras High Court recorded as their opinion that the proposition that generally only one suit for partition will lie is settled law and that, that is the only view reconcilable with the terms of S. 11, Expl. 4 and O. 2, R. 2, Civil P. C. The decision in *Ram Harakh* v. *Ramlal* (1), is dissented from and the learned District Judge has also

(1) [1916] 38 All. 217=33 I.C. 124.

held the observations of Walsh, J., in that suit to be obiter. The other cases which the learned District Judge has cited in order to fortify bis view are the Privy Council decision in *Moonshee Buzloor Ruheem* v *Shumsoonnissa Begum* (2) and *Upendra Narain Roy* v. *Janki Nath Roy* (3). These cases however do not relate to suits for partition which must form by their nature an exception to the general rule and only affirm the principle laid down in O. 2, R. 2, Civil P. C , that when any claim is omitted or intentionally relin quishe l, a subsequent suit in respect of that portion is barred.

I must respectfully dissent from the dictum in the Madras case quoted above that it is settle l law that only one suit for partition will lie. A contrary view has been taken in the Calcutta High Court in *Jogendra Nath Roy* v. *Baldevdas* (4) and in *Sasimohan Saha* v. *Harinath Saha* (5), in the Bombay High Court in *Shantaram Balkrishna* v. *Waman Gopal* (6), and in the J C's. Court in Sind in *Uttamchand Munghirmal* v. *Sahamatrai Khubchand*, *A. I. R.* 1931 *Sind* 27. It has also been laid down in *Sonba* v. *Babaya* (7), that a suit brought by a member of the same family for partition of the unalienated portion of the joint family property does not preclude a second suit by the same plaintiff against that member and his transferee for partition of the alienated property. In the case out of which this appeal arises there had been a partition between three brothers. Subsequently after separate possession had been acquired, it was discovered that a malik makbuza field had acci lentally been left out of account, and a second suit for partition was brought and decreed. When partition by metes and bounds of this field was sought by the plaintiff it was resisted by a person who alleged that he was then in possession by virtue of a transfer to him by the sons of one of the partitioning brothers, a transfer which was made immediately after the previous partition. As the plaintiffs were not in possession a declaratory suit had to be brought and it is out of this suit that this second appeal arises. The plaintiffs' claim in respect of their one-third share was decreed by the trial Judge but dismissed in the lower appellato Court, for the reasons which have been stated. It is clear from the rulings cited that the preponderance of opinion is that where there has been an inadvertent omission to partition some of the joint family property a subsequent suit may be brought for partitioning the same. The property which has not been partitioned must remain joint family property, and as such susceptible to partition at a future date, at the very least by a member of the family who was not the original plaintiff in the partition suit. It is contended before me that in the present case the property which had not been partitioned no longer remained the joint property of the family but that the plaintiffs had no right to any share in it by reason of their failure to include it in the property to be partitioned. The acceptance of this proposition would mean, in a case where a field or property had been omitted by a genuine misapprehension of all the parties to the suit, that the loss would fall on the unfortunate member of the family who had chosen to become a plaintiff in the suit. The property omitted remains joint family property susceptible to partition, except in such cases where as a result of the suit that property has been held by the Court to be insusceptible of partition. I am satisfied that in this case a suit for partitioning the field which had been omitted lay and the decision of the trial Court, on all the points before it, is a correct decision.

The judgment of the lower appellate Court is accordingly set aside and the decree of the trial Court is restored. Respondent 1, who is the original defendant, will pay the costs of the other parties throughout.

S.N./R.K. *Appeal allowed.*

(2) [1866] 11 M.I.A. 551=8 W.R. 3=2 Sar. 259 =2 Suth. 59 (P.C.).
(3) [1918] 45 Cal. 305=47 I.C. 129.
(4) [1908] 35 Cal. 961=6 C.L.J. 735=12 C.W. N. 127.
(5) A.I.R. 1928 Cal. 459=110 I.C. 60.
(6) A.I.R. 1923 Bom. 85=68 I.C. 682=47 Bom. 389.
(7) A.I.R. 1924 Nag. 89=78 I..C. 376=20 N.L. R. 28.

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GRILLE, A. J. C.

Kashiram—Appellant.

v.

Kanhaiyalal—Respondent.

Misc. Appeal No. 16 of 1929, Decided on 26th October 1931, against order of remand by Dist. Judge, Hoshangabad, D/- 19th January 1929.

Trusts Act (1882), S. 91—Contract to sell - Property passing to third party with notice of contract—Specific performance sued for —Property must pass to person entitled at time of contract.

Where a specific performance of a contract in respect of property which has subsequently passed into the hands of a third party with due notice of that contract is enforced, the law is that the property in question shall pass to the person entitled thereto and existing at the time of the contract. [P 94 C 2]

Fida Hussain—for Appellant.

W. R. Puranik—for Respondent.

Judgment.—This appeal arises out of a suit which was instituted as far back as the year 1923. The plaintiff had bought from Ramlal three shares in a ginning factory at Khirkia in 1922. Ramlal is a partner in the business. These shares at the time they were sold carried with them the right to accumulated but unascertained profits in the business proportionate to the shares for three years. The plaintiff had obtained the shares and brought a suit against the defendants who were the managers of the concern, for the profits which they would not give him. The claim was resisted on various grounds which are not material to the present appeal but necessitated two appeals up to this Court and remand orders for a further trial of the suit. Meanwhile the defendants had instituted a suit against Ramlal, who sold these shares to Kanhaiyalal claiming specific performance of a previous contract to sell these very shares to them. That suit terminated in the success of the present defendants, that is to say, Kashiram, Champalal and Anantlal, and their claim for specific performance of a contract to sell these shares to them was decreed after an appeal to this Court. Kanhaiyalal, the plaintiff in the suit out of which this appeal arises was a party to the suit and it was definitely found therein that he had purchased these shares with full notice of the previous contract the specific performance of which was decreed between other parties. By this time the present suit had been remanded for the second time to the trial Court and in consequence of the decision in the suit for specific performance the trial Judge now held, that the plaintiff's claim with regard to profits accumulated prior to the date of the transfer of the shares must fail, that there was no cause of action remaining to him and the plaintiff's suit was accordingly dismissed. In first appeal the learned District Judge reversed this decision on the ground that the property in the shares could not pass to the defendants until after a decree had been passed and the purchase money handed over. He found that there was no agreement in the contract to sell, that the ownership should pass before the money was deposited and that the money was not deposited at any time during the period the suit for specific performance was in progress. The result of the learned District Judge's decision was to remand the case once more for trial. It is against this order that the defendants now come up in second appeal.

Where specific performance of a contract in respect of property which has subsequently passed into the hands of a third party with due notice of that contract, is enforced, the law is that the property in question shall pass to the person entitled thereto and existing at the time of the contract. It is clear that in each case, that is to say, of the actual sale to the plaintiff and of a contract to sell to the defendants, the subject-matter was identical, namely, the full shares with the right to a proportionate share in the profits in the business for the previous three years. Any contrary supposition is negatived by the fact, noteworthy in itself, that the amount which the plaintiff says he paid for the shares is considerably less than the amount for which the defendants had contracted to buy them. In this transaction the shares cannot be dissociated from the previous profits arising out of them. It appears to me that the principles of S. 91, Trusts Act (Act 2 of 1882) apply. That section runs:

"Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specfic performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract."

In this case the contract was for selling the shares with the previous profits. The plaintiff is bound to relinquish the shares, and of course he does not and cannot dispute that he is so bound, but maintains that he is still entitled to continue this suit for the profits. To do this would not be holding the property to the extent necessary to give effect to the contract. To give effect to the contract he forgoes his right to sue for profits on the shares which were included in the

contract which the defendants made previous to his purchase, a contract of which he was fully aware. The decision of the trial Court on this point is correct and the plaintiff's suit was rightly dismissed and his application at the time to amend the plaint claiming interest in lieu of profits rightly refused. The result is that the appeal succeeds. The order of the lower appellate Court is reversed and the decree of the trial Court is restored. The costs of the appeal against that decree will be borne by the respondent pleader's fee in this court Rs. 35.

S.N./R.K. *Appeal allowed.*

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STAPLES, A. J. C.

Nago—Applicant.

v.

Shankar—Opposite Party.

Criminal Revn. No. 293 of 1931, Decided on 9th December 1931, against order of First Class Magistrate, Chanda, D/- 20th July 1931.

Criminal P. C. (1898), S. 350-A—Bench of three Magistrates—One remaining absent at two hearings, but assisting in delivering judgment and signing it is illegal.

Where one of the three Magistrates remains absent at two important hearings, his assisting in delivering the judgment, and signing the judgment constitute an illegality vitiating the trial: *A. I. R* 1926 *Lah.* 304, *Ref.*; 20 *Cal.* 870; 18 *Mad.* 394; 38 *Mad.* 304 and *A.I.R.* 1921 *Bom.* 44, *Foll.*; 41 *All.*116, *Dist.*; 3 *N. L. R.* 67, *Expl.* and *Appr.* [P 96 C 1, 2]

S. Y. Deshmukh—for Applicant.
W. R. Puranik—for Opposite Party.

Order.—The applicant Nago made a complaint against two persons, Shankar and Gana, in the Court of the Bench of the Honorary Magistrate Second Class, Warora. The two accused were convicted by the Bench and preferred appeals to Mr. Waidya, Magistrate First Class, who exercises appellate powers. Mr. Waidya, without going into the merits of the case, set aside the convictions on the ground that there was an illegality in the trial. The applicant has now filed two applications for revision, the present application and *Criminal Revision No.* 294 *of* 1931, (*Nago* v. *Gana*), contending that there was no illegality. The two applications were heard together and this order will govern both.

There were three Magistrates on the Bench at the commencement of the trial, Mr. Chinoy, Mr. Deshpande and Mr. Dawoodbhoy. Of these Magistrates Mr. Chinoy and Mr. Dawoodbhoy were present throughout at all the hearings of the case ; but Mr. Deshpande was absent at two hearings, viz., on 9th May and 11th May 1931, when the witnesses for the prosecution were cross-examined : at the latter hearing the statements of the accused were also recorded and charges were framed against them. It is clear then, that he was absent at two important hearings. After that Mr. Deshpande was present at all the subsequent hearings and he and the other two Magistrates have all signed the judgment. Mr. Waidya has held that the fact that Mr. Deshpande has signed the judgment though he was not present throughout the trial, constitutes an illegality.

The question is one not free from difficulty ; but I think it must now be considered settled by S. 350-A, Criminal P. C., which was enacted in 1923, that is, subsequent to all the cases cited before me except *Banwari* v. *Emperor* (1). The rules framed by the Local Government under S. 16 of the Code are also, I think clear on the point. S. 350-A runs as follows:

"No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Ss. 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings."

Rule 7 in para.12 of serial No.5, part 5 of the Book Circulars of the Government of the Central Provinces, is as follows:

"Notwithstanding anything contained in Rr. 5 and 6 no case shall be disposed of except by a quorum of Magistrates who have heard the whole of the evidence provided that in complaint cases which have been compromised or withdrawn, final orders may be passed by any member of the Bench."

Both according to S. 350-A and according to rule quoted above I am of opinion that two principles are laid down; first, that there must be a quorum, which in R. 4 is laid down as "any number of the Bench, not being less than two," present

(1) A. I. R. 1926 Lah. 304 = 93 I. C. 255 = 27 Cr. L. J. 463=7 Lah. 122.

throughout the proceedings;and, secondly that only such a quorum is competent to deliver judgment. Under Rr. 5 and 6 and also according to S. 350-A, Criminal P. C., other members of the Bench may attend at any sitting during the hearing of the case and the place of any member can be taken by another member at a hearing, but the trial will not be valid unless the two conditions laid down above are fulfilled.

The first of the two principles laid down above is clear and no trial can be held good unless at least a quorum, i. e., two Magistrates, is present at every hearing throughout the proceedings. For this proposition I would only refer to *Banwari* v. *Emperor* (1). On the second point there might be some doubt, viz., whether when a quorum had been present throughout, the fact that another Magistrate, who was not present throughout, assisted in delivering judgment and signed the judgment will vitiate the proceedings. That it would do so has been clearly held in *Hardwar Sing* v. *Khega Ojha* (2), *Queen-Empress* v. *Basappa* (3) and *Re Subbramania Ayyar* (4) The same view has been taken in *Emperor* v. *Gangappa* (5). A contrary view has been held by Piggott,J.,in *Emperor* v. *Mathura* (6) but, I would point out that that case anc be distinguished, because of the rule framed by the Local Government under S. 16, Criminal P. C., to the effect that the provisions of S. 350 of the Code would apply to a case when there was a change of the members of the Bench at different hearings. Whether such a rule is ultra vires or not I do not propose to discuss in the present case, because no such rule has been framed by the Local Government of the C. P. I would point out however that in *Hardwar Sing* v. *Khega Ojha* (2) it has been clearly laid down that such a rule is ultra vires, and that according to S. 16 of the Code rule framed under that section must be consistent with the Code. I would also point out that S. 350-A has been enacted since the decision in *Emperor* v. *Mathura* (6) and, as already indicated above, I am of opinion that this section really decides the matter.

I was referred by the learned counsel for the appellant to the decision of Stanyon, A. J. C., in *Balbhadra Bani* v. *Tribhuban Nath* (7), but I am of opinion that that decision, so far from controverting the second principle which I have stated above, viz., that no member of the Bench who has not been present throughout shall take part in the judgment or sign it, really supports it. In the case in *Balbhadra Bani* v. *Tribhuban Nath* (7) the trial began with four Magistrates but as two of the Magistrates were held to be related to the complainant the District Magistrate ordered that the case should be tried and decided by the remaining two members, who formed a quorum. It was so tried and the trial was held to be legal, as a quorum of two Magistrates who decided the case was present throughout. I would quote only the following passage from that ruling:

"But it is manifest that the two Magistrates who decided the case sat throughout the trial. They constituted a quorum of the Bench and they heard all the evidence. The removal from the Bench during the trial of two other Magistrates who were supernumerary to the quorum necessary to constitute a valid Bench, did not invalidate that Bench or vitate the trial : see *Karuppana Nadan* v. *Chairman,Madura Municipality* (8). The first objection therefore breaks down."

In the present case, if the judgment had been delivered only by Mr. Chinoy and Mr. Dawoodbhoy, no objection could have been taken on the ground of illegality, but, as Mr. Deshpande, who was not present at the two hearings, has assisted in delivering judgment and has signed the judgment, I hold that the trial is illegal and the accused must be held to have been prejudiced.

I hold therefore that the decision of Mr. Waidya in the appeal is correct and dismiss the application for revision.

S.N./R.K. *Application dismissed.*

(2) [1893] 20 Cal. 870.
(3) [1895] 18 Mad. 394=2 Weir 17.
(4) [1915] 38 Mad. 304 = 16 Cr. L. J. 489=29 I. C. 329.
(5) A. I. R. 1921 Bom. 44=63 I. C. 151=22 Cr. L. J. 615.
(6) [1919] 41 All. 116=19 Cr. L. J. 1004 = 48 I. C. 344.
(7) [1907] 3 N. L. R. 67=6 Cr. L. J. 43.
(8) [1898] 21 Mad. 246=2 Weir 17.

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GRILLE, A. J. C.

Babulal —Accused—Applicant.

v.

Tundilal—Complainant — Non-Applicant.

Criminal Revn. No. 142 of 1931, Decided on 19th October 1931, against order of Sess. Judge, Bhandara, D/- 17th March 1931.

(a) Criminal P. C. (1898), S. 439—Finding reached on evidence is not interfered with by Court of revision.

It is not for a Court sitting in revision to decide which of two conflicting sets of evidence should be believed. It is sufficient that there was sufficient evidence on the record from which the trying Magistrate could reach the decision. [P 98 C 1]

(b) Penal Code (1860), S. 499—To say that man is outcasted when he is not, is defamation—Person asserting excommunication of complainant by panchayat knowing it was not true cannot be protected under Excep. 9.

To say that a man is outcasted when he is not outcasted is defamation, and it is also established law that the members of the caste cannot as individuals take the law into their own hands and declare a member to be outcasted and assert it to be so unless there has been a regular meeting of the caste panchayat and a decision on the subject. If there has been no panchayat there can be no privilege in respect of the remark made that a man has been outcasted : 2 *I. C.* 226 and *A.I.R.* 1926 *All.* 306, *Rel. on.* [P 98 C 1]

Where the caste panchayat gave everyone full liberty to dine or not to dine with the complainant and the accused asserted, in spite of contradiction, that the complainant had been excommunicated by the panchayat, which they knew was not correct, they cannot be said to have been acting in good faith and cannot claim protection under Excep. 9, S. 499 : 33 *Mad.* 67, *Appr.*; *A. I. R.* 1924 *Mad.* 670, *Dist.*; *A. I. R.* 1928 *All.* 321 and *A. I. R.* 1914 *P. C.* 116, *Ref.* [P 98 C 2]

H. S. Gour and *W. R. Puranik* — for Applicant.

W. S. Barlingay and *S. K. Barlingay* —for Non-Applicant.

Vivian Bose—for the Crown.

Order.—These are applications in revision by three persons, Babulal, Ramlal and Tarachand, who have been convicted of defamation by the Subdivisional Magistrate, Gondia, and sentenced to a fine of Rs. 50 each. An application was made to the Sessions Judge, Bhandara, asking him to submit the record to the High Court with a request that powers under S. 435, Criminal P. C., be exercised, but this the Sessions Judge declined to do and consequently the applications for revision have been filed by the applicants direct.

The complainant in this case is a Powar of Bhandara and there has always been a distinction between the Powars of Bhandara and those of Chanda, the former arrogating to themselves a higher status and in previous years the Chanda Powars had made attempts to be brought on terms on intermarriage and interdining with the Bhandara Powars, but they have not so far succeeded. The complainant who is a gentleman of advanced views and a social reformer, has despite these restrictions existing between the two sects of Powars, married the daughter of a Chanda Powar and on the facts of this particular case a panchayat of the Bhandara Powars was called to decide what was to be done in the matter. It has been found by the trial Court that the panchayat, as a matter of fact, did nothing, and stated that members of the caste should either dine or not dine with the complainant as they liked and that it was useless to quarrel and that all members were given a free hand. Shortly after this some friends of the complainant who had continued to dine and keep up social intercourse with him were present at a social function at Gondia which the accused, the present applicants, also attended. When invited by their host to dine, the applicants demurred at the presence of the complainant's friends and on being asked for their reasons stated that these friends of the complainant dined with him and so they would not dine with them since the complainant had married the daughter of one of the Chanda Powars who were of a low mixed breed and that the complainant had been outcasted on this account by a meeting of the panchayat. The host and several others contradicted this statement, but the accused persisted in asserting its truth and added that even if the panchayat had not outcasted him they would do so themselves. On these facts the accused have been convicted and fined.

In revision it is contended on their behalf that the accused did not act in malice in any way, and that they were perfectly entitled to exercise their discretion as to whether to dine or no with the complainant or his friends, that is to say, those who continued to associate with him commensally. That, no doubt, is perfectly correct and had the applicants merely refrained from dining no conviction against them would have been pos-

sible. The offence lies in the assertion that the complainant had been outcasted. It has been suggested that the actual words as to outcasting and pollution were not uttered. This Court must proceed on the basis that they were, and the findings of fact of the Courts below are binding. I have perused the evidence and the finding of fact is certainly not perverse; neither does it contravene any established principles of law. It is not for a Court sitting in revision to decide which of two conflicting sets of evidence should be believed. It is sufficient that there was sufficient evidence on the record from which the trying Magistrate could reach the decision. The same principle will apply as to the finding what the actual decision of the panchayat was.

To say that a man is outcasted when he is not outcasted is defamation, and it is also established law that the members of the caste cannot as individuals take the law into their own hands and declare a member to be outcasted and assert it to be so unless there has been a regular meeting of the caste panchayat and a decision on the subject. Cases in point are *Mukund Ram* v. *Emperor* (1) and *Khamani* v. *Emperor* (2). If there has been no panchayat, there can be no privilege in respect of the remark made that a man has been outcasted. It has been further contended that the remarks were made in good faith and for the benefit of the persons to whom they were addressed and that the applicants were protected by the ninth and tenth exceptions to S. 499, I. P. C. Good faith in this case appears to me entirely lacking. The decision of the panchayat gave every one liberty to do as they pleased and it certainly was not an act done in good faith by the applicants to try to enforce their views on other people by expressing publicly facts which were not true, that is to say, that the complainant was outcasted and that the panchayat had declared him to be so. The defence of good faith is further discounted by the repetition of the offence and the absence of any apology or indication that the applicants were merely acting according to their own private opinion alone. That the offence is so aggravated and any possible presumption of good faith thereby destroyed has been held in *Mohammad Nazir* v. *Emperor* (3) and in *Arnold* v. *Emperor* (4).

In the present case the applicants approached Bairagi (P. W. 2) who is a pleader, when they received a notice from the complainant, and repeated the imputations to him. A case in which the facts are almost identical with those now before me is *Cooppoosami Chetty* v. *Duraisami Chetty* (5). With the decision in that case I am in entire and respectful agreement. The only case which has been cited before me on behalf of the applicants is also a case from the Madras High Court *Ayyaswami Iyer* v. *A. Thirumalai Iyer*, *A. I. R.* 1924 *Mad.* 670, but the facts there appear to have no present application. It is cited as authority for the contention that when there is no malice and the accused acted in good faith and in the interests of the community, there was protection under Excep. 9, S. 499, I. P. C.; but in that case the defamation complained of was published after the complainant had been called upon to appear before the panchayat, he failed to do so and an order of excommunication was passed against him in his absence by the remainder of the community; that is to say, there was a properly constituted panchayat which came to a decision in the course of its ordinary duties, and it was held by the Madras High Court that the proceedings had correctly been held privileged; the panchayat in fact was merely carrying out its ordinary duties in the exercise of which it is protected by the law. Here action was taken by individual members who not only made defamatory statements but asserted facts which were untrue and which they must have known to be untrue. The decision of the trying Magistrate was a perfectly correct decision and the punishment imposed cannot be said to have been excessive.

It is finally contended that since the complainant has admitted that the accused bear him no personal malice, an admonition will be sufficient punishment. I cannot accept this view. Admonition, a recent introduction into the Criminal

(1) [1909] 9 Cr. L. J. 535=2 I. C. 226.
(2) A. I. R. 1926 All. 306=92 I. C. 584=27 Cr. L. J. 296.
(3) A. I. R. 1928 All. 321=117 I. C. 355.
(4) A. I. R. 1914 P. C. 116 = 23 I. C. 661=15 Cr. L. J. 309=41 I. A. 149 = 41 Cal. 1023 (P.C.).
(5) [1909] 33 Mad. 67=3 I. C. 955.

Procedure Code, is not intended to apply to offences of the nature of defamation. It is an extension of the principle that leniency should be shown to people of tender years and to first offenders, and is certainly not applicable to men of responsible position who made defamatory statements and aggravated the offence by repeating them and attempting justification. The applicants, in my opinion, had been dealt with leniently and there are no grounds for any reduction in the sentence.

The applications for revision are accordingly dismissed.

K.N./R.K. *Applications dismissed.*

A. I. R. 1932 Nagpur 99

GRILLE, A. J. C.

Madho and *others*—Appellants.

v

Deoman and *another*—Respondents.

Second Appeal No. 362-B of 1929, Decided on 28th November 1931, against decree of Addl. Dist. Judge, Khamgaon, D/- 20th September 1929.

(a) Berar Land Revenue Code (1896), Ss. 82 (2) and 216 (k)—R. 148 applies to subdivisions of a number.

Rule 148 has reference only to the subdivision of numbers and can have no possible application to the joining of numbers. [P 100 C 1]

(b) Berar Land Revenue Code (1896), S. 205—Plaintiff has right to pre-empt portion of field which formerly held two different survey numbers if when he bought his portion it had one survey number only.

At a revision of the survey in 1924, adjoining Survey Nos. 3 and 4 belonging to *K* were joined so as to form a single survey number and the map was corrected accordingly and the new enhanced assessment was levied in one lump sum and was paid as such by the occupant *K* for two years. He sold his interest to plaintiff in part of the field corresponding to old Survey No. 4. 18 days later, the remaining interest in the field was sold by him to defendant 1. Plaintiff sued to pre-empt defendant 1:

Held: that by the joining of the old Survey Nos. 3 and 4 a distinct survey number was formed and that the plaintiffs being co-occupants with *K* when he sold part of it to defendant 1 were entitled to pre-empt defendant 1. When the plaintiffs acquired an interest in what had been a single and undivided survey number for two years or more they became co-occupants thereof. The fact that the portion of the field which they acquired corresponded to one of the original fields from which the new survey number was formed could not automatically, convert that part of the survey number into a recognized subdivision thereof. That would require specific recognition under S. 4 (5) and S. 86: 9 *N. L. R.* 16; 14 *N. L. R.* 51 and 14 *N. L. R.* 55. *Ref.*

[P 101 C 1]

M. B. Kinkhede, *J. R. Mudholkar*, *G. G. Hatwalne* and *S. A. Sohni*—for Appellants.

D. W. Kathalay, *A. V. Khare* and *W. B. Pendharkar*—for Respondent 1.

Judgment.—This appeal arises out of a suit for pre-emption under S. 205, Berar Land Revenue Code, 1896. Survey Nos. 3 and 4 of Mauza Awar in the Jalgaon taluk of the Buldana District both belonged to one Shrikrisandas; they were adjoining survey numbers. At a revision of the survey in 1924 they were joined so as to form a single survey number and the map was corrected accordingly and the new enhanced assessment was levied in one lump sum and was paid as such by the occupant for the two years 1925-26 and 1926-27. On 20th March 1927 defendant 2, Shrikisandas, sold his interest in part of this field to the appellants. This part corresponded to the old Survey No. 4. 18 days later on 7th April 1927, the remaining part of the field was sold to defendant 1, and under S. 205, Berar Land Revenue Code, 1896, the plaintiffs-appellants claimed to pre-empt this part of the survey number as being co-occupants with Shrikisandas. Subsequent to the purchases these two divisions have been recorded as pot-hissas of the field 3-4. The case proceeded ex parte against defendant 2, the original occupant of the field. Defendant 1 contended that the plaintiffs had no right of pre-emption as the portions purchased by the plaintiffs and himself consisted of distinct and separately recognized survey numbers.

It was also contended that whatever was done by the Settlement Officer in the course of the revision of the survey was no more than an administrative act which could not extinguish existing rights in the fields or create any new rights. The trial Court found that by virtue of S. 85 (2), Berar Land Revenue Code, 1896, the Deputy Commissioner was the Settlement Officer so empowered to make a single survey number from the two existing numbers and that this was duly done, and that by the subsequent transfer the plaintiffs became co-owners in the new survey number and had a right of pre-emption on the disposal of any interest therein. In appeal this decision was reversed by the Additional District Judge, Khamgaon, who held that the action of the Settlement Officer

amounted to no such amalgamation or formation of a new survey number as contended by the plaintiffs, and was nothing more than a "grouping" of the two survey numbers and could not form a new survey number as such formation was prohibited. The view taken was that the formation of survey numbers under S. 85, Berar Land Revenue Code is, by the terms of that section, subject to departmental orders and the orders of the Chief Commissioner, and that R. 148, which is a Revision Survey Rule framed under Ss. 83 (2) and 216 (k) of the Code, prohibits the creation of any new survey number except where land has been taken for public purposes since the original survey. No new number was therefore formed, and the action taken amounted to no more than "grouping" permissible under S. 85 (1) of the Code. The portion of the field in dispute was therefore at the time of the sale a single survey number, and the plaintiffs having acquired a separate single survey number could not possibly be co-owners in respect of the other. The plaintiffs' suit was dismissed.

Against this decision the plaintiffs now appeal and the grounds taken are that under S. 85 (2), Berar Land Revenue Code, the Settlement Officer was empowered to join distinct survey numbers so as to form a single number and that this is what was done and that R. 148, on which the lower appellate Court relied, has no application. It is clear that the appeal must succeed. The learned Additional District Judge appears to have considered S. 85, sub-S. (1), Berar Land Revenue Code, and not the provisions under sub-S. (2) which specifically empowers the Deputy Commissioner or other officer aforesaid, in this case the Settlement Officer,

"to join distinct survey numbers so as to form a single survey number or subdivide survey numbers so as to form distinct survey numbers."

In the exercise of these powers regard is to be had to departmental orders. It is manifest that R. 148, on which the learned Additional District Judge relies has reference only to the subdivision of numbers and can have no possible application to the joining of numbers. It runs as follows:

"148. The old revenue survey numbers are to be retained as they now stand; they are not to be broken up or subdivided according to occupancy of tenants.

Exception.—Where land has been taken up for public purposes since the original survey, it must be separately measured, deducted from the old survey number, and made into a number by itself; this is the only case in which new survey numbers will be formed."

This rule provides for the subdivision of numbers only and not to any amalgamation or consolidation and provides that, when the Settlement Officer can act in the case of a survey number comprising more than one holding either under S. 85 or S. 86, he is to act under the latter section rather than the former; but the rule can in no way derogate from the powers conferred on the Settlement Officer in specific terms to form a single survey number or to join two distinct numbers. The "grouping" to which the Additional District Judge has referred under S. 85 (1) of the Code is a distinct matter relating to the formation of villages on the original survey. The maps and papers that have been filed show undisputably that from these two adjoining survey numbers having the same occupant a distinct survey number was formed, the old boundary obliterated and the revised assessment levied on the field 3-4. The learned advocate for the respondents has attempted to show that this new survey number is not a survey number but what he calls a "block number;" and the only distinction I am able to see is in the name which he has given to it. In upholding the judgment of the lower appellate Court he relies on para. 11, Chap. 8, Part 4 of the Berar Land Records and Survey, where there are instructions concerning the formation of new survey numbers to this effect:

"No new survey numbers are to be formed except in the following cases:

(i) Land taken up for public purposes such as public buildings, threshing-floors, burial grounds, etc.

(ii) Waste land given out for cultivation.

All other cases will be dealt with by the formation of subdivisions of existing survey numbers.

When any new survey number is formed it should be given the number next after that of the last survey number in the village."

This shows, as R. 148 does, that the application of this instruction lies only in the matter of subdivisions of survey numbers and not in the joining or amalgamation thereof.

It cannot be disputed that if these two areas shown now in the map as pothissas 1 and 2 of field No. 3-4 really constituted recognized divisions of the

rvey number, then the plaintiffs will have no claim to pre-emption. This was laid down by Batten, A. J. C., in *Mt. Gangu* v. *Chandu* (1), and has been reaffirmed by Mittra, A. J. C., in *Suryabhan* v. *Renai* (2) and *Gadadhar* v. *Chunnilal* (3), and the respondents try to relegate these pot-hissas to that position. They have certainly not been recognized divisions of survey numbers under S. 86 subsequent to the sales by the original occupant. At the revision of survey in 1924 they were made into one survey number and are subject to the incidents of a survey number. When the plaintiffs acquired an interest in what had been a single and undivided survey number for two years or more they became co-occupants thereof. The fact that the portion of the field which they acquired corresponded to one of the original fields from which the new survey number was formed cannot automatically, as is contended by the respondents, convert that part of the survey number into a recognized subdivision thereof. That would require specific recognition under S. 4 (5) and S. 86 of the Code and this recognition has not been accorded. The plaintiffs therefore became co-occupants and within three weeks of their becoming co-occupants Shrikisandas, the original occupant, sold his remaining interest in the survey number without affording the plaintiffs an opportunity of exercising their right of pre-emption which they had under S. 205. That no notice was given has been found as a fact. The alienation by defendant 2 in favour of defendant 1 was not an alienation of a complete and single survey number as the lower appellate Court has held, but an alienation of a part of one survey number by one co-occupant thereof.

The result is that the appeal succeeds. The decree of the lower appellate Court is set aside and that of the lower Court restored. The respondents will pay the appellants' costs throughout.

K.N./R.K. *Appeal allowed.*

(1) [1912] 9 N. L. R. 16=18 I. C. 862.
(2) [1917] 14 N. L. R. 51=42 I. C. 447.
(3) [1917] 14 N. L. R. 55=44 I. C. 541.

**** A. I. R. 1932 Nagpur 101**

JACKSON, J. C. AND NIYOGI, A. J. C.

Brijmohan and *others*— Plaintiffs—Applicants.

v.

Raghoba—Defendant—Non-Applicant.

Civil Revn. No. 478 of 1930, Decided on 30th November 1931, against order of Sub-Judge, 2nd Class, Multai, D/- 14th July 1930.

**** Civil P. C. (1908), O. 9, R. 13 and Ss. 141 and 151—Right of appeal is not matter of procedure but substantive right and hence cannot arise by implication—Application to restore application for restoration of suit dismissed—No appeal lies—Appeal, Competency:** 19 *N. L. R.* 119=75 *I. C.* 589=*A. I. R.* 1923 *Nag.* 293, *Overruled.*

The right to appeal is not merely a matter of procedure but one of substance; it cannot arise by implication but only by virtue of an express enactment. S. 141 cannot be interpreted as giving a substantive right to make an application to set aside the dismissal of an application for restoration of a suit dismissed in default. In the absence of an express provision in the Code the right to make such applications is implied in S. 151 and the order passed thereon must be regarded as passed under that section. Therefore no appeal lies from an order rejecting an application to set aside the dismissal of an application for restoration of a suit dismissed in default: 9 *N. L. R.* 33, *Appr.*; 7 *N. L. R.* 32, *Expl.* and *Doubted*; 19 N. L. R. 119=75 I. C. 589=A. I. R. 1923 Nag. 293, **Overruled**; (*Case-law referred*). [P 102 C 1,2]

M. R. Bobde and *M. D. Khandekar*—for Applicants.

R. M. Bhagade—for Non-Applicant.

Opinion

Niyogi, A. J. C.—The question referred to the Bench for determination is:

"Whether an appeal lies from an order rejecting an application to set aside the dismissal of an application for restoration of a suit dismissed in default."

On this question there has been a divergence of opinion in this Court. In *Faridbi* v. *Mohamad Amin* (1), Drake-Brockman, J. C., held that no appeal lies from an order rejecting an application to set aside the dismissal of an application for restoration of a suit dismissed in default. In *Kalicharan* v. *Ratansingh* (2), Hallifax, A. J. C., took a contrary view and held that an appeal lies. In the last mentioned case no reference was made to the previously decided case reported in *Faridbi* v. *Mohamad Amin* (1). Hallifax, A. J. C., held that the right of appeal is only a matter of procedure and inasmuch as S. 141, Civil P. C., provides that the procedure applica-

(1) [1912] 9 Nag. L. R. 33=19 I. C. 97.
(2) A. I. R. 1923 Nag. 293=75 I. C. 589=19 N. L. R. 119.

ble to suits shall be followed in all proceedings in any Court of civil jurisdiction, the order refusing to set aside the dismissal of the application for restoration of a suit dismissed in default must be regarded as one passed under O. 9, R. 13, Civil P. C. He arrived at this result by assuming that after the word 'suit' wherever it occurs in R. 9, O. 9, the following words must be read "or other proceeding to which this rule applies by virtue of S. 141" and by parity of reasoning the learned Additional Judicial Commissioner inferred that the same words must be added after the word "suit" in Cl. (c), R. 1, O. 43.

Having regard to the observations made by their Lordships of the Privy Council in *Thakur Prasad* v. *Fakirullah* (3), to the effect that the proceedings spoken of in S. 647 of the Code of 1882 which corresponds to S. 141 of the Code of 1908, include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, it is doubtful whether S. 141, Civil P. C., would be applicable to cases of applications to set aside the dismissal of an application for restoration of a suit dismissed in default. In any case S. 141 cannot be interpreted as giving a substantive right to make such applications. In the absence of any express provision in the Code the right to 'make such applications is implied in S. 151, Civil P. C. In *Sarat Chandra Bose* v. *Bisweswar Mitra* (4) it was held that an application in so far as it purported to be under O. 9, R. 9, was not competent, but that the provisions of S. 151, Civil P. C., may be resorted to in order to do real and substantial justice. That is also the view of the Allahabad High Court: see *Ganesh Prasad* v. *Bhagelu Ram* (5). If therefore it is treated as an application made to invoke the inherent powers vested in the Court under S. 151, Civil P. C., the order passed thereon must be regarded as having been passed under that section. The view expressed in *Manikji* v. *Surajmal* (6) and followed in *Faridbi* v. *Mohamad Amin* (1) that S. 141 operates to give the same remedy in respect of an application as the one provided for in O. 9 in respect of a suit, does not appear to be sound. The correctness of the ruling reported in *Manakji* v. *Surajmal* (6) was doubted by Hallifax, A. J. C., himself in *Harlal* v. *Narayan* (7). Even on the assumption that by virtue of S. 141 the procedure provided in O. 9 is applicable to the proceeding arising out of such an application as the present, the application itself not being one for setting aside the dismissal of a suit, the order cannot be treated as one passed under O. 9, R. 13. The addition of the words suggested by Hallifax, A. J. C., after the word "suit" in O. 9, R. 9, Civil P. C., is obviously not the right method of interpretation.

Sections 96 and 104 are the only provisions which confer a right of appeal. It is only by virtue of S. 104 (1) (i) that the orders made under rules specified in O. 43, R. 1, become appealable. S. 141 (1) expressly lays down that an appeal shall lie from such orders and "from no other orders." O. 43, R. 1 (c) only speaks of an order rejecting an application for an order to set aside the dismissal of a suit. To give an extended interpretation to this provision by amplifying its import so as to cover cases which do not fall strictly within O. 9, would be contrary to the express terms of S. 104 (1) (i). The right to appeal is not merely a matter of procedure but one of substance: it cannot arise by implication but only by virtue of an express enactment: see *Rangoon Botatoung Co. Ld.* v. *The Collector, Rangoon* (8). In *Chandar Sahai* v. *Durga Prasad* (9) and *Bajit Lal Pathak* v. *Rameswar Singh* (10) the same view was taken and it was held that no appeal lay.

My answer to the reference is therefore that no appeal lies.

Jackson, J. C.—I have had the advantage of reading the opinion of Niyogi, A. J. C., and I agree with him that no appeal lies.

The initial mistake, in my opinion, was made in *Manakji* v. *Surajmal* (6), in which it was held that if an applica-

(3) [1895] 17 All. 106=22 I. A. 44=6 Sar. 526 (P.C.).
(4) A. I. R. 1927 Cal. 534=103 I. C. 69=54 Cal. 405.
(5) A. I. R. 1925 All. 773=89 I. C. 350=47 All. 878.
(6) [1911] 7 N. L. R. 32=10 I. C. 705.
(7) A. I. R. 1922 Nag. 267=64 I. C. 420=18 N. L. R. 152.
(8) [1912] 40 Cal. 21=16 I. C. 188= 39 I. A. 197 (P.C.).
(9) A. I. R. 1924 All. 682=79 I. C. 323=46 All. 538.
(10) A. I. R. 1928 Pat. 335=109 I. C. 264=7 Pat. 333.

tion for setting aside a dismissal of a suit for default is itself dismissed for default an application for its reinstitution can be entertained under the provisions of S. 141, Act 5 of 1908. S. 141 deals with procedure only and the above decision amounts to holding that the right to apply to set aside the dismissal for default of an application for setting aside the dismissal of a suit for default, is merely a matter of procedure. In *Kalicharan* v. *Ratansingh* (2), Hallifax, A. J. C., was correct in saying that the right of appeal is no more and no less a matter of procedure than the right to apply for the setting aside of a dismissal in default; but where he erred, I think, was in not realizing that neither right is a matter of procedure, both rights being substantive rights, which can only be given by express enactment.

K.N./R.K. *Reference answered.*

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* A. I. R. 1932 Nagpur 103

NIYOGI, A. J. C.

Sheshrao—Plaintiff—Appellant.

v.

Mansaram—Defendant—Respondent.

Second Appeal No. 303-B of 1929, Decided on 16th October 1931.

*** Hindu Law—Alienation — Widow—Gift —Consenting reversioner cannot challenge.**

Whether consent is given at the time of or after the gift, from the point of view of widow's competency, there is no difference between her voluntary transfers and those for consideration. So far as the right to possession over the property is concerned the donee is in no worse position than the transferee for consideration. Even after the widow's death, the donee's possession being peaceful, is perfectly lawful and if the reversioner takes no steps to recover possession that possession matures into a prescriptive title. The widow's alienations are only voidable. The reversioner may accept her alienations as valid or binding on him or he may repudiate them. It is purely a matter of option with him. If he chooses to affirm the alienation, it is, so far as he himself is concerned binding on him. But having once affirmed the alienation, it is not open to him to repudiate it. In other words, he cannot be permitted to approbate and reprobate in the same breath. The law does not require that the consent in order to be valid must be given at the time of the alienation. Even a consent given subsequently to the alienation serves to validate it: *A. I. R.* 1931 *Bom.* 100, *Dist.*; (*Case law referred.*) [P 104 C 1]

M. B. Kinkhede—for Appellant.

P. S. Kotwal and *B. W. Joshi*—for Respondent.

Judgment.—This appeal arises out of a suit instituted for setting aside a gift and recovery of the property covered by it. One Janabai adopted the plaintiff, Sheshrao, on 20th November 1918. Four days prior to adoption she made a gift of the property in suit, to one Mansaram, her relative through her first husband. On 2nd February 1923, Sheshrao executed a document which purported to confirm the aforesaid gift. He has now filed this suit on the allegations that he was a minor on 2nd February 1923, that he executed the deed of ratification under coercion and undue influence, and that the gift being void ab initio was incapable of ratification. The Courts below have concurrently found that there was no undue influence or coercion practised on the plaintiff, that he was a major when he executed the deed, that the widow's gift was not void ab initio but was only voidable at the instance of the plaintiff and that the plaintiff having chosen to affirm the gift it was finally binding on him. On these findings the plaintiff's suit having been dismissed, the plaintiff has preferred this second appeal.

In this Court the finding as to the absence of coercion or undue influence is not challenged. It is contended that a gift made by a Hindu widow is ab initio void so that it could not be validated by mere consent. It is pointed out on the authority of *Rangasami Gounden* v. *Nachiappa Gounden* (1), *Abdulla* v. *Ramlal* (2), *Ratan* v. *Laloo* (3), *Sobharam* v. *Makdu* (4), *Fatte Singh* v. *Sarha* (5), *Sardar Singh* v. *Kunj Bihari Lal* (6), *Panchand Chhotalal* v. *Manoharlal Nandlal* (7), *Pilu* v. *Babaji* (8) and *Chooramani Desi* v. *Baidya Nath* (9), that a Hindu widow's gift is only valid if made for religious purposes or when it is in the nature of a relinquishment of the whole estate in favour of the next reversioner. It may be conceded that a gift made as above is binding upon reversioners, but it does not follow that the gift if not supported by such consideration is absolutely void. Their Lordships of the Privy Council in *Bijoy Gopal* v. *Krishna*

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(1) A. I. R. 1918 P. C. 196=50 I. C. 498=46 I. A. 72=42 Mad. 523 (P.C.).
(2) [1911] 34 All. 129=12 I. C. 601.
(3) [1886] 1 C. P. L. R. 110.
(4) [1893] 12 C. P. L. R. 63.
(5) A. I. R. 1930 Nag. 198=122 I. C. 437=26 N. L. R. 204.
(6) A. I. R. 1922 P. C. 261=69 I. C. 36=49 I. A. 383=44 All. 503 (P.C.).
(7) [1918] 42 Bom. 136=43 I. C. 729.
(8) [1909] 34 Bom. 165=4 I. C. 534.
(9) [1904] 32 Cal. 473.

Mahishi (10), have described the position of a Hindu widow in these terms:

"A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not therefore absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court."

If a widow is the owner of her property there can be no bar to the transfer of her property being regarded as valid during her lifetime, although the question may arise after her death. No case has been brought to my notice which goes as far as to lay down that a Hindu widow is incompetent, as a minor or a lunatic, to make any operative transfer of her interest for her lifetime. In *Bai Parvati* v. *Dayabhai Manchharam* (11) and *Dhanji Natha* v. *Dhuma Hiraji Mali* (12), it was held that a gift by a widow is binding on herself. If so, her gift cannot be characterized as one which the law does not recognize. It therefore follows that, from the point of view of a widow's competency, there is no difference between her voluntary transfers and those for consideration. So far as the right to possession over the property is concerned, the donee is in no worse position than the transferee for consideration. Even after the widow's death, the donee's possession, being peaceful, is perfectly lawful and if the reversioner takes no steps to recover possession that possession matures into a prescriptive title. As has been again affirmed by their Lordships of the Privy Council in *Ramgowda Annagowda* v. *Bhausaheb* (13), the widow's alienations are only voidable. The reversioner may accept her alienations as valid or binding on him or he may repudiate them. It is purely a matter of option with him. If he chooses to affirm the alienation, it is, so far as he himself is concerned, binding on him. But having once affirmed the alienation, it is not open to him to repudiate it. In other words, he cannot be permitted to approbate and reprobate in the same breath.

In *Basappa* v. *Fakirappa* (14), a gift made by a Hindu widow of a portion of her husband's property with the consent of the next reversioner, was held to be valid and binding on the particular reversioner, who consented to it, on the principle of estoppel. In *Ramgowda Annagowda* v. *Bhausaheb* (13), a Hindu widow made a gift of a portion of her husband's estate with the concurrence of the next reversioner and it was held by their Lordships of the Privy Council that the next reversioner was precluded from questioning it.

It is true that the consenting reversioner gave his consent for some benefit which he received, but that does not affect the applicability of the doctrine of estoppel. Nor does the law require that the consent in order to be valid must be given at the time of the alienation. Even a consent given subsequently to the alienation serves to validate it: see *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (15). A question in the form in which it arises in this case arose in the case reported in *Ramakotayya* v. *Viraragavayya* (16), and it was held that although strictly the doctrine of election may not apply when the reversioner does not derive any pecuniary benefit, the reversioner would be precluded by the doctrine of estoppel if he positively and definitely chose to announce his intention to abide by the act of the widow; and this was also the opinion of the Allahabad High Court: see *Fateh Singh* v. *Rukmini Ramanji Maharaj* (17), and of the Patna High Court: see *Kesho Prasad Singh* v. *Chandriha Prasad Singh* (18). The appellant relies on *Tukaram* v. *Yesu* (19), but that case is clearly distinguishable for the reason that the claimant was not a consenting party to the gift. It may be conceded that the consent by the reversioner to a gift may not bind a remote reversioner who becomes entitled to the

(10) [1907] 34 Cal. 329=34 I. A. 87 (P.C.).
(11) A. I. R. 1920 Bom. 355=58 I. C. 266=44 Bom. 488.
(12) A. I. R. 1924 Bom. 382=80 I. C. 234.
(13) A. I. R. 1927 P. C. 227=105 I. C. 703=54 I. A. 396=52 Bom. 1 (P.C.).
(14) A. I. R. 1922 Bom. 102=64 I. C. 214=46 Bom. 292.
(15) [1907] 30 All. 1=35 I. A. 1=9 Bom. L. R. 1348=6 C. L. J. 766=12 C. W. N. 74=17 M. L. J. 605=5 A. L. J. 1=11 C. C. 78=3 M. L. T. 1 (P.C.).
(16) A. I. R. 1929 Mad. 502=119 I. C. 156=52 Mad. 556 (F.B.).
(17) A. I. R. 1923 All. 387=72 I. C. 8=45 All. 339 (F.B.).
(18) A. I. R. 1923 Pat. 122=68 I. C. 394=2 Pat. 217.
(19) A. I. R. 1931 Bom. 100=129 I. C. 591=55 Bom. 46.

property at the death of the widow, or a son adopted subsequent to the reversioner's consent. The bar against the consenting reversioner is in the nature of a personal estoppel and this distinction was noticed in *Tukaram* v. *Yesu* (19). At p. 58 (*of* 55 *Bom.*) it is clearly conceded that the gift may be binding on the consenting reversioner on the ground of estoppel. It is therefore clear that the appellant is estopped from challenging the gift after having affirmed it by execution of the deed of consent dated 2nd February 1923.

The result is that the appeal stands dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Nagpur 105

NIYOGI, A. J. C.

Prayagrao—Plaintiff—Appellant.

v.

District Council, Betul—Defendant—Respondent.

Second Appeal No. 309 of 1930, Decided on 31st August 1931.

(a) C. P. Local Self-Government Act (1920), S. 23 (1)—Market—Court must interpret its meaning as given by enactment—Notification under S. 23 in respect of private market—No suit filed—Private market is converted into public market.

Court cannot interpret the term "market" used in the section otherwise than in the sense assigned to it by the enactment for the reason that it may prejudicially affect the interests of any person or a class of person. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. The expression "any market" in S. 23 (1) means a market other than a public market. A market becomes a public market when the District Council or independent Local Board has by notification made under S. 23 been invested with the exclusive right of levying fees and tolls and of control. [P 105 C 2, P 106 C 1]

Where therefore a notification is issued in respect of a private market and no suit is filed as required by S. 23 (3) the Local Government's order must be deemed to have become final, and its effect is that a private market is converted into a public market. [P 106 C 2]

(b) Interpretation of Statutes — Duty of Court enunciated.

It is not the function of the Court to make the law reasonable, but to expound it as it stands according to the sense of the words: 17 *C. P. L. R.* 113 and 10 *N. L. R.* 42, *Ref.* [P 106 C 1]

(c) C. P. Local Self-Government Act (1920), Ss. 25 and 29—Plaintiff must prove notification by Government under S. 25.

Section 29 can only be invoked if the plaintiff can prove that the village in which the market is situated has been notified by the Local Government under S. 25. The mere fact that the Deputy Commissioner has by his order referred the plaintiff to the civil Court would not clothe him with a right of action under S. 29, if under the statute, he is not entitled to it. [P 106 C 2, P 107 C 1]

M. B. Kinkhede—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—The appellant filed the suit out of which this appeal arises for a declaration that the market held on field No. 139/1 of Mauza Khedi-Khurd belonged to him and that he had the right to levy market fees in exercise of his right of ownership of the village. This market was declared to be a public market by Notification No. 2766-1202-XVIII, dated 6th October 1924, in accordance with S. 23 (1), Local Self-Government Act (4 of 1920). The plaintiff omitted to institute a suit as provided in S. 23 (3) of that Act. Later he made an application to the Deputy Commissioner, Betul, under S. 27 of the Act for a certificate, recognizing his right to levy fees or tolls. His application was dismissed, on 27th September 1928. The plaintiff has consequently sued in accordance with S. 29, Local Self-Government Act (4 of 1920), to establish his right. The Courts below agreed in holding that the suit was untenable and barred by time. The plaintiff has therefore filed this second appeal.

It is argued for the appellant that the market being a private property of the plaintiff, any notification issued under S. 23 was ultra vires and ineffective to deprive him of any part of his proprietary right, which could only be done by the application of the Land Acquisition Act. S. 23 (1), Local Self-Government Act (4 of 1920), runs as follows:

"The Local Government may, by notification, order that the rights of levying fees and tolls and of control in any market shall vest exclusively in the District Council or independent Local Board."

It is suggested that this provision was intended to apply only to a public and not a private market. There is nothing in S. 23 to indicate that the notification is restricted only to public markets. S. 23 (1) mentions "any market." A "market" is defined in S. 2 (2), a "public market" in S. 2 (3) and a "private market" in S. 2 (4). A market becomes a public market when the District Council or independent Local Board has by notification made under S. 23 been invested with the exclusive right of levying fees and tolls and of control. A "private market" means a market other than a

public market. A market may mean a private market unless it is declared to be a public market as noticed above. It thus follows that the word "market" occurring in S. 23 (1) must be understood in the sense in which it is defined in S. 2 (2). To restrict the term so as to mean a public market, as contended for, would be to amend and not to construe the Act. It is true that S. 23 (1) makes an inroad on the private rights of the proprietors, but the Court cannot interpret the term "market" used in the section otherwise than in the sense assigned to it by the enactment for the reason that it may prejudicially affect the interests of any person or a class of persons. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. It is not the function of the Court to make the law reasonable, but to expound it as it stands according to the sense of the words. It is not contended that this section itself is ultra vires of the legislature. If therefore the legislature intended to divest the proprietors of their rights of levying fees and tolls and of control over the markets situated in the villages, that intention must be given effect to although ostensibly it is unjust to proprietors. It was observed by Stanyon, A. J. C., in *Emperor* v. *Katay Kisan* (1), that the difficulty of applying any particular law, or the possibility, or even the probability, of injustice resulting from its application, afford no justification for a violation of that law by the Courts called upon to administer it. In the case of statute law, at any rate, the responsibility of the Courts ends with its due administration : for such results as may arise from that administration the responsibility lies on the legislature. It was also observed by Mitra, Offg. A. J. C., that where the language of the statute is clear and unambiguous, Courts have to give effect to it whether it has the effect of divesting a vested right or not : see *Miyasaheb* v. *Champalal* (2). It is therefore clear that although the expression "any market" as used in S. 23 (1), Local Self-Government Act, may be a private market, the notification issued in respect of such market cannot be regarded as irregular or illegal (unless there is a notification under S. 25 as pointed out later).

(1) [1904] 17 C. P. L. R. 113.
(2) A. I. R. 1914 Nag. 62=10 N. L. R. 42.

That the expression "any market" in S. 23 (1) cannot mean a public market is manifest from the very definition of the public market given in S. 2 (3). That definition clearly indicates that a market becomes a public market only after the notification is issued in respect of it under S. 23 (1) and obviously the contention that notification has to be issued with respect to a public market only would not be sound. It would be redundant to issue a notification under S. 23 (1) in respect of a market when it is already a public market. It must therefore follow that any market, as used in S. 23 (1), means a market other than a public market. Now a notification having been issued in respect of this market on 6th October 1924 and no suit having been filed as required by S. 23 (3), the Local Government's order, by notification made under S. 23 (1), must be deemed to have become final. The effect of the order has been to convert the market into a public market.

But it is contended with reference to S. 26 that inasmuch as the market in suit was lawfully in existence on the date on which the Local Self-Government Act, 1920, came into force, the plaintiff, being the proprietor, had a right to levy fees and tolls. The Act defines "a private market" negatively as being that which is not "a public market." Then it distinguishes a species of presumably private markets in certain villages which are to be notified by the Local Government under S. 25 of the Act, and this class of private markets is excluded from the operation of S. 23 of the Act. If a notification is issued under S. 23 in respect of such markets, that notification would be ultra vires. Ss. 26—34 are made applicable only to those villages which are notified by the Local Government under S. 25 of the Act. These sections apply to no other markets except those that have been notified. The plaintiff's suit purports to be one under S. 29 of the Act. The plaintiff is entitled to invoke this section only if he can prove that the village in which the market is situated has been notified by the Local Government under S. 25, Local Self-Government Act. In the District Council Manual there is a list of villages which are notified under S. 25 ; but that list does not include the village of Khedi. It is therefore obvious that the plaintiff is neither entitled to a license under

S. 26 (1) nor to the grant of certificate under S. 27. The mere fact that the Deputy Commissioner has by his order referred the plaintiff to the civil Court would not clothe him with a right of action under S. 29 if, under the statute, he is not entitled to it.

It is clear that the village in which the market in question stands not having been notified under S. 25, Local Self-Government Act, the plaintiff has no right of action under S. 29, Local Self-Government Act. The plaintiff ought to have taken action only under S. 23 (3) and that he omitted to do. The suit has been rightly dismissed by the Courts below. The appeal is therefore dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Nagpur 107

SUBHEDAR, A. J. C.

Baldeoprasad—Defendant 2 — Appellant.

v.

Premnarain and *others*—Plaintiff and Defendants 1 and 3 to 6—Respondents.

Second Appeal No. 216 of 1929, Decided on 11th August 1931, against decree of Addl. Dist. Judge, Narsinghpur, D/- 22nd December 1928.

C. P. Tenancy Act (1920), Ss. 5 and 11 — Tenant dying heirless — Rights engrafted on tenancy by transfer from tenant come to end and landlord is entitled to possession.

If a tenant after having made a transfer which is valid as against himself and as against the landlord were to voluntarily surrender his tenancy the law will presume that the tenancy has a continuance in order to work out the rights created by such a valid transfer. This principle has however no application where the tenant right comes to an end by operation of law, that is when the tenant dies without heirs entitled to succeed under the law. The determination of tenancy in such a case enlarges the rights of the landlord and gives him a right to immediate possession leading to the forfeiture of the rights of the transferee in the land : (*Case law referred*).

[P 109 C 1]

D. N. Choudhry and *H. D. Mulak*—for Appellant.

M. B. Kinkhede, *N. G. Bose* and *A. R. Kulkarni*—for Respondent 1.

Judgment.—The facts necessary for the disposal of this second appeal are shortly these : One Munde was an occupancy tenant of certain fields situate in Mauza Imaliya of which the plaintiff is the lambardar. Munde having died heirless on 10th February 1927, the suit, out of which this second appeal arises, was filed by the plaintiff to recover possession of Munde's holding from defendant 2 who held possession over it by virtue of four mortgages of the year 1892-93 effected thereon by Munde. The other defendants were joined in the suit as they laid claim as heirs to succeed to the holding in dispute, defendant 1 on the allegation that he was Munde's son and the other defendants as Munde's cousin's sons. The plaintiff denied that the defendants, other than defendant 2, were heirs of the deceased and contended that since the mortgages in favour of defendant 2 were not consented to by the then lambardar they were not binding upon him and that at any rate the tenant mortgagor having died the mortgages came to an end by operation of law and he was entitled to recover possession of the holding in the absence of any heirs of the deceased tenant.

The trial Court held : (1) that defendant 1 not being the legitimate son of the deceased tenant Munde had no title to succeed to the holding in dispute ; (2) that defendants 3 to 6 were not in any way so related to the deceased Munde as to become his heirs ; and (3) that all the mortgages in favour of defendant 2 having been consented to by the then lambardar, the same were binding on the plaintiff and he was therefore only entitled to redeem them. A decree was therefore passed in favour of the plaintiff, ordering that defendant 1's name as a tenant of the field in dispute be struck off from the revenue papers, that defendant 1 should deliver constructive possession of the land to the plaintiff, and declaring that the plaintiff was entitled to redeem all the mortgages of defendant 2. Against this decree the plaintiff went up in appeal and the Additional District Judge, Narsinghpur, while upholding all the findings of fact of the trial Court, altered the decree appealed against by ordering kbas possession to be delivered to the plaintiff as, according to him, the mortgages came to an end by the death of the mortgagor tenant. It is against this decree that defendant 2 has filed the present second appeal. (After discussing evidence, the judgment proceeded). The only other point argued on behalf of the appellant is one of pure law and requires the determination of the question whether the mortgagee-appellant can resist the present claim of the lambardar-respon-

dent for ejectment on the only ground available to him that the latter's predecessor-in-title had given his consent to the several mortgages under which he holds possession of the holding. There is only one answer possible to this question and it is in the negative, because, excepting on one occasion, the law bearing on the point was consistently interpreted by this Court in the several cases which are reported in the official and non-official reports.

The earliest case on the point is *Kushabai* v. *Rewaram* (1). The mortgage in question in that suit was a possessory mortgage and was executed in 1873 when Act 10 of 1859 was in force under which the occupancy rights were not transferable without the consent of the malguzar. On the tenant's disappearance and in the absence of his heirs the malguzar was held entitled to evict the mortgagees in possession. The next case is *Bhopalsing* v. *Thakur Borelal* (2) : in this case the question for decision was the position of a subtenant when the tenancy of the person from whom he held the land was determined by a surrender of it to the malguzar and it was held that when the tenancy was determined, the subtenancy which was grafted upon it necessarily came to an end and that the sub-tenant could not become a tenant of the malguzar otherwise than under a special contract.

In *Joharuddin* v. *Keshcorao* (3), an occupancy tenant had mortgaged his occupancy rights in his holding to the defendant with the consent of the malguzar who had foreclosed the mortgage during the lifetime of the tenant. After the death of the tenant without heirs the malguzar sued to oust the mortgagee who was in possession of the holding under a foreclosure decree. It was held that because the defendant had foreclosed his mortgage while the tenant was alive the mortgagee acquired an indefeasible title to the holding in the same way as he would have under a voluntary sale by the tenant with the consent of the malguzar, the subsequent death of the tenant not making any difference between the one and the other transaction. In *Vithal* v. *Ganpat* (4), which was also a suit by a lambardar to eject a mortgagee in possession from the holding upon the death of the tenant without heirs, it was held that, since the tenant right had been determined not by a voluntary act on the part of the tenant but by operation of law the mortgagee could not resist the claim for possession because a tenant could mortgage nothing beyond his tenant rights in the holding which rights were extinguished upon his death. It may be noted that in this case the lower appellate Court had ordered redemption apparently on the ground that the mortgage was consented to by the plaintiff.

In *Diwan Maharajsha* v. *Abheram* (5), it was held that in the case of a sublease granted by a tenant without the consent of his landlord the determination of the tenancy also determined the subtenancy, but that if the sublease was legally granted a voluntary surrender by the tenant could not operate to prejudice the rights of the sublessee. The principle enunciated in this case was however dissented from in *Bhagwangir* v. *Narain* (6), where Obbard, Offg. J. C., held that a surrender by a tenant to the malguzar was absolutely void against previous alienations whether properly or improperly made. This then is the only case which undoubtedly supports the contention now advanced before me on behalf of the appellant. But the principle laid down there was expressly dissented from by Ismay, J. C., in *Saiyad Noor* v. *Ramji* (7) and the one laid down by him in *Diwan Maharajsha* v. *Abheram* (5), followed.

In *Mt. Rani Bahu* v. *Sobha Ram* (8), the plaintiffs brought a suit for possession of land of which they claimed to be occupancy tenants. The defendant resisted the claim on the ground that he was in possession by virtue of usufructuary mortgages executed in his favour by the former tenant who had died heirless: it was held (1) that what was mortgaged to the defendant was a subsisting tenancy, on the determination of which by the death of the tenant without heirs the mortgage grafted upon it necessarily determined also ; and (2) that the doctrine that a voluntary surrender by a tenant cannot operate to prejudice the rights of one holding under him by virtue of a

(1) [1891] 5 C.P.L.R. 120.
(2) [1892] 6 C.P.L.R. 74.
(3) [1892] 6 C.P.L.R. 109.
(4) [1896] 10 C.P.L.R. 65.
(5) [1896] 11 C.P.L.R. 5.
(6) [1898] 12 C.P.L.R. 134.
(7) [1899] 12 C.P.L.R. 158.
(8) [1918] 43 I.C. 912.

transaction good against the landlord has no application to a case where the tenant dies without heirs. A similar question again arose in *Govindrao* v. *Sarjabai* (9), and was decided on the principle laid down in the earlier cases.

I hold then that a tenant under the Central Provinces Tenancy Law which formerly permitted transfers could transfer nothing beyond his tenant right in the holding. Therefore any transfer engrafted on the tenant right, whether by way of mortgage or sublease, and whether consented to by the landlord or not, comes to an end when the tenant right is itself determined by operation of law. If a tenant after having made a transfer which is valid as against himself and as against the landlord were to voluntarily surrender his tenancy the law will presume that the tenancy has a continuance in order to work out the rights created by such a valid transfer. This principle has however no application where the tenant right comes to an end by operation of law, that is, when the tenant dies without heirs entitled to succeed under the law. The determination of tenancy in such a case enlarges the rights of the landlord and gives him a right to immediate possession leading to the forfeiture of the rights of the transferee in the land.

For the reasons given above the decree of the lower appellate Court is confirmed and this appeal dismissed with costs.

K.N./R.K. *Appeal dismissed.*

(9) A.I.R. 1926 Nag. 62=89 I.C. 872.

A. I. R. 1932 Nagpur 109

SUBHEDAR, A. J. C.

Ramratansingh and *another*—Appellants.

v.

Hari and *others*—Respondents.

Second Appeal No. 326-B of 1929, Decided on 14th September 1931, against decree of Dist. Judge, Akola, D/- 10th October 1929.

(a) Provincial Insolvency Act (1920), S. 4 —Insolvency Court has jurisdiction to determine genuineness or otherwise of deed by insolvent.

Insolvency Court has full jurisdiction to determine the question of the genuineness or otherwise of the deed of gift executed by the insolvent more than two years prior to his being adjudged insolvent : *A. I. R.* 1929 *All.* 105 (*F. B.*), *Foll.*; *A. I. R.* 1926 *All.* 470 (*Sen J.'s view*), *not Foll.* ; *A. I. R.* 1921 *Nag.* 159, *Ref.* [P 110 C 1]

(b) Provincial Insolvency Act (1920), S. 4 —Provisions of S. 4 are retrospective.

The provisions of S. 4 are mere alterations in the procedure and are as such retrospective. Hence the mere fact that the deed of gift relied on by the objector was executed prior to the enactment of S. 4 which gave jurisdiction to the insolvency Court to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court is no bar to the decision of the matter in controversy in the proceedings before the insolvency Court : *A. I. R.* 1929 *Lah.* 761 ; *A. I. R.* 1924 *All.* 40, *Ref.* [P 110 C 2]

M. B. Kinkhede—for Appellants.

A. V. Khare and *W. B. Pendharkar*—for Respondents.

Judgment.—The facts leading to this second appeal are briefly these: One Jansingh, on 5th May 1919, executed a deed of gift of the property in dispute in favour of his grandsons (Ex. 0-1). He was very much indebted, and on 19th February 1924 he applied to be adjudged insolvent and the order of adjudication was passed on 16th August 1924. The receiver attached the property in dispute and on 13th December 1926 the grandsons preferred an objection to the attachment on the ground that the property belonged to them by virtue of the aforesaid deed of gift. As the gift was apparently prior to two years before the order of adjudication was passed the insolvency Court allowed the objection; but on appeal the lower appellate Court held that apart from the provisions of S. 53, Provisional Insolvency Act, the Court had to determine under S. 4 (*ibid*) whether the transaction was at all genuine and valid and remanded the case for determination of this question. After an elaborate trial the insolvency Court held that the deed was invalid against the receiver, because it had the effect of defeating the creditors. This decision was apparently given under the provisions of S. 53, T. P. Act, read with S. 4, Provincial Insolvency Act.

Against this decision the objectors appealed and the learned District Judge appears to have upheld the contention of the appellants that the lower Court's finding that the gift was voidable under S. 53, T. P. Act, was ultra vires as that Court could not do so even under the provisions of S. 4, Provincial Insolvency Act. But the lower appellate Court relying on the opinion expressed by Sulaiman, J., in *Hari Chand Rai* v. *Moti*

Ram (1), construed the finding of the lower Court as meaning that the deed of gift (Ex. 0-1) was really no gift at all and held that the question whether a particular transaction is in reality a mere sham or genuine was open for determination under the provisions of S. 4, Provincial Insolvency Act. Accordingly on a review of the evidence and the circumstances of the case the learned Judge came to the conclusion that the deed of gift

"was a mere blind to save the property for the insolvent himself, and not a real gift."

The appeal was accordingly dismissed and the decision of the first Court upheld though on different grounds.

The objectors have now come up in second appeal and the first point argued on their behalf is that the insolvency Court had no jurisdiction whatsoever to determine the genuineness or otherwise of the deed of gift on which the appellants relied. Reliance was placed by the learned counsel for the appellants on the view of Mukerji, J., in *Hari Chand Rai* v. *Moti Ram* (1), which was also followed by Sen, J., in *Anwar Khan* v. *Muhammad Khan* (2). I however prefer to follow the view of Sulaiman, J., in *Hari Chand Rai's* case (1) which was upheld by a majority of Judges in *Anwar Khan* v. *Muhammad Khan* (2), and hold that the insolvency Court had full jurisdiction to determine the question of the genuineness or otherwise of the deed of gift on which the appellants relied under S. 4, Provincial Insolvency Act. I am also supported in this view by a decision of this Court in *Gangadhar* v. *Shridhar* (3), where Macnair, A. J. C., made the following observations in connexion with the point under consideration :

"I add that S. 4, Act 5 of 1920, has now given Courts full power to decide the merits of the claims of third parties and in future the plea that the insolvency Court has no jurisdiction to investigate the alleged title of a third person will be obviously untenable."

The next contention urged on behalf of the appellants was that since the deed of gift on which the title of the appellants is based was executed on 5th May 1919 before Act 5 of 1920 came into force the title thus acquired by them could not be investigated by Courts under the jurisdiction conferred on them by S. 4 of the new Act and reliance was placed on *Hindusingh* v. *Mangal* (4), which lays down that unless an intention to the contrary is clear, an Act is to be construed as operating only on cases or facts which come into existence after the Act, and not retrospectively on cases which had come into existence before the Act. But the same case also lays down the further proposition that as a general rule alterations in forms of procedure are retrospective in effect and apply to pending proceedings. In my opinion the provisions of S. 4, Act 5 of 1920, are mere alterations in the procedure and as such are retrospective. This was also the view held by the Lahore High Court in *Shib Narain* v. *Lachmi Narain*, *A. I. R.* 1929 *Lah.* 761, where an order of adjudication had been passed under the old Act and a claim to the property advanced after the enforcement of the new Act. In this case as well as in *Maharana Kunwar* v. *E. V. David* (5), it was also held that it was open to the person claiming the property attached by the insolvency Court to bring a regular suit for adjudication on the merits of his claim, but if he places the matter before the insolvency Court and that Court proceeds to determine the question, its decision is final and binding for all purposes as between the debtor and the debtor's estate and all claimants against him or the estate on the other.

I hold then that the mere fact that the deed of gift relied on was executed prior to the enactment of S. 4 of the present Provincial Insolvency Act which gave jurisdiction to the insolvency Court to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, was no bar to the decision of the matter in controversy in the present suit by the insolvency Court. I may as well note that in addition to filing their objection petition in the insolvency Court the appellants had also instituted regular Civil Suits Nos. 65 and 66 of 1926 for declaration that the property attached belonged to them on the

(1) A. I. R. 1926 All. 470=94 I. C. 429=48 All. 414.
(2) A. I. R. 1929 All. 105=113 I. C. 819=51 All. 550 (F.B.).
(3) A. I. R. 1921 Nag. 159=61 I. C. 589.
(4) A. I. R. 1923 Nag. 227=72 I. C. 438=19 N. L. R. 110.
(5) A. I. R. 1924 All. 40=77 I. C. 57=46 All. 16.

basis of the deed of gift, but they got the suits dismissed as withdrawn on the ground that they would have the matter decided by the insolvency Court : see Exs. R-35, 36, 37 and 38.

The result is that the decision appealed against is correct and this appeal fails and is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Nagpur 111

NIYOGI, A. J. C.

Gayaprasad—Applicant.

v.

Emperor—Non-Applicant.

Criminal Revn. No. 145 of 1931, Decided on 15th June 1931.

C. P. Excise Act (1915), Ss. 34, 35 and 45 —Offence under Ss. 34 and 35 read with S. 45 should be tried as warrant cases —It is irregularity amounting to illegality to try them as summons cases.

For the purpose of procedure to be followed in trying criminal cases, the nature of the offence need not be considered. A case becomes a "summons case" or "warrant case" according to the nature and the measure of punishment which the law attaches to the offence. All offences under Ss. 34 and 36, which are committed after the conviction of the first offence, have to be tried as a "warrant case." It is a clear irregularity in trying such a case as a summons case and it is fatal to the trial as it amounts to an illegality : 29 *Mad.* 372, *Ref.* [P 111 C 2]

W. B Pendharkar—for Applicant.

Order.—Gaya Prasad, son of Mithoo, was convicted for an offence punishable under S. 34 (b) read with S. 45, Central Provinces Excise Act, and sentenced to four months' rigorous imprisonment. His appeal having been dismissed, he moves this Court in revision.

The applicant was accused of illegal sale of liquor. The case was tried as a summons case, although he had been previously convicted of an offence punishable under S. 36, Excise Act. After the prosecution witnesses were examined and discharged, the applicant engaged a pleader, who prayed for permission to cross-examine the witnesses. This request was not allowed on the ground that it being a summons trial, the accused was not legally entitled to ask for the production of the witnesses for cross-examination over again.

The principal question in this case is whether the applicant being a previous convict under the Excise Act, it was open to the Magistrate to try his case as a summons case. S. 45, Central Provinces Excise Act, is as follows :

"If any person, after having been previously convicted of an offence punishable under Ss. 34, 35 and 36 or S. 40, or under the corresponding provisions in any enactment repealed by this Act, subsequently commits and is convicted of an offence punishable under any of those sections, he shall be liable to twice the punishment which might be imposed on a first conviction under this Act."

Section 34 defines the various acts which amount to offences under the Excise Act and such acts are punishable with imprisonment for a term which may extend to six months. As the applicant was already convicted of an offence punishable under S. 36, Excise Act, he was liable under S. 45 to be punished with imprisonment for a term of 12 months. S. 4 (l) (w), Criminal P. C., defines "warrant case" as a case relating to an offence punishable with death, transportation, or imprisonment for a term extending six months. The term "offence" also is defined in S. 4 (i) (o) of the same Code as meaning any act or omission made punishable by any law for the time being in force. From this it is clear that the offence under S. 34, S. 35 or S. 36, Excise Act, becomes an offence triable under the Criminal Procedure Code, and in view of S. 45, if a person is liable to be punished with imprisonment for a term of 12 months, the case must fall within the meaning of "warrant case" as defined in the Criminal Procedure Code. The learned District Magistrate is of opinion that S. 45, Excise Act, does not create a new offence, but only empowers the Court to impose heavier punishment. It is immaterial that S. 45 does not create a new offence.

For the purpose of the procedure to be followed in trying criminal cases, the nature of the offence need not be considered. A case becomes a "summons case" or "warrant case" according to the nature and the measure of punishment which the law attaches to the offences. The terms of S. 45 leave no doubt that all offences under Ss. 34 and 36, Excise Act, which are committed after the conviction of the first offence, have to be tried as a "warrant case." It appears to me that it leaves no option to the Magistrate in the matter. Consequently when the offence for which the applicant was prosecuted became punishable under S. 45 with imprisonment for more than six months, it ought to have been tried as a warrant case. There has been a clear irregularity in trying this

case as a "summons case." The irregularity is fatal to the trial as it amounts to an illegality: see *Emperor* v *Chinnapayan* (1). The course followed has gravely prejudiced the accused. I agree with the learned District Magistrate that such cases have to be severely dealt with, but the Judge has to see that he punishes crime without doing injustice.

The learned District Magistrate's argument that the previous conviction cannot be proved until after the accused is found guilty does not appear to be valid in view of S. 221 (7), Criminal P. C. which provides that "the fact, date and place of conviction shall be stated in the charge." Dealing only as I do with the trial of offences under the Excise Act, it appears to be necessary for the prosecution to state at the outset the fact of previous conviction. This was done in the present case, as I find a certified copy of an entry in the register of criminal cases relating to the accused's previous conviction has been filed along with the challan.

I set aside the conviction and order a retrial. This case will now be tried as a "warrant case." If the applicant is found guilty, the trial Magistrate will no doubt take into consideration the period of sentence already suffered by the applicant. The accused will surrender before the District Magistrate.

K.N./R.K. *Revision allowed.*

(1) [1906] 29 Mad. 372=4 Cr. L. J. 231.

A. I. R. 1932 Nagpur 112

MACNAIR, J. C.

Saibaj—Applicant.

v.

Gaffoor—Non-applicant.

Criminal Revn. No. 351 of 1931, Decided on 3rd December 1931.

Penal Code (1860), S. 441—"Continuing trespass"—No fresh offence by mere continuing trespass.

Remaining in possession of property after unlawful entry is not a fresh offence of criminal trespass. To constitute criminal trespass as defined in S. 441, there must either be entry upon property in the possession of another or unlawful continuance thereon after a lawful entry. A lawful owner, who merely goes near to the land as he dares, cannot be said to have re-entered upon the land. It would probably amount to re-entry if the true owner entered upon the land while the trespasser remained there: *A. I. R.* 1928 *Pat.* 124, *Diss. from.* [P 112 C 2]

V. N. Herlekar—for Applicant.

Order.—One Gaffoor took forcible possession of a house of the applicant Saibaj. Saibaj filed a complaint under S. 448, I. P. C. Gaffoor was convicted and fined Rs. 50 but still did not give up possession. A second complaint under S. 448, I. P. C., was laid; Gaffoor was convicted in the Magistrate's Court but was acquitted in appeal. The learned Sessions Judge has rightly stated that the conviction cannot be sustained unless there was criminal trespass as defined in S. 441, I. P. C., and has held that remaining in possession of property after unlawful entry is not a fresh offence of criminal trespass.

I am asked to interfere in revision on the ground that the Sessions Judge has taken a wrong view of the law. The applicant's counsel relies on *Emperor* v. *Bandhu Singh* (1). In that case Mullick, A. C. J., stated that the continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares, to make a claim to it. He therefore comes to the conclusion that each time that the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by S. 441 a new offence under that section is committed and a new liability arises. With all deference to the views expressed by Mullick, A.C.J. and Wort, J., I am unable to agree with this view. To constitute criminal trespass as defined in S. 441, I. P. C., there must either be entry upon property in the possession of another or unlawful continuance thereon after a lawful entry. I do not see how a lawful owner who merely goes near to the land as he dares can be said to have re-entered upon the land. It would probably amount to re-entry if the true owner entered upon the land while the trespasser remained there but it is not alleged that the applicant Saibaj entered the house at all. Gaffoor then did not make a fresh entry and has not committed an act of criminal trespass as defined in S. 441, I. P. C. I have considerable sympathy with the applicant but remark that Ss. 145 and 522, Criminal P. C., would have enabled him to get possession of the property had he taken action in due time. The application is dismissed.

W.D./R.K. *Application dismissed.*

(1) A. I. R. 1928 Pat. 124=106 I. C. 691=29 Cr. L. J. 99=6 Pat. 794.

A. I. R. 1932 Nagpur 113

NIYOGI, A. J. C.

Vithoba—Plaintiff—Appellant.

v.

Bhawani and *others* — Defendants — Respondents.

Appeal No. 270-B of 1929, Decided on 17th September 1931, against appellate decree of Addl. Dist. Judge, Buldana, D/- 25th June 1929.

Berar Land Revenue Code (1928), S. 179—"Most nearly related" means related by consanguineous relationship.

The expression "most nearly related" occurring in S. 209, Berar Land Revenue Code, 1896 and S. 179, Berar Land Revenue Code, 1928, excludes relationship by affinity, and denotes consanguineous relationship: 14 *O. C.* 193; 7 *O. C.* 6 and *A. I. R.* 1925 *All.* 449, *Ref.* [P 113 C 1]

R. M. Bhagade—for Appellant.

V. R. Dhoke—for Respondents.

Judgment.—This appeal arises out of a suit instituted for pre-emption by the appellant in respect of a share in field S. No. 25. That field is divided into three parts, viz., 25/1, 25/2 and 25/3. 25/2 is held by the plaintiff and the half-share in 25/3 is held by defendants 2 to 4 and half-share by defendant 5. On 11th April 1927, the defendants-respondents 2 to 4 sold their half-share in 25/3 to Bhawani respondent-defendant 1. Defendant-respondent 5 Govinda enforced his right of pre-emption by a suit No. 174/1927 and obtained actual possession of the share pre-empted by him. The plaintiff-appellant filed a suit out of which this appeal arises for pre-emption of the same share on the ground that he has superior right of pre-emption. He based his right on two facts, namely, that he held the largest interest in the field and that he was more nearly related to the vendors than defendant 5. Both the Courts held that the plaintiff was not related to the vendors at all whereas defendant 5 was related to one of the vendors by affinity and dismissed the suit. It is urged for the appellant that the expression "most nearly related" occurring in S. 209, Berar Land Revenue Code, 1896, and S. 179, Berar Land Revenue Code, 1928, excludes relationship by affinity, but that it denotes consanguineous relationship. Defendant 5 is Chandrabhan's (defendant 2's) son's father-in-law's brother. He is not therefore related to Chandrabhan, one of the vendors by ties of blood. There can be no consanguineous relation between a father-in-law and a son-in-law. In cases of those persons who are related by marriage it is hardly possible to determine the degree of relationship. How is it possible to determine the degree of propinquity of a man with his son's father-in-law on the one hand and his grandson's father-in-law on the other? The expression "most nearly related" cannot have any meaning in regard to relationship originating from marriage. It is only when the relationship is based on community of blood, that is, consanguinity, that it is possible to determine the degrees of propinquity. The learned Judge of the lower appellate Court is of opinion that relationship which is formed by alliance includes that of a sister's son and a daughter's son. This is based on a confusion between cognatic relationship and that of affinity and cannot be accepted as a correct exposition of the law. Relationship which exists through the father or mother, brother or sister, is of a totally different kind from that which arises by marital alliance between the members of two distinct stocks. While in the first case there is community of blood in the latter case there is none and it is for this reason that it is impossible to determine the degree of propinquity in regard to the relations of the latter class.

The learned Judge of the lower appellate Court has apparently misunderstood the case reported in *Muhammad Ayub Khan* v. *Kaniz Fatima Bibi* (1). There it is clearly held that the relationship mentioned in S. 9, Oudh Laws Act means consanguinity from a common stock as was held in *Mt. Jafri Begum* v. *Mt. Golab Kuar* (2). The same view was taken in *Abhainandan Prasad* v. *Pashpat Nath* (3). It is clear that defendant 5's relationship with defendant 2 as alleged, has no bearing on the question of determining the priority in the matter of pre-emption. The issue as to the quantum of interests held by the plaintiff-appellant and defendant-respondent 5, has not been investigated. The determination of the case rests entirely upon the nature of the finding on that issue. The case will therefore go back to the lower appellate Court for deter-

(1) [1910] 14 O. C. 193=11 I. C. 919.
(2) [1904] 7 O. C. 6.
(3) A. I. R. 1925 All. 449=87 I. C. 298=47 All. 470.

mining the issue which has been left open. The plaintiff's appeal succeeds. The respondents will bear the costs of this appeal and those of the lower appellate Court. The costs of the first Court will abide the result.

V.B./R.K. *Case remanded.*

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* A. I. R. 1932 Nagpur 114

NIYOGI, A. J. C.

Tarabai—Plaintiff—Appellant.

v.

Chogmal and *another*—Defendants—Respondents.

Misc. Appeal No. 20-B of 1931, Decided on 14th December 1931, against order of Addl. Dist. Judge, Buldana, D/- 10th August 1931.

***(a) Civil P.C. (1908), S. 20—"Carrying on business"—Ginning factory of one person remaining dormant under special contract of combination with other factories — Owner continuing to derive profit from contract—Owner is deemed to be carrying on business of ginning factory.**

The test of carrying on business is not the continuity or intermittancy of the business, but the fact of owning interest in the business and receiving profits. Consequently a person must be deemed to be carrying on a business of ginning factory if under a special contract of combination entered into by him with other factories, his factory remains quiescent and he derives profits from the contract. Under the circumstances the intervals of inactivity do not imply either suspension or cessation of business: *A. I. R.* 1922 *All.* 367 and *South Behar Ry. Co.* v. *Inland Revenue Commr.*, (1925) *A. C.* 476, *Ref.*; 18 *Bom.* 294; *A. I. R.* 1929 *Mad.* 146; *A. I. R.* 1929 *Mad.* 347; *A. I. R.* 1930 *Lah.* 818 and *A. I R.* 1927 *Mad.* 689, *Dist.* [P 115 C 1]

(b) Civil P. C. (1908), O. 30, R. 1—Persons carrying on business as firm in British India are liable to be sued in British India irrespective of whether they are non-residant foreigners.

Two or more persons carrying on business in the name of a firm in British India, are liable to be sued in British India in the name of the firm, and would be amenable to the jurisdiction of any competent Court in British India irrespective of whether they are British subjects or foreigners: 17 *Bom.* 662; 25 *Bom.* 528 and *A. I. R.* 1924 *Mad.* 158, *Ref.*; 12 *Bom.* 507, *not Appr.* [P 116 C 2]

H. S. Gour, P. S. Kotval, M. B. Kinkhede, M. R. Bobde and *A. R. Kulkarni*—for Appellant.

A. V. Khare—for Respondents.

Judgment.—The appellant Tarabai instituted a suit against the respondents, Chogmal Mulchand and Bansilal, who constituted a firm styled "Chogmal Shankarlal," for recovery of moneys advanced for the purposes of respondents' ginning and pressing factory at Deulgaon Raja. The fact which gave jurisdiction to the Court of the Additional District Judge, Buldana, was, inter alia, alleged to be that the firm carried on business of ginning and pressing within the limits of its jurisdiction. The respondents pleaded that the Court had no jurisdiction to try this suit for the reason that the pressing and ginning factory owned by the respondents at Deulgaon Raja had ceased to work for time prior to the institution of the suit, as the respondents' firm had entered into a contract of combination with other factory owners under which the respondents' factory was to remain quiescent. The lower Court found that the respondent's factory at Deulgaon Raja had ceased working some time prior to the institution of the suit and, consequently held that as the respondents were not carrying on business within its jurisdiction the Court was not competent to try this suit. It therefore returned the plaint for presentation to proper Court under O. 7, R. 10, Civil P. C. The plaintiff has preferred this appeal.

The principal point for determination in this appeal is whether the respondents should be deemed to have been carrying on business at Deulgaon Raja notwithstanding that their ginning and pressing factory had been kept inactive on account of the respondents having joined the combination. It appears that the respondents carried on their business in two different ways: the ginning business was carried on under a contract of combination which was made every year, while the pressing business was carried on under a contract of combination which was for five years. Under this method of carrying on business while some of the factories are kept active, others are kept closed, although even the latter class of factories have to be maintained in good working order and in readiness for any emergency and the owners are entitled to a share in the joint profits of the combination. The question for determination is whether the respondents should be regarded as not carrying on business by reason of their factory being kept inactive in accordance with the agreement described above. It appears to me that the circumstance that the respondents' factory was kept inactive does not imply either suspension or cessation of business which the respondents carried on by means of the factory at Deulgaon Raja.

Analyzing the nature of the contract of combination, it would appear that the pressing and ginning business which is ordinarily carried on at Deulgaon Raja, necessarily involves quiescence of some factories. Notwithstanding a factory is inactive the owner realizes profits by virtue of his ownership of the factory, pursuant to the contract of working in combination. It is not denied that some factories which were subject to the contract of combination were actually working and it is out of the profits accruing from these active factories that the respondents were entitled to claim a share. In other words in consideration of keeping their own factory dormant probably for the purpose of obviating unfair competition the respondents acquired interest during the term of the contract in the factories, which were working for profits. Considered from this point of view the respondents' position was precisely the same as that of those owners whose factories were to be kept working. It cannot therefore be said of him that he was not carrying on business any more than it could be said of the others.

The test of carrying on business is not the continuity or intermittency of the business but the fact of owning interest in the business and receiving profits. In *Kirpa Ram* v. *Mangal Sen* (1), a similar question arose for decision and their Lordships held that the expression "carrying on business" occurring in S. 20 (a), Civil P. C., is used as distinct from personally working; it does not necessarily involve personal presence or personal effort. It only means having an interest in a business at that place, a voice in what is done, a share in the gain or loss, and some control, if not over the actual method of working, at any rate upon the existence of the business. In the present case it is manifest that the respondents had an interest in the ginning and pressing business of Deulgaon Raja and had a share in the gain or loss, and as partners in the combination had some control however small over the business. The mere fact that the respondents' own factory was kept inactive will not affect the issue: *South Behar Ry. Co.* v. *Inland Revenue Commissioners* (2), provides a parallel, although the question related to the assessment of income-tax. In that case the issue for determination was whether the South Behar Railway Co., were company carrying on a trade or business or undertaking of a similar character and liable to be assessed to corporation profits tax. The company entered into a contract with the Secretary of State for India in 1895, to find the money and materials for the construction of the railway which was to be undertaken by the Secretary of State through such agency as he should appoint, but at the risk and cost of the company. The Secretary of State, as from the opening of the railway and until the determination of the contract, was to work and maintain the railway and was to retain a percentage of the gross receipts of the railway, the balance being the net earnings of the company.

By a supplemental contract made in 1906, after the railway had been opened, the company, until the determination of the principal contract, was to relinquish the railway to the Secretary of State in consideration of a fixed annuity to be paid half-yearly to the company in lieu of the percentage of earnings payable under the principal contract. Since the supplemental contract the only business of the company was to receive the annuity and to declare dividends. It was held

> "that the company carried on a business or similar undertaking within the meaning of S. 52, Finance Act, 1920, and was therefore liable to corporation profits tax."

While delivering his opinion Lord Sumner, observed as follows:

> "Business is not confined to being busy; in many businesses long intervals of inactivity occur."

It is therefore clear that the respondents were carrying on business although their factory remained dormant under a special contract. The learned counsel for the respondents relies on *Gosami Shri Girdhariji* v. *Shri Goverdhan Lalji* (3), *Bombay Co.* v. *Municipal Council, Dindigul*, *A. I. R.* 1929 *Mad.* 146; *John* v. *Oriental Government Security Co.*, *A. I. R.* 1929 *Mad.* 347; *R. J. Wyllie & Co.* v. *Secy. of State*, *A. I. R.* 1930 *Lah.* 818 and *Govindrajulu Naidu* v. *Secy. of State* (4). I find that these cases have no bearing on the point at issue. In *Goswami Shri Girdhariji* v. *Shri Goverdhan Lalji* (3), their Lordships of the

(1) A. I. R. 1922 All. 367=65 I. C. 93.
(2) [1925] A. C. 476.
(3) [1893] 18 Bom. 294=21 I. A. 13=6 Sar. 396 (P.C.).
(4) A. I. R. 1927 Mad. 689=105 I. C. 576=50 Mad. 449.

Privy Council were considering the question as to whether the Acharya of the Vaishnav community (residing at Udepur) who had an establishment for the collection and entry of gifts made by devotees at Bombay, was carrying on business within the meaning of Cl. 12, Letters Patent, 1865. Their Lordships held that:

"The receipt of donations at Bombay or acceptance of offerings on ceremonial visits, was not tantamount to carrying on business, which is intended to relate to a business in which a man may contract debts, and ought to be liable to be sued by persons having business transactions with him."

In *Bombay Co.* v. *Municipal Council, Dindigul, A. I. R.* 1929 *Mad.* 146, it was held:

"Where profits are earned in one place, while the business is controlled from another place, it is the latter place where the profits must be held to be earned."

This case properly interpreted favours the appellant, inasmuch as under the contract of combination the respondents ought to be considered to control their business at Deulgaon Raja: *John* v. *Oriental Government Security Co., A. I. R.* 1929 *Mad.* 347, is also distinguishable since it was held that a company which has an agency in Madras, doing nothing but act as a post office forwarding proposals and sending moneys and not having any discretion in the matter either to conclude contracts or to vary them or to enter into them, did not carry on business in Madras. In the two last mentioned cases the question for determination was whether the Secretary of State should be regarded as carrying on business and it was held that

"carrying on Government was not carrying on business, which implies the object of gain or profit."

The case affords no assistance in the determination of the point at issue in the present case. It is next contended for the respondents that they, being non-resident foreigners, could not be sued in British Indian Courts notwithstanding that they were carrying on business in British India. No doubt the view taken in *Kessowji Damodar Jairam* v. *Khimji Jairam* (5), supports this contention. But it must be noticed that this view was overruled in *Girdhar Damodar* v. *Kassigar Hiragar* (6), and was not followed in *Rambhat* v. *Shankar Baswant* (7) and in *Janoo Hassan* v. *Batchu Kamandu* (8). Apart from these judicial authorities, O. 30, R. 1, Civil P. C., provides a complete answer to the respondents' contention. The respondents are sued in the name of the firm and as they have been found carrying on business in British India they would be amenable to the jurisdiction of any competent Court in British India irrespective of whether they are British subjects or foreigners. O. 30, Civil P. C. is a reproduction of the principal rules comprised in O. 48 (a) of the English Rules. While interpreting O. 48 (a) of the English Rules, Lord Esher, M. R. in *Worcester City and County Banking Co.* v. *Firbank Pauling & Co.* (9), observed as follows:

"Reading R. 1, O. 48 (a) with Rr. 3 and 8, it seems to me that it is now immaterial whether the writ is against an English firm or against a foreign or colonial firm and the only question to be considered in order to see whether the case comes within the rule is whether the firm carries on business within the jurisdiction. If the firm carries on business within the jurisdiction, then whether it is an English or a foreign firm and whether it also carries on business in a colony or abroad or not, a writ may be issued against the partners in the firm name."

This statement of the law fully supports the plaintiff in the present case, who has sued the respondents in the name of the firm and has proved that the firm carries on business at Deulgaon Raja within British India.

The result is that the appeal is allowed and the suit remitted to the lower Court for trial. The respondents' cross-objections consequently fail. The respondents will bear the costs of both the Courts. Pleader's fees Rs. 50.

V.B./R.K. *Appeal allowed.*

(5) [1888] 12 Bom. 507.
(6) [1893] 17 Bom. 662.
(7) [1901] 25 Bom. 528=3 Bom. L. R. 82.
(8) A. I. R. 1924 Mad. 158=76 I. C. 752.
(9) [1894] 1 Q. B. 784=63 L. J. Q. B. 542=9 R. 367=70 L. T. 443=42 W. R. 402.

A. I. R. 1932 Nagpur 116

JACKSON, J. C.

Abdul Razak—Accused—Applicant.

v.

Municipal Committee, Nagpur—Non-Applicant.

Criminal Revn. No. 324 of 1931, Decided on 28th October 1931.

C. P. Municipalities Act (1922), S. 189—Conviction under S. 133—Continuing fine cannot be prospective.

Where the Magistrate convicts the accused under S. 133 and further orders the accused to remove his merchandise outside the Municipal limits by a certain date and imposes a daily fine

in default of removal, such order is illegal. The imposition of a continuing fine cannot be prospective but can only follow on proof that the offence has been continued. [P 117 C 1]

R. G. Rao—for Applicant.

P. K. Salve—for Non-Applicant.

Order.—There is a mistake in the order of the trial Court in that reference has been made to S. 199 instead of S. 189, Municipalities Act. This, to my mind, does not affect the legality of the conviction. The order however requiring the accused to remove his merchandise outside Municipal limits by a certain date and imposing a daily fine in default of removal seems to me clearly illegal. The imposition of a continuing fine cannot in my opinion be prospective, but can only follow on proof that the offence has been continued. The second sentence of the Magistrate's final order is set aside.

P.N./R.K. *Order accordingly.*

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* A. I. R. 1932 Nagpur 117

STAPLES, A. J. C.

Manikchand—Defendant— Appellant.

v.

Krishna—Plaintiff—Respondent.

Misc. Appeal No. 55 of 1930, Decided on 30th November 1931.

*** Evidence Act (1872), S. 35— Entry in school register stating date of birth is admissible to prove age when such duty is cast upon school master under standing orders.**

Where there is an official duty cast upon any officer or minister to make an entry, and in pursuance of such duty he duly makes an entry in his register, such entries are admissible in evidence. Thus since under Education Manual of the Central Provinces and Berar, Part 2, Ch. 6, Art. 27, which deals with the admission of pupils, it is laid down that in case of a pupil admitted to a recognized school for the first time, the date of birth shall be ascertained from the parent or guardian in writing and entered in the admission register, and consequently there is a duty imposed upon the schoolmaster to enter the age of all pupils he admits in his register, such entry is admissible in evidence to prove the age of a person : *S. A. No. 48-B of 1931, Foll.*; *2 N. L. R. 34, Dist. A. I. R. 1927 Bom. 11, Ref.* [P 118 C 1]

D. N. Khare, K. S. Naydu and *R. V. Khare*—for Appellant.

G. S. Lule—for Respondent.

Judgment.—The respondent brought a suit for setting aside a sale of his half share in Field No. 29 of Mauza Mana in the Chanda District, which was effected by his mother Mt. Laxmibai in favour of the defendant-appellant Manikchand on 25th May 1919. Various pleas were put forward by the defendant in the trial Court and several issues were framed. The suit however was really dismissed on the ground of limitation only and it was held that the suit was barred under Art. 44, Lim. Act, as the plaintiff had attained majority more than three years before the suit. On appeal however that finding was reversed by the District Judge, who held that the plaintiff was born on 24th July 1907, that he attained majority on 24th July 1925 and that the suit, which was brought on 21st July 1928, was within time. He accordingly reversed the decree of the trial Court and remanded the case under O. 41, R. 23 for a fresh decision upon merits. The defendant has now preferred this second appeal against this finding and the order of remand. The only question then to be determined in this appeal is whether the finding of the lower appellate Court that the respondent Krishna was born on 24th July 1907 is correct. That finding is a pure finding of fact on the evidence, and it cannot now be set aside in what amounts to a second appeal as the lower appellate Court was under no misconception in the matter and has not misconceived the evidence. The argument however put forward by the learned counsel for the appellant was that the Courts below were wrong in admitting inadmissible evidence, namely, Exs. P-17, P-18, P-19 and P-20. The objection seems to be on two grounds : one, as stated in the second ground of the memorandum of appeal, that these documents were only copies of the original documents, which are not on the record, and, secondly, that they are not admisible in evidence to prove the age of the plaintiff-respondent according to the decision in *Mr. Collier* v. *Mrs. Baron* (1). Further as regards the declaration (Ex. P-17) it was argued that that was a declaration by one Sheikh Ramzan, who was not the guardian of the minor.

As regards the fact that these exhibits are copies, I do not think much need be said and no argument was put forward before me by the learned counsel for the appellant. They are, duly attested copies, and there is nothing to show that the originals were not produced in Court: on the contrary, it appears that the originals were produced and therefore the copies are admissible in evidence. As regards the contention that such en-

(1) [1905] 2 N.L.R. 34.

tries in school admission registers or affidavits with regard to age and such registers are not admissible in evidence according to the decision in *Mr. Collier* v. *Mrs. Baron* (1), I would refer to my judgment in *Deoba* v. *Durgaprasad* (2). I would point out that a distinction can be drawn between an entry in a Baptismal register and an entry in a School Admission Register. As stated in that judgment, it is not the duty of a priest under any official order when baptising a child to ascertain the age of the child or to record the age : on the other hand, a schoolmaster, when admitting a boy into his school, is bound under standing orders to inquire about his age and to enter his age in the register. As noted in *Mr. Collier* v. *Mrs. Baron* (1) at p. 37:

" a marriage register is evidence not only of the fact of marriage, but of the time of its celebration ; for both these facts must have been known to the clergyman making the entry and it was his duty to state them correctly in the register."

Thus, where there is an official duty cast upon any officer or minister to make an entry, and in pursuance of such a duty he duly makes an entry in his register, such entries are admissible in evidence. I would refer to the Education Manual of the Central Provinces and Berar, Part 2, Ch. 6, Art. 27, which deals with the admission of pupils. It is there laid down that in the case of a pupil admitted to a recognized school for the first time, the date of his birth shall be ascertained from the parent or guardian in writing and entered in the admission register. Thus under standing orders there is a duty imposed upon the schoolmaster to enter the age of all pupils whom he admits in his registers and such entries therefore are admissible in evidence to prove the age of the persons concerned. I would in this connexion refer to *Bhanudas* v. *Krishnabai* (3).

The other contention about the declaration or affidavit in Ex. P-17 has not, I think, much force. It is true that the affidavit was made by Sheikh Ramzan, who has been examined as P. W. 18, and that he was not the guardian of the plaintiff at the time. On the other hand he has deposed that he has been in the service of the plaintiff's family for 30 years from the time of the plaintiff's father and that he made the affidavit as regards the plaintiff's age before the Head Master of the Punwat Marathi School about 10 or 11 years before the time of his deposition after consulting the Register of Births and Deaths, which was in the possession of the malguzar, and that he had satisfied himself of the correct date of the plaintiff's birth from that register. Such evidence is surely admissible and cannot be rejected merely on the ground that Shaikh Ramzan, who was acting on behalf of the plaintiff's mother and guardian, was not himself the plaintiff's guardian. I am of opinion, then, that there is no force in the grounds put forward on behalf of the appellant, that no inadmissible evidence has been admitted by the Courts below and that the finding with regard to the age of the plaintiff-respondent cannot be disturbed. I therefore dismiss the appeal. Costs of the appeal will be borne by the appellant. I fix pleader's fees at Rs. 25. Other costs will follow the event.

V.B./R.K. *Appeal dismissed.*

(2) Second Appeal No. 48-B of 1931, Decided on 21st October 1931.

(3) A.I.R. 1927 Bom. 11=99 I.C. 307=50Bom. 716.

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NIYOGI AND GRILLE, A. J. Cs.

Karimbhoy Shamshuddin—Applicant.

v.

Rudra Pratap Singh and *another*—Non-Applicants.

Misc. Petn. No. 6 of 1931, Decided on 12th August 1931.

(a) Civil P. C. (1908), S. 100—Breach of contract—Suit for damages—Finding as to what damages should be paid is question of fact—Contract Act S. 73.

In a suit for damages caused by a breach of contract, the finding as to the amount of damages that should be awarded to the plaintiff is a question of fact and not at all a question of law. [P 119 C 2]

(b) Landlord and Tenant—Royalty—Where tenant pays royalty to landlord it is recoverable on breach of contract.

Where the plaintiff has paid a certain sum as royalty to a zamindar for a certain lease the plaintiff can recover that amount from the zamindar on breach of contract of the lease, in spite of the fact that the plaintiff was a sub-lessee and exclusive of any question of privity of contract between them. [P 120 C 1]

(c) Civil P. C. (1908), S. 110—Modification of lower Courts decree by High Court of pecuniary nature in appellant's favour—It is variation of lower Court's decree—But appellant cannot make that ground for appeal to Privy Council on grounds unconnected or dissociable from those in which Courts were of one mind.

Where the modification of a decree of a lower Court consists of a modification of a pecuniary nature in the appellant's favour on a matter to

be debated before the Privy Council. it amounts to a variation of the decree of trial Court and it is immaterial as far as that point is concerned, whether under S. 110, any substantial question of law is involved. But the appellant cannot make that decision a basis or appeal to the Privy Council on grounds unconnected with or rather dissociable from those on which he has succeeded and on which the Courts were of one mind : 8 *C. W. N.* 294 and *A. I. R.* 1922 *All.* 89 = 44 *All.* 200=64 *I. C.* 916 *held Overruled by A. I. R.* 1925 *P.C.* 60 (*P.C.*), *Expl.* ; *A. I. R.* 1927 *Cal.* 543, *Rel. on.* [P 119 C 2]

W. R. Puranik and *Fida Hussain*—for Applicant.

Kinkhede and *A. R. Kulkarni*—for Non-Applicants.

Judgment.—This is an application for leave to appeal to His Majesty in Council against the judgment and decree passed by a Bench of this Court in First Appeal No. 66 of 1929. The applicant was the plaintiff-appellant in the litigation and had sued a zamindar and another for recovery of damages arising out of a breach of contract. The co-defendant had himself originally entered into a contract with the zamindar and the trial Court held that the plaintiff was a sub-lessee of the co-defendant and dismissed the suit, holding that there was no privity of contract between him and the zamindar. This Court allowed the appeal to the extent of Rs. 5,000 with interest holding that there was privity of contract between the plaintiff and the zamindar defendant, but that, applying the rule laid down in the explanation to S. 73, Contract Act, the appellant, by deliberately refraining from using the means offered him to mitigate the loss caused, had forfeited any claim to compensation on account of money invested in the undertaking, which was one for the cutting of timber and converting it into sleepers, and estimated profits. The applicant now desires leave to appeal to His Majesty in Council claiming that Rs. 21,000 should have been awarded him in place of Rs. 5,000. Most of the questions raised in the application are questions of fact, but one point is alleged to be an important question of law, and that is that this Court has erred in its construction of the explanation to S. 73, Contract Act. That explanation runs as follows :

"In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

This is a direction as to the points which the Court has to consider in a suit for damages caused by a breach of contract. The direction has been followed and the conclusion at which the Court arrived (and which is concurrent with the conclusion reached in the trial Court) is not a question of law at all but a question of fact. No other point of law is urged as arising in this case, and the question that remains for determination is whether the decree does or does not affirm the decision of the Court below.

It had been the practice of this Court and of other High Courts in India to consider that where the modification of a decree of the lower Court consisted of a modification of a pecuniary nature in the appellant's favour on the matter which was to be debated before the Privy Council the decree was an affirming decree : *Sree Nath Roy Bahadur* v. *Secretary of State* (1), and *Kamal Nath* v. *Bithal Das* (2). This contention can no longer be regarded as good law by virtue of the decision of their Lordships of the Privy Council in *Annapurnabai* v. *Ruprao* (3), where it is laid down that such an enhancement in the appellant's favour is a variation of the decree of the first Court and that consequently it is immaterial under S. 110, Civil P. C., whether any substantial question of law is involved. Prima facie it would seem therefore that this case falls within the rule of *Annapurnabai* v. *Ruprao* (3), but a further point for consideration arises and that is whether the subject-matter, in respect of which Rs. 5,000 has been awarded, is the matter which the applicant desires to be discussed before the Privy Council. In the plaint in the trial Court the claim made by the plaintiff was specified as falling under four heads, namely : (1) Rs. 5,000 paid by himself as royalty in advance, (2) Rs. 2,000 for the refund of the deposit made by Sarat Chandra Bose, the defendant who originally took the contract from the zamindar, (3), Rs. 3,516 for the amount which the plaintiff himself had invested in the undertaking and (4) Rs. 1,05,000 on account of the loss of the estimated profits. The claim in respect of Rs. 2,000, refund

(1) [1904] 8 C.W.N. 294.
(2) A.I.R. 1922 All. 89=64 I.C. 916=44 All. 200.
(3) A.I.R. 1925 P.C. 60=86 I.C. 504=51 I.A. 319=51 Cal. 969 (P.C.).

of deposit made by Sarat Chandra Bose, is not pressed. Rs. 5,000 which this Court awarded to the plaintiff is for the refund of royalty which he paid to the zamindar and which the lower Court had disallowed on the ground that he was a sub-lessee of the co-defendant and consequently not entitled to claim from the zamindar.

We may note that this Court has held that the amount advanced as royalty having been paid by the plaintiff himself was recoverable from the zamindar exclusive of any question of privity of contract between them. We are in respectful agreement with the opinion of Rankin, C.J., expressed in *Narendra Lal* v. *Gopendra Lal* (4), that the decision of their Lordships in *Annapurnabai* v. *Ruprao* (3), does not go so far as to entitle a person whose claim has been enhanced on appeal to the fullest extent on that particular claim, to make that decision a basis for a further appeal on grounds unconnected with or rather dissociable from those on which he had succeeded, and on which the Courts were of one mind. On the facts before us it is clear that nothing more could be recovered in respect of the royalty paid in advance and it has been held that the question of the repayment of royalty was independent of any question of privity of contract between the parties. The point for consideration which remains is therefore whether the claim in respect of the remaining items, namely, Rupees 3,516, the amount alleged to have been invested in the undertaking, and the reduced claim on account of the estimated profits, in respect of the inadmissibility of which the Courts are of concurrent opinion, form a claim distinct from that in respect of the royalty which has been allowed. It is clear that nothing is claimable in respect of the royalty ; the applicant has received his demand thereof in full. In *Annapurnabai* v. *Ruprao* (3), leave to appeal was given on the claim in respect of which an enhancement had been permitted and the leave to appeal in respect of other items in the suit, on which there had been concurrent findings, was not asked for.

It is strenuously urged before us that as the case is one for damages arising out of a breach of contract, separate items making up the total claim cannot be dissociated, and the subject-matter is one and indivisible. We have already adverted to the finding that the plaintiff is entitled to a refund of Rs. 5,000 apart from the question of privity of contract between the parties. This will be found in para. 8, of this Court's judgment and in the circumstances it appears to us that this claim is exciseable from the remaining claim which is for damages on account of the loss of money invested and potential profits. It is true that the trial Court held that the plaintiff had no case, since he had no privity of contract with the zamindar, and that this Court held that there was privity of contract but that the plaintiff by his own action had destroyed his claim for damages; but we do not consider this as derogating in any way from the concurrent nature of the findings and that part of the decree which maintains that the plaintiff is not entitled to any damages. Both Courts came to a determination as to what the damages would have been if damages could be found assignable, and both Courts are agreed that the plaintiff declined to continue work in pursuance of the contract which had only temporarily been stopped, when he should reasonably have done so when facilities for continuance were provided by the zamindar. Although the explanation to S. 73, Contract Act, is not mentioned specifically by the trial Court in its judgment, the application of that direction is the basis of the trial Court's findings on issues 11, 12 and 14. The Courts therefore are of one mind that in no case would the plaintiff be entitled to any damages or for a refund of the amount alleged to have been invested. We consider that the refund of Rs. 5,000 with interest ordered in this Court is independent of the claim for damages which the applicant now prefers, and that, consequently, the decision of their Lordships in *Annapurnabai* v. *Ruprao* (3), does not apply to this case and are consequently of opinion that this application for the grant of a certificate should be refused. The application is dismissed with costs. Pleader's fee Rs. 40.

B.V./R.K. *Application dismissed.*

(4) A.I.R. 1927 Cal. 543=103 I.C. 65.

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Full Bench

MACNAIR, J. C., SUBHEDAR AND NIYOGI, A. J. C's.

Mohammadi Gul Rohilla—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 345 of 1931, Decided on 9th May 1932, against order of Sess. Judge, Nagpur, D/- 28th October 1931.

**** (a) Criminal P. C. (1898), Ss. 417 and 430—Appeal by accused against conviction in respect of minor offence heard and decided by High Court — Appeal under S. 417 from judgment of acquittal of graver offence is competent.**

Per *Macnair, J. C.* and *Subhedar, A. J. C.*— An appeal under S. 417 can be preferred although an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. A judgment which acquits the accused of a graver charge but convicts him of a minor offence can be attacked by filing two distinct appeals. *Niyogi, A. J. C. dissenting.* [P 124 C 1]

Per *Macnair, J. C.*— The proviso to S. 430 merely means that judgments of the lower Court can be varied by a superior tribunal in the manner specified in S. 417 and Ch. 32. It furnishes no authority for the proposition that a Court can vary its own judgment when deciding an appeal presented under the provisions of S. 417. [P 122 C 2]

Per *Subhedar, A. J. C.*— If the Government prefers an appeal against the acquittal for the major offence, after the appeal by the convict against his conviction for the minor offence is dismissed, it is open to the accused to question the propriety of his previous conviction and to the appellate Court to give effect to this plea by dismissing the Government appeal and making suitable recommendation to the Local Government if the Court came to the conclusion that on the facts established the convict was not guilty of any offence at all, or in the alternative by accepting the Government appeal and substituting a conviction for the major offence: *A.I.R.* 1928 *P.C.* 254, *Ref.*; *A.I.R.* 1926 *Bom.* 555, *Diss. from.* [P 125 C 1]

Per *Niyogi, A. J. C.* —An appeal by the Local Government against a subordinate appellate Court's judgment of acquittal of a graver offence is competent only if it is filed before the High Court pronounces its judgment in appeal from conviction of minor offence. If for any reason this is not possible, the standing counsel may move for adjournment of the convict's appeal intimating that the Local Government is taking steps towards filing such an appeal [P 127 C 1]

(b) Penal Code (1860), S. 304—Interpretation of.

Per *Macnair, J. C.* — S. 304 must be interpreted as providing punishment for the offence of culpable homicide in all cases where the accused cannot be convicted of murder. [P 123 C 1]

*** (c) Criminal P. C. (1898), S. 403 — Applicability of.**

Per *Macnair, J. C.*— S. 403 refers to a fresh trial. It has no application where the decision of both appeals by the convict and the appeal by the Government is a continution of the original trial. [P 123 C 2]

*** (d) Criminal P. C. (1898), Ss. 417 and 430—Appeal against conviction before Bench —Bench may form opinion that some other conviction has been wrongly upheld in previous appeal.**

Per *Macnair, J. C.* — A Bench of two Judges, when considering an appeal against a conviction may form an opinion that some other conviction of the appellant had been wrongly upheld in a previous appeal. In either case they will presumably make a recommendation to Government that action should be taken under the provisions of S. 401. [P 123 C 2]

(e) Criminal Trial — Sentence — Person guilty of major offence is guilty of minor offence—Criminal P. C., Ss. 423 and 417.

Per *Macnair, J. C.*—A person who is guilty of the major offence is guilty of the minor offence. The substitution of punishment for the major offence for a less severe punishment for the minor offence does not involve variation of the conviction and sentence for the minor offence. [P 123 C 2, P 124 C 1]

*** (f) Criminal P. C. (1898), .S 417 — Appeal should be preferred by Government with all reasonable expedition possible.**

Appeals should be preferred by the Government with all reasonable expedition possible. Where in the opinion of the standing counsel it is likely that Government will appeal against the acquittal, the appeal against the conviction should be postponed in order that both appeals may be heard together : but there should be no postponement if there is only a possibility that the Local Government may desire to appeal: 5 *All.* 253, *Rel. on.* [P 124 C 1]

**** (g) Criminal P. C. (1898), Ss. 417, 423 and 430—Appeal by convict — Finding and sentence reversed—Reversal of finding and sentence is final—Appeal dismissed—Orders under S. 423 can be passed on appeal by Government.**

Per *Macnair, J. C.* — If the convict has appealed and the finding and sentence have been reversed with or without an order for retrial, the appeal of the Local Government must fail. The reversal of the finding and sentence is final and no order can be passed inconsistent with that reversal. If the convict's appeal has been dismissed, any of the orders allowed by S. 423 can be passed on the appeal by the Local Government. An acquittal on the graver charge is not directly inconsistent with the conviction on the minor charge. S. 430 does not make the findings on which the previous order was passed final. [P 124 C 1]

Per *Niyogi, A. J. C.* — S. 430 contemplates an order of an appellate Court subordinate to the High Court, and the proviso does not affect a High Court's judgment, since there is no appeal under S. 417, against a judgment of a High Court. The High Court's judgment or order must therefore be regarded as final. If the High Court acquits the accused of a minor offence the Local Government's appeal against the subordi-

nate original or appellate Court's order of acquittal is not competent. [P 125 C 2, P 126 C 1]

(h) Criminal Trial — Conviction — Person cannot be convicted for two distinct offences on same set of facts.

Per *Subhedar, A. J. C.* — It is against the fundamental principle of criminal jurisprudence to convict a person of two distinct offences on the same set of facts. [P 125 C 1]

(i) Criminal P. C. (1898), S. 417 —Appeal against acquittal after dismissal of appeal against conviction—Appeal should be heard by Bench of Judges who did not appear in previous appeal.

Per *Subhedar, A. J. C.* — An appeal against acquittal filed after the dismissal of the appeal against conviction by a Judge of this Court should invariably be heard by a Bench of Judges who did not hear the previous appeal and that an application for revision for enhancement of sentence arising out of a case finally disposed of by a Judge of this Court be also heard by another Judge. [P 125 C 2]

(j) Appeal—Competency—Powers of appellate Court—Competency to hear appeals depends upon power to enforce orders.

Per *Niyogi, A. J. C.* — The competency of the appellate Court to hear appeals depends upon its powers to enforce its orders; any circumstance which takes away or restricts this power must affect the competency of the Court. Any appeal filed under such circumstance will be futile. *Cox* v. *Hakes*, (1891) 15 *A. C.* 506, *Ref.* [P 126 C 2]

M. Y. Sharif—for Appellant.

Vivian Bose—for the Crown.

Macnair, J. C. — In *Emperor* v. *Modkya* (1), a Bench of two Judges decided an appeal preferred by the Local Government under the provisions of S. 417, Criminal P. C. Modkya had been tried on a charge of murder and had been acquitted of that charge but convicted of an offence under S. 304, I. P. C. He had appealed to the High Court and his appeal had been dismissed. The learned Judges held that the appeal by the Local Government was incompetent after the appeal preferred by Modkya had been heard and decided by the High Court. In consequence of this decision the learned standing counsel asked that the hearing of the appeal filed by Mohammadi Gul should be adjourned till he could ascertain that the Local Government did not intend to file an appeal against the acquittal of Mohammadi Gul on a graver charge. It was clearly improper to hear and decide the appeal at once if the decision precluded an appeal by the Local Government. At the same time it was clearly undesirable to delay the hearing of the appeal which may result in the acquittal of the appellant for a considerable time. The Local Government cannot well be forced to decide before the last day of limitation whether or not an appeal under S. 417 should be filed, and the period allowed by Art. 157, Lim. Act, is six months.

Appeals from persons, who have been acquitted of a major offence but convicted of a minor one, are fairly numerous. A Bench of three Judges was therefore constituted to decide whether or not it is necessary to give an adjournment and under what if any, conditions the appeal should be adjourned if adjournment was necessary. The learned standing counsel contends that *Emperor* v. *Modkya* (1) was wrongly decided. In *Emperor* v. *Modkya* (1) reliance was placed on S. 430 Criminal P. C.:

"Judgments and orders passed by an appellate Court upon appeal shall be final, except in the cases provided for in S. 417, and Ch. 32."

I agree with the Judges who decided that case that the proviso has no application to the facts I am considering. S. 417 allows an appeal against the appellate order of acquittal. Ch. 32 permits interference on revision with an appellate judgment. The proviso then merely means that judgments of the appellate Court can be varied by a superior tribunal in the manner specified in S. 417 and Ch. 32. It furnishes no authority for the proposition that a Court can vary its own judgment when deciding an appeal presented under the provisions of S. 417. But the point which is strongly urged by the standing counsel is that the decision of an appeal against the order of acquittal entails no variance of a judgment dismissing an appeal by the convict. The Criminal Procedure Code makes separate provision for appeals against convictions and appeals against acquittals. Ss. 407 to 415 relates to appeal against convictions: S. 417 relates to appeals against acquittals. S. 423 which details the powers of an appellate Court, deals separately with appeals from acquittals and appeals from convictions. The Limitation Act too gives different periods of limitation for these appeals. A judgment then, which acquits the accused of a grave charge but convicts him of a minor offence, can be attacked by the filing of two distinct appeals. When an appeal against the conviction is heard the appellate tribunal is not competent to consider the correctness of the acquittal : *Kishan*

(1) A. I. R. 1932 Nag. 73=1932 Cr. C. 346.

Singh v. *Emperor* (2). If a conviction for the minor offence is upheld, the judgment finally decides that the appellant is guilty of that offence. But the question whether the major offence was committed, is not before the Judge and is not decided. In *Emperor* v. *Jorabhai* (3) Fawcett and Madgavkar, JJ., held that the dismissal of the appeal against the conviction would not prevent the enhancement of the sentence under the provisions of S. 439, Criminal P. C. They stated at p. 788 (*of* 50 *Bom.*) :

"What the judgment of 7th April came to was that it confirmed the conviction, and that it rejected the appeal as to sentences in the sense that it saw no reason to reduce them. That in no way was a decision that the sentences should not be enhanced, if a proper procedure was taken, such as the Code allowed for that purpose and therefore so far as the judgment goes, there is nothing which in any way ties our hands."

These remarks apply mutatis mutandis to the consideration of an appeal against acquittal after confirmation of a conviction. I add that the Judges who decided *Emperor* v. *Modkya* (1) approve of the view taken in *Emperor* v. *Jorabhai* (3). The judgment confirming the conviction for the minor offence then does not prevent a decision that a more serious offence has been committed. It is desirble to make specific reference to the case where a conviction for an offence of culpable homicide not amounting to murder has been upheld. It is not necessary to find that murder was not committed for the purpose of deciding whether an offence under S. 304, I. P. C., has been committed; if it were, an appeal against a conviction under S. 304 would result in acquittal if the appellate Judge held that the offence amounted to murder. S. 304 then must be interpreted as providing punishment for the offence of culpable homicide in all cases where the accused cannot be convicted of murder. The view that an appeal against the acquittal is competent after an appeal against the conviction is dismissed is supported by two considerations. In the first place, the appeal against the conviction may have been summarily dismissed and elementary principles of justice demand that the Local Government should not be precluded from appealing by an order passed behind its back. In the next place, had the conviction and acquittal dealt with two separate offences it seems clear that a judgment passed in appeal against the conviction would not prevent consideration of an appeal against the acquittal and I think it impossible to interpret S. 430 as allowing such an appeal but allowing no appeal when the conviction is of a minor offence.

The learned counsel, who appears for the convict, urges that S. 403, Criminal P. C., justifies the decision in *Emperor* v. *Modkya* (1). But S. 403 refers to a fresh trial. It has no application to the case I am considering, where the decision of both the appeals by the convict and the appeal by Government is a continuation of the original trial. It is next urged that consideration of an appeal against acquittal after decision of the appeal against the conviction is inconvenient and leads to anomaly. It is not necessary to consider the correctness of the view taken in *Emperor* v. *Jorabhai* (3) that a convict, after his appeal has been dismissed cannot show cause why the sentence should not be enhanced. Even if this view is correct, he can, in my opinion, argue that he is not guilty of any offence when contesting the appeal against the acquittal, and the Judges can dismiss the appeal against the acquittal on the ground that the convict is guilty of no offence: just as in civil litigation a party can urge that the facts did not justify any decree against him although the decree against him may be final, as reason why the amount of the decree should not be increased. The Judges then in the appeal against the acquittal may form an opinion that the conviction should not have been upheld. But this is not anomalous; a Bench of two Judges when considering an appeal against a conviction may form an opinion that some other conviction of the appellant had been wrongly upheld in a previous appeal. In either case they will presumably make a recommendation to Government that action should be taken under the provisions of S. 401, Criminal P. C.

I do not think any difficulty is involved in the fact that if the appeal against the acquittal succeeds, there will be two convictions: one for the minor offence and one for the major. A person who is guilty of the major offence is guilty of the minor offence. The substitution of

(2) A.I.R. 1928 P.C. 254=111 I. C, 332=50 All. 722=55 I.A. 390 (P.C.).
(3) A.I.R. 1926 Bom. 555=97 I.C. 805=50 Bom. 783.

punishment for the major offence for a less severe punishment for the minor offence does not involve variation of the conviction and sentence for the minor offence. I therefore with greatest respect, dissent from the view taken in *Emperor* v. *Modkya* (1) and express my opinion that an appeal under S. 417 can be preferred, although an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. I desire however to express my agreement with the opinion of Stuart, C. J., and Straight, J., in *Empress of India* v. *Yakub Khan* (4) that appeals should be preferred by Government with all reasonable expedition possible. Where in the opinion of the standing counsel it is likely that Government will appeal against the acquittal, the appeal against the conviction should be postponed in order that both appeals may be heard together: but there should be no postponement if there is only a possibility that the Local Government may desire to appeal. In the case I am considering then the learned Government Advocate should be asked to state if he still desires an adjournment on the ground that the Local Government is likely to file an appeal at an early date.

I have now had the advantage of reading a draft of the opinion which my brother Niyogi, A. J. C., proposes to record. I desire to add a few words to my opinion. If the convict has appealed and the finding and sentence have been reversed with or without an order for retrial, the appeal of the Local Government must fail. The reversal of the finding and sentence is final and no order can be passed inconsistent with that reversal. If the convict's appeal has been dismissed any of the orders allowed by S. 423, Criminal P. C., can be passed on the appeal by the Local Government. An acquittal on the graver charge is not directly inconsistent with the conviction on the minor charge. S. 430 does not, in my opinion, make the findings on which the previous order was passed final. It does not appear to me a sufficient answer to the argument that the framers of the Criminal Procedure Code could not have intended the Local Government's right of appeal to be taken away by an order passed behind its back to say that this will seldom occur if the Courts adopt a certain procedure and invariably exercise due care.

(4) [1883] 5 All. 253=(1883) A.W.N. 25.

Subhedar, A. J. C.—I have had the advantage of perusing the opinions recorded by the learned Judicial Commissioner and Niyogi, A. J. C., in the present case and I fully agree with the views of the former. As I was a member of the Bench which decided *Emperor* v. *Modkya* (1) it would not be out of place to briefly state the circumstances and the reasons for that decision. Modkya and three others were tried for definite charges of murder (S. 302, I. P. C.) but were convicted by the Sessions Judge only of culpable homicide not amounting to murder (S. 304, I. P. C.), and sentenced each to four years' rigorous imprisonment; they were acquitted of the substantive charges of murder. Against their convictions all the accused preferred appeals to this Court which, after notice to the Crown, were disposed of by Staples, A. J. C., who confirmed the convictions and dismissed the appeals In his judgment the learned Additional Judicial Commissioner however remarked that all the accused should have been found guilty of murder, but left it to the Local Government to apply in revision for enhancement of the sentences, if so advised.

The Local Government therefore applied in revision for enhancement of sentences passed upon all the accused except Modkya against whom an appeal under S. 417, Criminal P. C., against his acquittal of the charge of murder was preferred. Since the appeal involved the question of capital sentence it was, under the rules, heard by a Bench consisting of Staples, A. J. C., and myself. While holding that the Local Government had a right of appeal against the acquittal of Modkya on a charge of murder, we felt doubtful of entertaining it after the dismissal of the appeal by Modkya against his conviction for the reason that since his conviction of the offence of culpable homicide not amounting to murder had become irrevocable under S. 430, Criminal P. C., by reason of the dismissal of his appeal by one of us, we could not, on the same set of facts, further convict him of murder so long as the previous conviction remained in force.

In *Emperor* v. *Jorabhai* (3), which was a case in revision for enhancement of sentence, the view taken was that the accused could not, in showing cause

against enhancement of sentence, take advantage of S. 439 (6), Criminal P. C., and question the propriety of his conviction which was previously upheld by the High Court. A fortiori, in the Government appeal, Modkya could not, in our opinion, challenge the propriety of his previous conviction for the minor offence which was upheld by this Court when it dismissed his appeal. As no provision in the Criminal Procedure Code was brought to our notice whereby we could, in allowing the Government appeal against the acquittal, also set aside the previous conviction, obtained on the same set of facts, and record a conviction of murder, and since it is against the fundamental principle of criminal jurisprudence to convict a person of two distinct offences, on the same set of facts we came to the conclusion that the Government appeal was, under the circumstances, incompetent.

On an interpretation of Ss. 417 and 430, Criminal P. C., the view now expressed by the learned Judicial Commissioner that in a case like *Modkya's*, if the Government prefers an appeal against the acquittal for the major offence, after the appeal by the convict against his conviction for the minor offence is dismissed, it is open to the accused to question the propriety of his previous conviction and to the appellate Court to give effect to this plea by dismissing the Government appeal and making suitable recommendation to the Local Government, if the Court came to the conclusion that on the facts established the convict was not guilty of any offence at all, or in the alternative by accepting the Government appeal and substituting a conviction for the major offence, appears to me to be well founded and removes the doubts and difficulties experienced in the decision of *Modkya's* case (1).

Apparently this view runs counter to that propounded in *Emperor* v. *Jorabhai* (3) and *Emperor* v. *Dhanna Lal* (5) that the propriety of the findings on which his conviction is previously upheld by the High Court cannot be questioned by the accused in subsequent proceedings in revision for enhancement of the sentence. But as pointed out by the learned Judicial Commissioner, in his opinion, this difficulty could be solved by the Court making suitable recommendation to the Local Government as was done by a Bench of this Court, of which I was a member in *Emperor* v. *Damdoo, Criminal Revision No.* 238 *of* 1931. That was a case in which the accused was convicted of murder (S. 302, I. P. C.), but was sentenced to transportation for life, and his appeal was dismissed by Staples, A. J. C., with an observation that the sentence of death should have been passed on the accused. Subsequently the Local Government moved this Court in revision for enhancement of the sentence. In showing cause against enhancement the accused claimed right under S. 439 (6), Criminal P. C., to show cause against his conviction. Following the Bombay and Lahore view it was however held that the accused could not challenge the legality of his conviction, but as the Bench came to the conclusion that the conviction was not correct it dismissed the application for revision and made a recommendation to the Local Government to take such action in the matter as they might deem fit. In the result the Government was pleased to remit the unexpired portion of his sentence and ordered the convict to be set at liberty.

While fully agreeing with the considered opinion of the learned Judicial Commissioner, in the present case I would recommend with a view to giving proper effect to these conclusions that an appeal against acquittal, filed after the dismissal of the appeal,against conviction, by a Judge of this Court, should invariably be heard by a Bench of Judges who did not hear the previous appeal, and that an application for revision for enhancement of sentence arising out of a case finally disposed of by a Judge of this Court, be also heard by another Judge.

Niyogi, A. J. C.—I have had the advantage of perusing the opinion recorded by the learned Judicial Commissioner. I regret I cannot persuade myself to agree with the opinion. Consequently, I wish to add what follows:

Section 430, Criminal P. C., contemplates an order of an appellate Court subordinate to the High Court, and the proviso does not affect a High Court's judgment, since there is no appeal under S. 417, against a judgment of a High Court. The High Court's judgment or order must therefore be regarded as final.

(5) A. I. R. 1929 Lah. 797=117 I. C. 669=10 Lah. 241.

Having regard to the terms of S. 417 as interpreted by their Lordships of the Privy Council in *Kishen Singh* v. *Emperor* (2) and Art. 157, Sch. 1, Lim. Act, it must be conceded that the Local Government has a right to appeal against a subordinate appellate Court's judgment of acquittal of a graver offence. But for considerations set forth below, such appeal is competent only if it is filed before the High Court pronounces its judgment in appeal from conviction of the minor offence.

Section 423 (a) defines powers of the appellate Court hearing an appeal against acquittal:

" . . . . The Court may if it considers that there is no sufficient ground for interfering, dismiss the appeal or may (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law."

If an appeal is preferred subsequent to the decision by the High Court of the convict's appeal relating to the minor offence, the Court dealing with such appeal cannot exercise its full powers. I shall explain the position by an illustration: A man is convicted of offence punishable under S. 304, but acquitted of offence under S. 302. Both the Local Government and the convict have the right of appeal. I shall now examine the effect of the High Court's decision in the convict's appeal relating to a minor offence. The Court hearing this appeal can exercise all powers mentioned in (b) of S. 423. It may either (i) acquit the accused, or (ii) order a retrial, or (iii) affirm the conviction. Whatever the decision, it cannot be set aside or altered by any Court and it is therefore final. (a) If the High Court, acquits the accused of the minor offence (e. g., culpable homicide), is the Local Government's appeal against the subordinate original or appellate Court's order of acquittal competent? I think not; for this reason that the Court dealing with appeal against acquittal cannot exercise all the powers defined in (a) of S. 423. Can it convict the man of murder in the face of the High Court's order of acquittal on the same facts? If it can, which of the two decisions is to prevail? (b) If the High Court dealing with the convict's appeal orders a retrial, is it open to Court hearing the appeal against acquittal to convict the accused and pass a sentence of death? Can such a sentence be carried out while the High Court's order of retrial in the convict's appeal stands and is being given effect to? (c) If the High Court in the convict's appeal affirms the conviction, can the Court hearing the appeal under S. 417 order a retrial? If so, how can this be effective in the face of the other judgment already passed by the same Court? Moreover, S. 403, Criminal P. C., debars such a trial.

The competency of the appellate Court to hear appeals depends upon its power to enforce its orders; any circumstance which takes away or restricts this power must affect the competency of the Court. It must follow that any appeal filed in such circumstance will turn out to be futile. In other words the appeal itself will be incompetent. In *Cox* v. *Hakes* (5) at p. 534 Lord Herschell in delivering his opinion upon an analogous question stated the principle in these terms:

"I think it is impossible to read the section. Your Lordships have to construe without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of appeal in case it should differ in opinion from the Court below, were intended to be co-extensive. And I cannot think that it was ever contemplated that an appeal should be entertained from any class of orders when that which was effected by them could never be effectually interfered with . . . and if it had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the Court of appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the legislature did not intend the right to hear and determine appeals to extend to such cases."

This principle was stated in connexion with a case where the legislature did not make any provision for enforcing the appellate Court's judgment, but it will apply with equal force to a case where the appellate Court, as in the present case, is unable to enforce the powers conferred on it by law. In fact the Criminal Procedure Code has made no provision for resolving the conflict between the decisions of the High Courts of the nature already indicated. The very fact that the learned Judicial Commissioner finds it necessary to invoke powers of the Local Government under S. 401, Criminal P. C., is itself an argument to prove

(6) [1891] 15 A. C. 506=60 L. J. Q. B. 89=63 L. T. 392=39 W. R. 145=17 Cox. C. C. 158=54 J. P. 820.

the incompetency of appellate Court to hear and determine the appeal. It must be noticed that the Local Government has no power to reverse the judgment, but only to remit the sentence. It must therefore follow that the legislature could not have intended to give a right of appeal in case where the appellate Court which is supposed to hear the appeal is unable to exercise its powers vested in it by law and enforce its own orders, by reason of another judgment of the same Court having become final and effective. The view taken in *Emperor* v. *Modkya* (1), is, in my opinion, correct. In order to avoid these anomalies the only course is that the Local Government should file the appeal against acquittal before the decision by the High Court of the convict's appeal or preferably, before the appeal is heard. If, for any reason, this is not possible, the standing counsel may move for adjournment of the convict's appeal intimating that the Local Government is taking steps towards filing such an appeal. I am aware of the difficulty likely to arise in the event of the convict's appeal being dismissed without notice to the Crown, but it can be solved by issuing notice to the Crown, in every appeal involving serious offence. I am of opinion that the convict's appeal under the aforesaid circumstances must be adjourned.

R.M./R.K. *Order accordingly.*

A. I. R. 1932 Nagpur 127

MACNAIR, J. C.

Mt. Lahani — Complainant — Applicant.

v.

Khushal—Accused—Non-applicant.

Criminal Revn. No. 388 of 1931, Decided on 8th February 1932, by Addl. Sess. Judge, Nagpur.

Criminal P. C. (1898), Ss. 242, 535 and 537 — Omission to state particulars in accordance with S. 242 not accompanied by failure of justice is cured by Ss. 535 and 537.

The principle object of the provisions in S. 242 that the particulars of the offence of which a person is accused shall be stated to him and that he shall be asked if he has any cause to show why he should not be convicted is to discover whether the accused admits that he has committed the offence. The omission, consequently, to state the particulars of the offence in accordance with the provisions of S. 242 unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned is cured by the provisions of Ss. 535 and 537 : *A. I. R.* 1927 *P. C.* 44, *Rel. on.* ; *A. I. R.* 1927 *Cal.* 196 and 25 *Mad.* 61 (*P. C.*), *Expl.* ; *A. I. R.* 1925 *Nag.* 44 (*F. B.*), *Ref.* [P 128 C 1, 2]

R. S. Ruikar—for Applicant.

Vivian Bose, Government Advocate—for the Crown.

Order.—Khushal was accused of an offence punishable under S. 352, I. P. C. The Bench Magistrates adopted the procedure laid down in Ch. 20, Criminal P. C., for the trial of summons cases and convicted Khushal. The learned Additional Sessions Judge is of opinion that the trial was illegal because the Magistrates omitted to state the particulars of the offence to the accused in accordance with the provisions of S. 242, Criminal P. C. In support of his view he cites *Gopal Krishna Saha* v. *Matilal Singh* (1). It is uncertain whether the Magistrates did omit to state the particulars of the offence to the accused. The record contains no note that this was done : but Ss. 242 to 244, Criminal P. C., do not expressly state that such a note should be made. In my opinion, even if the view taken in *Gopal Krishna Saha* v. *Matilal Singh* (1), is correct, the omission to make a note, which involves no disobedience to an express provision regarding the mode of trial, would be a mere irregularity. As it seems however that the District Magistrate inquired whether particulars of the case were stated and that no reply has yet been given by the Bench Magistrates, it seems proper first to consider whether or not the conviction is vitiated if there was an omission to state the particulars. In *Abdul Rahman* v. *Emperor* (2), their Lordships of the Privy Council considered whether or not the trial was vitiated by non-compliance with the provisions of S. 360, Criminal P. C. : S. 360 contains the words "shall be read over" and the evidence was not read over. It was held that the curative provisions of Ss. 535 and 537, Criminal P. C., applied, as there was no probable suggestion that any failure of justice had been occasioned by the omission. The case of *Subramania Ayyar* v. *Emperor* (3), was distinguished. Their Lordships stated :

"The procedure adopted (in the case of *Subrahmania Ayyar*) was one which the Code positively

(1) A.I.R. 1927 Cal. 196=28 Cr. L. J. 155=54 Cal. 359=99 I.C. 411.

(2) A.I.R. 1927 P. C. 44=100 I. C. 227=28 Cr. L. J. 259=54 I.A. 96=5 Rang. 53 (P.C.).

(3) 1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P.C.).

prohibited, and it was possible that it might have worked actual injustice to the accused."

In *Gopal Krishna Saha* v. *Matilal Singh* (1), the learned Judges of the Calcutta High Courts relied on *Subrahmania Ayyar* v. *Emperor* (3) for the proposition that where the Code directs that a certain procedure shall be followed, disregard of that provision vitiates the trial. They would, I think, have come to a different conclusion if the judgment in *Abdul Rahman* v. *Emperor* (2), delivered some weeks later had been available to them. In my opinion, the principal object of the provisions that the particulars of the offence of which a person is accused shall be stated to him and that he shall be asked if he has any cause to show why he should not be convicted is to discover whether the accused admits that he has committed the offence: the following section gives directions for the procedure when such an admission is made. In the case I am considering there is no suggestion that the accused was prejudiced by the omission: the Magistrates proceeded to examine the complainant whose evidence gave detailed information regarding the offence of which the applicant was accused. Counsel for Khushal urges that in *Local Government* v. *Maria* (4), a Full Bench of this Court held that contravention of the provisions contained in S. 342, Criminal P. C., vitiates the trial. I agree that S. 242 uses the word "shall" in much the same manner as S. 342: but the ruling does not discuss the question whether non-compliance with the provisions of S. 242 renders the trial illegal. If the Judges in that case did answer the question in the affirmative, it is probable that their decision is not binding on me in view of the later decision of the Privy Council in *Abdul Rahman* v. *Emperor* (2), and whether it is or is not binding, the inference that the disregard of any direction regarding the mode of trial couched in language similar to that employed in S. 342 and S. 242, Criminal P. C., vitiates the trial, cannot be drawn from the decision in *Local Government* v. *Maria* (4) in view of the later Privy Council judgment.

It is unnecessary to refer to a number of decisions in which the High Courts of India have held that such an inference can be drawn from the decision in the case of *Subramania Ayyar* v. *Emperor* (3). It is now clear that all that was laid down in the case of *Subramania Ayyar* v. *Emperor* (3) was that the adoption of a procedure positively prohibited by the Code vitiated the trial if it was possible that such an adoption might have worked actual injustice to the accused. Following the decision in *Abdul Rahman* v. *Emperor* (2), I hold that the omission, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is cured by the provisions of Ss. 535 and 537, Criminal P. C. I therefore refuse to interfere.

P.N./R.K. *Reference rejected.*

(4) A.I.R. 1925 Nag. 44=87 I. C. 427=26 Cr. L. J. 971=20 N. L. R. 174 (F.B.).

A. I. R. 1932 Nagpur 128

STAPLES, A. J. C.

Tirathprasad—Defendant—Applicant.

v.

Municipal Committee, Jubbulpore —Plaintiff—Non-Applicant.

Civil Revn. No. 564 of 1930, Decided on 23rd October 1931, against decree of Small Cause Court Judge, Jubbulpore, D/- 3rd October 1930.

(a) C. P. Municipalities Act (2 of 1922), S. 44—Auction sale—Memorandum may be signed when purchase money is paid.

An auction sale is a contract, but such a contract is not complete until after the fall of the hammer, which signifies the acceptance of the offer or bid made by the last bidder. A regular auction sale can be held in the ordinary way, by the Municipal Committee and in order that the sale should conform with the provisions of S. 44, after the contract is completed by the last bid being accepted, a signed memorandum should be prepared, and finally, when the purchase money is paid by the purchaser, a contract in writing in the shape of a sale deed or lease deed should be prepared, signed by the President or the Vice-President. [P 129 C 2]

(b) C. P. Municipalities Act (2 of 1922), S. 44—Resale—Notice to auction purchaser before resale is necessary to make him liable for deficiency.

Resale, on default of the auction-purchaser, is bad if the notice of resale is not served upon the auction-purchaser before resale, and the auction-purchaser will not be liable for any deficiency in price. [P 130 C 1]

J. Sen—for Applicant.

N. G. Bose—for Non-Applicant.

Judgment. — The non-applicant, the Municipal Committee of Jubbulpore, brought a suit against the applicant for recovery of the sum of Rs. 200, and a decree was passed in favour of the Municipal Committee. The facts are, for the most part, admitted. Building plots in

Jubbulpore were sold by public auction, and on 23rd November 1927 the applicant Tirathprasad purchased a plot for Rs. 600. The bid was accepted and he deposited one-tenth of the price, namely, Rs. 60, according to the terms of the auction. The balance was to be deposited after the confirmation of sale. The sale was confirmed by the Municipal Committee, and a letter dated 24th April 1928, signed by the President of the Municipal Committee, was sent to Tirathprasad, informing him that the sale had been confirmed and requesting him to deposit the balance of the purchase money with other charges immediately. It was added that the amount must be deposited within 15 days. No notice appears to have been taken by Tirathprasad of this letter, and then a further letter was sent to him, dated 6th June 1928, stating that the sale had been confirmed by the General Committee, and that he was requested to credit the balance of the purchase money with other charges within a week from the receipt of the letter, failing which the plot would be resold at his risk and cost. This letter appears to have been received by Tirathprasad on the 29th June, as is admitted in para. 3 of the plaint. In the meantime, on the 20th June, as the balance of the purchase money had not been deposited by Tirathprasad, the Municipal Committee proceeded to resell the plot and a public auction was held, at which Mr. Mukerjee bought the plot for Rs. 360. The Municipal Committee have thereupon sued Tirathprasad for the deficiency in price, namely, Rs. 180 and Rs. 20 as interest by way of damages, and claimed Rs. 200. The defence raised was twofold, namely, that the provisions of S. 44, C. P. Municipalities Act, had not been complied with with regard to the sale; and, secondly, that there was no condition in the first auction that on failure to pay the balance of the price the plot would be resold and that the purchaser would be liable for the deficiency of the price at the subsequent sale. It was contended that the remedy of the Committee, if any, was only to sue Tirathprasad for the balance of the purchase money.

There is no force, I think, in the contention regarding S. 44, C. P. Municipalities Act, nor was that ground pressed. S. 44 says that contracts made by or on behalf of the Committee shall be in writing and shall be signed by the President or Vice-President and the Secretary. An auction sale is rather a peculiar case. No doubt such a sale is a contract, but the contract is not complete until after the fall of the hammer, which signifies the acceptance of the offer or bid made by the last bidder. There is no special law on the subject in India; but according to the law in England, which may be followed, a signed memorandum showing the parties thereto, the subject-matter and the terms of the contract, is necessary in all contracts including auctions where the subject-matter of the contract is either land or any interest in land (S. 40, Law of Property Act, 1925, 15 Geo. 5, C. 20) or goods of the value of £10 or upwards (S. 4, Sale of Goods Act, 1893, 56 & 57 Vict. C. 71). Auction sales of land in India are usually Court auction sales, to which of course this rule would not apply, but in such sales a sale certificate is always granted by the Court which would take the place of the signed memorandum. In other auction sales such as the sale in the present case by a Municipal Committee, the law as set forth above should, I think, be followed and a signed memorandum should be prepared. This view of the law will not in any way conflict with S. 44, C. P. Municipalities Act. On the contrary it would be in complete conformity with it. A regular auction sale can be held by a Municipal Committee in the ordinary way and then, after the contract is completed by the last bid being accepted, a signed memorandum should be prepared, and finally, when the purchase money is paid by the purchaser, a contract in writing in the shape of a sale deed or lease deed should be prepared under S. 44, Municipalities Act, which contract would be signed by the President or Vice-President and the Secretary. In the present case we have the evidence of the Municipal Secretary, Chatterjee (P. W. 1), that such a contract was not executed in the present case, because the applicant Tirathprasad resiled and did not pay the balance of the purchase money: had he paid the balance, a lease in proper form would have been duly executed and signed by the Secretary.

With regard to the other contention, I think the application would fail except for one point that seems to me to be important, namely, that the resale was

held before the notice, dated 6th June 1928, was served upon the applicant Tirathprasad. It is admitted, as already stated above in the plaint, that this notice was not served upon Tirathprasad until the 29th June; the sale however was held on the 20th June. In the notice, which is filed as Ex. P-4, Tirathprasad is called upon to pay the balance of Rs. 548-12-0 within a week from the receipt of the letter, failing which the plot would be resold at his risk and cost. Now, although the letter, or notice, is dated the 6th June, it was not served upon Tirathprasad until the 29th June, and according to the terms of the letter itself the resale should not therefore have been held until a week after the 29th June. For some reason or other however the sale was held on the 20th, i. e., more than a week before the notice was actually served upon Tirathprasad. I am of opinion, then, that this resale before the notice had been served upon Tirathprasad was bad and that therefore he cannot now be held liable for the deficiency in price at the subsequent sale. The Municipal Committee have only themselves to blame in the matter for acting so hastily. If they had waited, according to the terms of their own notice, for one week after it was served upon Tirathprasad, they could have held him liable for the loss occasioned by the resale.

I therefore set aside the decree of the lower Court in favour of the Municipal Committee and instead pass a decree dismissing their suit with costs. Costs of this application and of the suit will be borne by the Municipal Committee. I fix pleader's fees at Rs. 20.

V.B./R.K. *Revision allowed.*

** A. I. R. 1932 Nagpur 130

GRILLE, A. J. C.

Emperor

v.

Mt. Janki and *another* — Non-applicants.

Criminal Revn. No. 400 of 1931, Decided on 26th February 1932, Case reported by Sess. Judge, Raipur.

** **(a) Criminal P. C. (as amended in 1923), S. 562 (1)—Women convicted of offence punishable with transportation for life are ineligible for release on probation under S. 562.**

The phrase "punishable with death or transportation for life" must be interpreted disjunctively and women convicted of an offence for which transportation for life is one of the punishments provided are ineligible for release on probation under S. 562. The words "death or transportation for life" must be read as referring to offences the penalty for which provided by the Penal Code contains either death or transportation for life as one of the punishments awarded and not necessarily both : *A. I. R.* 1927 *Rang.* 205 (*F. B.*), *Foll.*; *A. I. R.* 1927 *Nag.* 53 and *A. I. R.* 1926 *Rang.* 51, *Diss. from.*

[P 131 C 1, P 133 C 1]

(b) Criminal P. C. (1898), Ss. 497 and 562 —Interpretation of.

The wording in Ss. 497 and 562 is equally to be considered disjunctively. [P 132 C 2]

(c) Criminal P. C. (1898), S. 562 (3)—Power of High Court to pass sentence.

The High Court is, by reasons of the provisions of S. 562 (3), now empowered to pass sentence itself when it exercises revisional powers.

[P 133 C 1]

V. Bose—for the Crown.

Order.—This is a reference by the Sessions Judge, Raipur, under S. 438, Criminal P. C., reporting Criminal Case No. 317 of 1931, decided by Mr. S. V. Nayadu, Magistrate, First Class, Bilaspur, and recommending that the order releasing the accused on probation of good conduct under S. 562 (1), Criminal P. C., be set aside as it is illegal and that the case be remanded for passing a legal sentence. The two accused are women and they have been convicted of the offence of voluntarily causing hurt in the commission of a robbery, which is punishable with transportation for life or with rigorous imprisonment for a term which may extend to ten years. In answer to a rule issued to show cause why the order of release should not be set aside and sentence passed the Government Advocate appeared for the Crown and the accused appeared in person.

The question whether the order is illegal depends on the interpretation of the words "punishable with death or transportation for life." The provision to release first offenders on probation is applicable to persons not under 21 years of age who are convicted of offences punishable with imprisonment for not more than seven years, but in the case of persons under 21 years of age, and women, if the offence of which they are convicted is not punishable with death or transportation for life ; the question is whether the phrase "punishable with death or transportation for life" is to be

interpreted conjunctively or disjunctively, that is to say, whether it refers to an offence for which the punishment is alternatively, death or transportation for life, or whether it refers to offences for which death or transportation for life is one of the punishments provided. The question, so far I have been able to ascertain, has arisen only in cases under S. 497, Criminal P. C., where the question of the eligibility of an accused person to be released on bail was under consideration. In that section the phrase occurs in identical form :

"When any person accused of any nonbailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life."

In both Ss. 497 and 562 this provision is inserted by virtue of the Amending Act 18 of 1923. On consideration of the language used in other parts of the Code of Criminal Procedure and also on consideration of the offences in the Indian Penal Code which are punishable with transportation for life, I am of opinion that the phrase must be interpreted disjunctively and that women convicted of an offence for which transportation for life is one of the punishments provided are ineligible for release on probation under S. 562, Criminal P. C. In a case of this Court, *Tularam* v. *Emperor* (1), Kinkhede, A. J. C., held that the phrase "death or transportation for life" in S. 497 did not extend to offences punishable with transportation for life only and was limited to those offences for which death and transportation for life were alternative sentences. In that judgment the interpretation of the phrase "death or transportation for life" propounded by Doyle, J., in *Muhammad Eusoof* v. *Emperor* (2) was accepted. The judgment however gives no independent reasons for the acceptance of this interpretation. The relevant part runs :

"I am also of opinion that the interpretation put by Doyle, J., in *Muhammed Eusoof* v. *Emperor* (2) on the phrase 'death or transportation for life' in S. 497, Criminal P. C., is consistent with the widening of this discretion (the reference is to the widening of the discretion of the powers of the Courts to grant bail) and is amply supported by the reasons given by that learned Judge."

Now in *Emperor* v. *Nga San Htwa* (3) a Full Bench of the Rangoon High Court held that the phrase "with death or transportation for life" in S. 497, Criminal P. C., must be read disjunctively as if it ran "with death or with transportation for life" and this ruling was the result of a reference by Doyle, J., who stated in his order of reference that on consideration he was convinced that the ruling that he himself had given in *Mohammad Eusoof* v. *Emperor* (2) was erroneous : he himself was a party to the Full Bench decision which was unanimous.

The meaning of the phrase must be the same in Ss. 497 and 562 since the wording is identical except for the insertion of the necessary negative in S. 562. The conjunctive and limited interpretation placed on it in *Mohammed Eusoof* v. *Emperor* (2) and followed in *Tularam* v. *Emperor* (1) is negatived from the grammatical point of view by the terms of Ss. 31 and 34, Criminal P. C. S. 31, sub-S. (3), reads :

"An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years, or of imprisonment for a term exceeding seven years."

Section 34 reads :

"The Court of a Magistrate, specially empowered under S. 30, may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years, or imprisonment for a term exceeding seven years."

It will be noticed that there is a slight difference in the wording of these two sections although the intention is that specially empowered Magistrates and Assistant Sessions Judges shall have identical powers in respect of the sentences they may pass; in S. 34 the word "of" is omitted before "imprisonment." whereas it occurs before that word in S. 31. I have not been able to ascertain or to imagine the reason for this variation, the effect of which is entirely immaterial. The wording of these two sections would therefore go against the view that the phrase "death or transportation for life" is a single and inseparable definition. Further, if offences punishable with death or transportation

(1) A. I. R. 1927 Nag. 53=97 I. C. 39=27 Cr. L. J. 1063.

(2) A. I. R. 1926 Rang. 51=93 I. C. 65=27 Cr. L. J. 401=3 Rang. 538.

(3) A. I. R. 1927 Rang. 205=104 I. C. 101=28 Cr. L. J. 773=5 Rang. 276 (F. B.).

for life were to be considered as referring only to those offences for which the sentences were alternative, that is to say, all sentences in which death was one of the punishments which might be awarded, the result would be that the District Magistrates or other Magistrates specially empowered under S. 30 would be able to try such offences since the words in S. 30, Criminal P. C., "not punishable with death" must mean something different from "not punishable with death or transportation for life" and the only offence which they would be precluded from trying would be that of murder by a life convict, an offence which under S. 303, I. P. C., is punishable with death alone. Yet again, if the phrase in question is to be taken as a single and inseparable definition it would exclude such offences for which there are three alternative punishments: death transportation for life or rigorous imprisonment for a certain term of years such as the giving or fabricating false evidence with the intention to cause any person to be convicted of a capital offence if such innocent person is convicted and executed (S. 94), and abetment of suicide committed by a child or insane or delirious person or idiot or a person intoxicated (S. 305). The illogical result would be that persons convicted of such offences for which one of the punishments provided is death would be entitled to the benefit of S. 562, Criminal P. C., and it cannot be presumed that the legislature had any intention of giving offenders convicted for the first time under those sections of the Indian Penal Code the benefit of the possibility of being released on probation. That however would be the natural result of the interpretation of the phrase "death or transportation for life" as referring only to such offences for which these alternative punishments are provided. If the phrase is considered disjunctively and ineligibility for release on good conduct is considered applicable to offences for which transportation for life is one of the punishments provided, the difficulty disappears immediately.

There is yet another instance in the language of the Code of Criminal Procedure which militates against the reading of the phrase as an inseparable definition. In S. 4 (w) of the Code "warrant-case" is defined as meaning a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months. We have therefore in three sections of the Criminal Procedure Code, Ss. 4, 31 and 34, where the words death and transportation for life in connexion with punishment and sentences are used disjunctively and one other, S. 30, where the disjunctive implication is essential. It must in my opinion follow that the wording in Ss. 497 and 562 is equally to be considered disjunctively.

Apart from the question of grammatical interpretation, it is relevant to consider certain offences punishable by the Indian Penal Code with transportation for life and lesser sentences in the alternative. Among these are offences against the State and the Army and Navy and Air Force contained in Chs. 6 and 7, I. P. C., among the offences affecting life is S. 311 (happily obsolete in these days) which lays down that a Thug shall be punished with transportation for life. Here there is no alternative of either a more or less serious nature but were it possible for a person to be convicted under that section at the present day it does not appear conceivable that a person under twenty-one, convicted should be capable of being bound over as a first offender. The offences of coining, rape and the aggravated form of arson punishable under S. 436, I. P. C., are all punishable with transportation for life or with rigorous imprisonment for a term of years and in my opinion the legislature did not and could not contemplate that in respect of offences of such a nature a person under 21 years of age might be bound over on probation as a first offender. Such a provision particularly in the case of rape would be an outrage on the public conscience. It is not a sufficient answer to say that no Court would release such an offender on probation; it cannot be presumed that the legislature would make it possible for a Court to be able to release such an offender on probation. The section of the Indian Penal Code in which the paradox of the inseparable definition can be finally demonstrated is S. 226 which runs:

"Whoever, having been lawfully transported, returns from such transportation, the term of such transportation not having expired and his punishment not having been remitted shall be punished with transportation for life, and shall also be liable to fine and to be imprisoned with

rigorous imprisonment for a term not exceeding three years before he is so transported."

Here there is no alternative to transportation for life, the other punishments being optionally additional. It would be manifestly an impossibility to release a person convicted under this section on probation as a first offender. I am therefore satisfied that the words "death or transportation for life" must be read as referring to offences the penalty for which provided by the Indian Penal Code contains either death or transportation for life as one of the punishments to be awarded and not necessarily both. The reasons given in *Emperor* v. *Nga San Htwa* (3) have my respectful concurrence and with the further reasons which I have adduced applicable to the phrase as it occurrs in S. 562, Criminal P. C., as opposed to S. 497, Criminal P. C., appear to me to make the disjunctive interpretation conclusive.

The learned Sessions Judge has made this reference with the recommendation that the order of release on probation be set aside and the case be remanded for passing of the legal sentence. He has not apparently noted the provisions of sub-S. (3), S. 562, Criminal P. C., whereby the High Court is now empowered to pass sentence itself when exercising revisional powers. In this particular case the Magistrate has very correctly come to the conclusion that the offence is of a technical nature. There was an assault by some members of the family on others arising out of a domestic dispute in the course of which one of the accused caught hold of the complainant and one of them snatched the ring from her ear, tearing the lobe in so doing, and afterwards concealed the property. Had the offence been one under which action under S. 562 was permissible such action would have been appropriate. In order to point out the correct interpretation of the phrase "an offence not punishable with death or transportation for life" it is not necessary to interfere in revision and to direct that these women be sent to jail. They have already been put to the expense and the anxiety of travelling from Bilaspur to appear in person before this Court. Taking the circumstances into consideration I do not consider it necessary to interfere in revision but it should be noted by the Magistrate in future that the release on probation of a woman or person under 21 years of age is not legal where the offence is punishable with transportation for life. The rule is discharged.

R.M./R.K. *Rule discharged.*

A. I. R. 1932 Nagpur 133

MACNAIR, J. C.

Dulloomiya—Complainant.

v.

Tularam—Accused.

Criminal Revn. No. 413 of 1931, Decided on 20th February 1932, case reported by Sess. Judge, Nagpur.

Criminal P.C. (as amended in 1923), S. 197—Offence under S. 168, Penal Code—No previous sanction is necessary — Penal Code (1860), S. 168 — C. P. Municipalities Act (1922), S. 45 (1).

Section 197, Criminal P. C., does not require previous sanction for taking cognizance of a complaint regarding the offence described in S. 168, Penal Code.

A complaint was preferred against *T*, a member of the Municipal Committee, alleging that *T* had committed an offence under S. 168, Penal Code. The allegation in the complaint was that *T* was a partner in a grass contract taken in the name of *M* from the Committee.

Held : that the Court could take cognizance of the offence without previous sanction of the Local Government : *A. I. R.* 1928 *Lah.* 72, *Ref. A. I. R.* 1928 *All.* 756, *not Foll.* [P 134 C 2]

G. R. Pradhan—for Accused.

R. W. Fulay, *R. G. Rao* and *S. P. Deshpande*—for Complainant.

Vivian Bose—for the Crown.

Order.—Dullumiyan, the non-applicant, preferred a complaint in a Magistrate's Court against Mr. Tularam Sakhare alleging that the latter had committed an offence punishable under S. 168, I. P. C. Mr. Tularam is a member of the Nagpur Municipal Committee. S. 45 (1), C. P. Municipalities Act, states that any member shall be deemed to have committed an offence under S. 168, I. P. C., if he is interested in any contract made with the committee unless he has obtained the written permission of the Deputy Commissioner. The allegation in the complaint was that Mr. Tularam was a partner in a grass contract taken in the name of one Marotrao from the Nagpur Municipal Committee. Mr. Tularam urged that S. 197, Criminal P. C., prevented the Court from taking

cognizance of the alleged offence without the previous sanction of the Local Government. The Magistrate held that no sanction was necessary. The learned Sessions Judge has made a report under S. 438, Criminal P. C., as he considers that sanction was necessary.

Section 197, Cl. (1), Criminal P. C., has been re-drafted by S. 50, Criminal P.C. Amendment Act 18 of 1923. Campbell, J., in referring a case to a Division Bench stated in *Muhammad Ismail* v. *Emperor* (1) (at p. 649 *of* 8 *Lah.*):

"Under the former section the offence excluded from cognizance was one of which a public servant was accused 'as a public servant' and under that section it would seem that no complaint against a Municipal Commissioner under S. 168, I. P. C., could have been proceeded with unless the sanction of the Local Government had been obtained. It is argued that the same is the spirit of the new section, but the actual words of that section now are : 'Any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties'. "

"It is desirable to have an authoritative interpretation of these words and I therefore refer the case to a Division Bench."

I respectfully agree with his interpretation of the section as it stood before the amendment. The applicant's counsel states that the words "while acting or purporting to act in the discharge of his official duty" have been substituted for the words "as such Judge or public servant" occurring in the old section in order to amplify the words and to make the sense clear. I accept this statement, but consider that the substitution had an effect which was not intended. The judgment of the Division Bench in *Muhammad Ismail* v. *Emperor* (1) held that, on the particular facts of the case they were considering, no sanction was required under S. 197, Criminal P. C. One of the particular facts of the case was that the Municipal Commissioner had obtained a contract for bricks to be supplied to the Municipal Committee. The judgment of the Bench Division however does not refer to the opinion of Campbell, J., that under the former section the provisions of S. 197, Criminal P. C., would have applied. In *Emperor* v. *Bhairon Prasad* (2) Dalal, J., considered a complaint that a member of the Municipal Board, Agra, acquired a share in a contract with the Board ; he held that sanction was necessary under the provisions of S. 197, Criminal P. C. He considered that the member was accused of an offence alleged to have been committed by him "while acting or purporting to act in the discharge of his official duty." I respectfully disagree with this opinion. A member who in his private capacity takes a contract with a Municipal Committee cannot be said to have done so "while acting or purporting to act in the discharge of his official duty."

No other decisions dealing with the question whether or not the revised S. 197, Criminal P. C., requires sanction for taking cognizance of a complaint regarding the offence described in S. 168, I. P. C., have been brought to my notice. The learned Sessions Judge has pointed out that it was formerly the practice to obtain sanction as is shown by the judgment in *Narayan* v. *Emperor* (3), but under the law then in force. sanction was necessary. In my opinion the Magistrate correctly held that no sanction was necessary. The proceedings are therefore returned to the Magistrate who will proceed with the investigation of the complaint. It appears that the substitution of the words "while acting or purporting to act in the discharge of his official duty" or the words "as such Judge or public servant," which was effected by the Criminal Procedure Code Amendment Act, was proposed in order to amplify the words and to make the sense clear (Statement of Objects and Reasons, 1914). As the substitution had an effect which does not appear to be intended by the legislature, this order will be brought to the notice of the Local Government.

P.N./R.K. *Order accordingly.*

(1) A. I. R. 1928 Lah. 72 = 109 I. C. 239 = 29 Cr. L. J. 511=8 Lah. 647.

(2) A. I. R. 1928 All. 756=113 I. C. 78=30 Cr. L. J. 62=51 All. 377.

(3) [1910] 6 N. L. R. 114=8 I. C. 274=11 Cr. L. J. 613.

A. I. R. 1932 Nagpur 134

MACNAIR, J. C.

Baliram—Applicant.

v.

Mt. Gangoo and *others*—Non-Applicants.

Criminal Revn. No. 389 of 1931, Decided on 21st January 1932, case reported by Addl. Sess. Judge, Nagpur.

Criminal P. C. (1898), S. 145—Preliminary order is suitable if dispute likely to cause

breach of peace exists and actual breach is likely to occur two or four months later.

To justify action under S. 145, it is immaterial whether or not there is sufficient time for parties to settle their disputes by referring to civil Courts. Under S. 145 there must be a present danger of a breach of the peace, but there need not be a danger of an immediate or imminent breach of the peace. A preliminary order under S. 145 is suitable if a dispute likely to cause a breach of the peace exists and the actual breach is likely to occur two or four months later: 7 *C. L. R.* 352 and 33 *Cal.* 33, *Rel. on.*; 7 *Cal.* 385 and *A.I.R.* 1929 *Cal.* 341, *Ref.*; *A. I. R.* 1924 *Oudh* 341 and *A. I. R.* 1925 *Oudh* 416, *not Foll.* [P 135 C 2]

R. N. Padhye—for Party No. 2.

Order.—Proceedings under S. 145, Criminal P. C., were started on a report that a breach of the peace was likely some two or four months after the date of the report. The Sessions Judge has recommended that the order passed should be set aside on the ground that the police report did not disclose apprehension of a breach of the peace until some time had elapsed. He has referred to a number of cases in support of the view that it is illegal to pass an order under S. 145 (1), Criminal P. C., if there is sufficient time for the parties to settle their disputes by referring to civil Courts, though action might be taken under the provisions of S. 107, Criminal P. C.

The decisions in *Chote Lal* v. *Emperor*, *A.I.R.* 1924 *Oudh* 341, and *Munnu Lal* v. *Harde, Ram*, *A.I.R.* 1925 *Oudh* 416, support the view of the Sessions Judge; but the reports of these cases are brief and do not give detailed reasons. In *Damodur Biddyadhur* v. *Syamanund Dey* (1) and in *Stewart* v. *Hubert Hughes*, *A.I.R.* 1929 *Cal.* 341, it was held that a dispute likely to cause a breach of the peace must exist at the time the order was passed and the dispute should be of such a character as to make it likely that it would cause a breach of the peace unless proceedings were taken up at once. I prefer however, to rely on the conclusions of Rampini and Mookerjee, JJ., in *Kulada Kinkar Roy* v. *Danesh Mir* (2). This case is also cited by the learned Sessions Judge and contains a very careful discussion of previous decisions on the point. The learned Judges adopt the view of Garth, C.J., in *Uma Charn Santra* v. *Beni Madhub Roy* (3), that there must be a present danger of a breach of the peace, but there need not be danger of an immediate or imminent breach of the peace: they concur in the view that it is sufficient for the Magistrate to take action if there is a reasonable apprehension that a disturbance of the peace is likely to occur.

It does not appear to me material whether there is or is not sufficient time for persons interested to resort to civil remedy. Action is taken under S. 145, Criminal P. C., not in the interest of any party, but to prevent a breach of the peace. If neither party intends to resort to civil remedy, the fact that there is time to do so does not affect the likelihood of a breach of the peace. S. 107, Criminal P. C., does not provide a suitable safeguard against breaches of the peace likely to occur in consequence of disputes concerning land or water. It is undesirable that crops should be left on the ground and binding over of one or more parties leaving it uncertain which party is to reap the crop is clearly unsatisfactory. S. 145, Criminal P. C., in my opinion, contains a clear indication that the preliminary order should be made in good time. The parties ought, if possible, to be heard and to produce their evidence before the time at which a breach of the peace is anticipated; attachment of the subject in dispute pending decision should be avoided by passing the preliminary order in time to render this unnecessary. In my opinion then a preliminary order is entirely suitable if a dispute likely to cause a breach of the peace exists and the actual breach is likely to occur two or four months later. The ground on which the learned Additional Sessions Judge has recommended that I should interfere is without force, and the proceedings will be filed. If the party who appeared before me desires that a recommendation should be made on any other ground, he must address a lower tribunal.

P.N./R.K. *Reference rejected.*

(1) [1881] 7 Cal. 385=8 C.L.R. 514.
(2) [1906] 33 Cal. 33=10 C. W. N. 257=2 C.L.J. 271=2 Cr. L. J. 670 (F.B.).
(3) [1881] 7 C.L.R. 352.

A. I. R. 1932 Nagpur 135

GRILLE, A. J. C.

Wali Mohammad—Applicant.

v.

Jamal Bhai and *another* — Non-Applicants.

Civil Revn. No. 264 of 1931, Decided on 16th November 1931.

(a) Civil P. C, (1908), O. 5, R. 3 and O. 10, R. 4 --Personal appearance of plaintiff can be compelled only under O. 5, R. 3 and O. 10, R. 4.

There are only two cases in which the personal appearance of the plaintiff can be required and these fall under O. 5, R. 3 and O. 10, R. 4. [P 136 C 1]

(b) Civil P. C. (1908), O. 16, R. 19—Plaintiff not residing within Court's jurisdiction nor within 200 miles from Court houses—Hs cannot be compelled to appear in person as defendant's witness but should be examined on commission.

A plaintiff who does not reside within the limits of the jurisdiction of the trial Court nor within 200 miles of the place where the Court sits cannot be compelled to appear in person as a witness for the defendant; but the defendant has to get him examined on commission at the place where the plaintiff resides: *A. I. R.* 1925 *Pat.* 125, *Ref.* [P 136 C 2]

Abdur Rahimkhan — for Applicant.

W. B. Pendharkar — for Non-Applicants.

Judgment.—This is an application in revision against the order of the Additional District Judge, Bhandara, in Civil Suit No. 8 of 1927 directing that the plaintiff should appear personally in Court. In this case the plaintiff had not appeared in the witness-box to support his case as he considered it unnecessary to do so, and after the plaintiff's evidence had been concluded and evidence for the defendants heard, the defendants wished to call the plaintiff as a witness. It was urged on behalf of the plaintiff that the plaintiff was an old man and was residing in Kathiawar and that if the defendants desired to examine him they should examine him on commission. The learned Additional District Judge asked the defendants to file interrogatories, and on perusal of the interrogatories decided that most of the questions were material for the decision of the case and directed the plaintiff to appear personally.

The Judge does not say under what provision of the Civil Procedure Code, this order has been passed. There are only two cases in which the personal appearance of the plaintiff can be required and these fall under O. 5, R. 3 and O. 10 R. 4 neither of which is applicable to the present circumstances. The case has long passed the stage of service of summons to the parties and the request for the plaintiff's presence was not the result of a desire on the part of the Court to examine him as a party but of the wish of the defendant to examine him as a witness. The plaintiff admittedly resides beyond the jurisdiction of the Court and the allegation that he has travelled as far as Berar from his native place, Kathiawar, is merely an allegation which has not been proved. Even if it were proved, it cannot entitle the Court to issue an order in contravention of the provisions of O. 16, R. 19. The plaintiff has not been directed to attend as a plaintiff but as a witness on behalf of the defendants and the rules applicable to the attendance of witnesses apply and no others. The case of *Muhammad Akbar Ali Khan* v. *Herbert Francis* (1), has been cited before me. That case is an authority for the proposition that an application by a plaintiff to examine himself by commission must be thoroughly scrutinized before being allowed and that it differs from an application by either party to have examination of witnesses on commission. This is certainly an application to examine the plaintiff on commission but the application does not originate from the plaintiff himself but from the defendant, and the judgment cited has no application whatsoever. The application is an application to examine a witness. The witness, who happens to be the plaintiff and is represented in Court, claims the protection of O. 16, R. 19, a protection to which he is entitled. He cannot be compelled to come to Court as a witness for the defendants since he does not reside within the limits of the Court's jurisdiction or within 200 miles of the place where the Court sits. The defendants can only have him examined on commission. The order of the Additional District Judge directing the plaintiff to appear personally must be set aside.

The application accordingly succeeds. I fix pleader's fee at Rs. 20; the costs of the application will be paid by the non-applicants.

B.V./R.K. *Application allowed.*

(1) A. I. R. 1925 Pat. 125=84 I. C. 993=3 Pat. 863,

* A. I. R. 1932 Nagpur 137 (1)

MACNAIR, J. C.

Ramchandra Wadhi—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 11 of 1932, Decided on 12th March 1932, against order of Magistrate, Second Class, Nagpur, D/- 16th November 1931.

*** Criminal P. C. (1898), S. 257, Proviso—Prosecution witnesses, if present, can be allowed to be cross-examined at defence stage.**

The proviso to S. 257 clearly contemplates the summoning of prosecution witnesses who have been cross-examined after the charge was framed at the defence stage and indicates that while the attendance of such witnesses should not ordinarily be compelled, there is no restriction on their examination, if present. Such examination should be confined to new matter in the same way as examination would be confined if the witnesses had been partly examined and the examination had been continued. Therefore an application for cross-examination of prosecution witnesses, when present in Court, at the defence stage should not be refused and the accused should be given a chance to cross-examine them : 4 *Bom. L. R.* 461, *Ref.* [P 137 C 1, 2]

G. R. Pradhan—for Applicant.

Vivian Bose—for Non-Applicant.

Order.—In the trial Court the witnesses for the prosecution were cross-examined at length after the charge was framed. The accused was called upon to enter upon his defence : he had engaged another counsel and made an application that the prosecution witnesses should be re-summoned. This was refused on the ground that the object of the application was delay and harrassment of the prosecution witnesses : this order, by itself supplies no reason for interference in revision.

On the next hearing however some of the prosecution witnesses were present in Court. No proper reason is given for the refusal to examine these witnesses : their examination would not have been harrassing and would not have caused great delay. The proviso to S. 257, Criminal P. C., clearly contemplates the summoning of prosecution witnesses who have been cross-examined after the charge was framed at the defence stage and indicates that, while the attendance of such witnesses should not ordinarily be compelled, there is no restriction on their examination, if present. *Emperor* v. *Nagar* (1). In my opinion therefore it was necessary for the Court to allow the accused to cross-examine these witnesses. It would have been of course proper for the Court to confine this examination to new matter in the same way as examination would be confined if the witnesses had been partly examined and the examination had been continued. I therefore set aside the conviction and sentence and direct that the trial should proceed from the point at which the application to examine the witnesses in Court was refused. I add that applications to examine fresh witnesses must receive consideration. The applicant's counsel asks that other prosecution witnesses may be re-summoned for the sole purpose of proving that they are inimical to the applicant and, in my opinion, this should be permitted ; the Government Advocate offers no objection to this direction.

K.N./R.K. *Revision allowed.*

(1) [1902] 4 Bom. L. R. 461.

A. I. R. 1932 Nagpur 137 (2)

MACNAIR, J. C.

(Haji Karim) Nur Mohamad—Plaintiff—Appellant.

v.

Rahman—Defendant—Respondent.

Appeal No. 567 of 1929, Decided on 23rd November 1931, against appellate decree of Dist. Judge, Nagpur, D/- 12th August 1929.

(a) Precedent—Judgment not published in official report need not necessarily be followed but should be considered—Practice.

A Subordinate Judge is not bound to follow a decision of the High Court which has not been published in the official report, though he is bound to give most respectful and careful consideration to the reasons which led to the decision. [P 138 C 1]

(b) Civil P. C. (1908), O. 30, R. 1—Suit in firm name—One partner can sign it.

When a suit is brought in the name of the firm, it is not necessary that more than one partner should sign the plaint : *A. I. R.* 1927 *Lah.* 115 and *A. I. R.* 1923 *Nag.* 137, *Ref.* [P 138 C 1]

M. Y. Shareef—for Appellant.

R. N. Padhye—for Respondent.

Judgment.—The plaint in this case describes the plaintiff as Haji Karim Nur Muhammad firm malik Haji Karim Kachi, aged 61. His suit was dismissed in so far as the defendant Jafar is concerned for reasons into which I need not now enter. He filed an appeal in the Court of the District Judge, Nagpur. The learned District Judge held that he was bound to follow an unreported ruling of this High Court, *Seth Madan Gopal* v.

Pandurang (1), decided by Findlay, J. C. He understood Findlay, J. C., to hold that when a suit is instituted in the name of a firm the plaint must be signed by at least two of the partners. He held that the description in the plaint meant that the firm was suing through its owner, in spite of the fact that his own view of the law was opposed to that which he supposed to have been taken by Findlay, J. C. He dismissed the appeal on the ground that the suit as framed was bad.

In appeal it is urged that the suit was properly framed. I remark that the learned District Judge was not bound to follow a decision of this Court which had not been published in the Nagpur Law Reports, though he was bound to give most respectful and careful consideration to the reasons which led to the decicision. It is obviously desirable that a Judge who has not access to all unpublished reports should refuse to exercise his judgment when one such report is brought to his notice. It may well be that in another unpublished judgment the opposite view has been taken. As a matter of fact, a view opposed to that followed by the Judge has been taken in *Shriram* v. *Madho Patil*, *A. I. R.* 1923 *Nag.* 137, decided by Dhobley, A. J. C. Dhobley, A. J. C., stated that where a suit was brought in the name of a shop, one of the partners could bring it on behalf of all the partners. It is then unnecessary for me to decide whether Findlay, J. C., was correctly understood by the learned District Judge. It is sufficient to say that the District Judge's own opinion was correct. O. 30, R. 1 allows two or more persons claiming as partners to sue in the name of the firm; when the suit is in the name of the firm the partners to that firm are suing. Cl. (2) of the rule allows the plaint to be signed by one of the partners. This view of the law is not disputed before me, but I may refer to a remark in *Hari Singh* v. *Karam Chand-Kanshi Ram* (2) at p. 10 (of 8 *Lah.*):

"When a suit is brought in the name of a firm it is precisely as though it were brought in the name of all the partners."

The respondents' counsel endeavours to support the decision that the suit must fail, because it is badly constituted on a different ground. He urges that the description of the plaintiff indicates that he sues as the owner of a one-man firm, whereas O. 30 applies to suits by firms consisting of two or more persons. The description of the plaintiff does render some support to this contention, but the written statement of the defendant contains the following paragraph:

"It is denied that Haji Wali is the owner of the firm of Haji Karim Nur Muhammad. He has no right to represent that firm and to institute a suit on its behalf. The plaint is not thus validly signed and verified, and it is not validly presented. The suit should be dismissed on this ground alone."

Clearly it was understood that the suit was instituted by a certain firm. The plaintiff rejoined that he was the owner and one of the partners of the firm. It seems clear then that the words in the plaint malik Hajiwali were not intended to mean that Hajiwali was the sole owner of the firm. The plaint though inartistically worded must be considered to be a plaint in the name of the firm Haji Karim Nur Muhammad which has, as a matter of fact, numerous partners. The signature to the plaint then was intended to be the signature of one of the partners in such capacity. The reason given by the learned District Judge for dismissing the appeal is therefore incorrect. His decree is set aside and the case remanded for decision of the other contention raised before him. Costs in this Court will be costs in the first appeal.

V.B./R.K. *Case remanded.*

(1) Civil Revn. No. 73 of 1928, Decided on 30th April 1928.

(2) A.I. R. 1927 Lah. 115=100 I. C. 721=8 Lah. 1.

A. I. R. 1932 Nagpur 138

GRILLE, A. J. C.

Sobhagsingh and *others*—Plaintiffs—Appellants.

v.

Khushal Gujar—Defendant—Respondent.

Second Appeal No. 473 of 1930, Decided on 20th February 1932, against decree of Dist. Judge, Nimar, D/- 14th April 1930.

Landlord and Tenant—Cultivating partnership—To constitute partnership malguzar must supply some part of capital — Contract Act, S. 251.

To constitute a contract of cultivating partnership it is essential that the malguzar should supply part of the working capital and by so doing take some part in the cultivation It is not necessary that he should take any actual part in agricultural operations or even in superintendence thereof. The agreement to share net profits does not necessarily connote a partnership :

10 *C. P. L. R.* 29. *Rel. on.* 3 *C.P.L.R.* 180; 6 *C.P. L.R.* 117; and 14 *C.P.L.R.* 12, *Ref.* [P 139 C 2]

W. R. Puranik—for Appellants.

A. V. Khare—for Respondent.

Judgment.—The plaintiff, a malguzar and lambardar of Patti No. 5 of Mouza Bhagwanpura, sued the defendant for possession of a field, alleging that it was his khudkasht. The defendant claimed to be an occupancy tenant of the field. It is admitted that from the years 1924 to 1926 the defendant was in occupation of this field and paid the malguzar a half-share of the net profits. In the following year the malguzar wished to discontinue the alleged agreement, but the defendant declined to vacate the feld, and proceedings under S. 145, Criminal P. C., resulted in the defendant being declared in possession. The plaintiff contended that this was a mere cultivating agreement and that he had agreed to supply the seed and the bullocks and that the defendant had agreed to supply his personal labour and supervision and that on a division of the net profits each was to receive half. The trial Court found that the plaintiff had not proved his allegation that he had supplied seed and bullocks and consequently that the relations between the parties were not those of persons cultivating under a joint agreement but those of landlord and tenant. The learned District Judge in appeal considered that the lower Court had wrongly assumed that a simple batai contract necessarily implied a lease. In mentioning the case law on the subject the learned District Judge held that the principle to be deduced from it was that a cultivating partnership is denoted when the agreement involves the sharing of losses as well as profits on the part of the malguzar, and held that in view of the accepted fact that it was the net produce which was to be shared, as stated in the pleadings, it would appear that it was a cultivating partnership and not a lease. He held however that on the oral evidence it had been proved that the defendant was created a tenant and consequently dismissed the plaintiff's claim.

The plaintiff in second appeal relies on the argument of the learned District Judge which is based on the pleadings, but it appears to me impossible for him to surmount the definite finding that the land in question was given out as a tenancy. There is certainly evidence on record on which the District Judge could come to this finding and that finding cannot be disputed. It is significant that the plaintiff's own witness has stated, agreeing with the defendant, that the defendant was liable for kotwari dues and rent. Not much significance can be attached to the use of the word "rent," since what is clearly meant is that the half-share of the net produce was to be handed over, and whether this constituted rent or no is a matter of law rather than of fact; but the evidence as to the liability of the defendant to pay kotwari dues in respect of this field adds very strongly to the defendant's claim that he was holding the land as a tenant and on the evidence the learned District Judge was entitled to find that a tenancy had been created.

I must also point out that the principle which the learned District Judge has deduced from the cases of *Kisan* v. *Jaiwant Rao* (1), *Khoshal* v. *Nanhu* (2), *Deopuri* v. *Arjun* (3) and *Ganoo* v. *Mukund* (4) that the question whether a cultivating partnership exists depends on the question whether losses are to be shared as well as profits, is incomplete. It is of course clear, as stated by Ismay, J. C., in *Ganoo* v. *Mukund* (4) that the sharing of gross profits would not of itself create a partuership since gross profits eliminate the qnestion of reduction on acccunt of losses, but the converse of this which the learned counsel for the appellant would urge, that the agreement to share net profits necessarily creates a cultivating partnership does not follow. The learned District Judge appears to have lost sight of the further principle laid down in *Khsohal* v *Nanhu* (2) and *Deopuri* v. *Arjnu* (3) that to constitute a contract of cultivating partnership it is essential that the malguzar should supply some part of the working capital and by so doing take some part in the cultivation. It is not necessary that he should take any actual part in agricultural operations or even in superintendence thereof, but it does appear essential that he must supply some part of the capital and not be content merely with a fluctuating return as a recompense

(1) [1890] 3 C. P L. R. 180.
(2) [1893] 6 C. P. L R 117.
(3) [1897] 10 C P. L. R. 29.
(4) [1901] 14 C. P. L. R. 12.

for permitting the opposite party to cultivate the land.

In this case it has been held on the evidence that the malguzar has supplied nothing. The agreement to share net profits does not necessarily connote a partnership and may well, in view of the fact that the landlord contributed nothing towards the working capital or the labour, be nothing more than an agreement as to the basis on which the rental was to be paid. A tenant clearly would not agree to pay half of the gross produce. His profit would naturally be estimated on the basis of what remained to him after all the working expenses had been paid, that is to say, the net profits Some of these profits must remain for him otherwise it would not be worth his while to cultivate. The agreement was that out of the net profits arising from the cultivation of the field he was to pay the malguzar half. It is logical and natural to arrive at this conclusion without any necessity for importing a consideration that there was an agreement to share losses. As it has been found that the plaintiff contributed no working capital, it would be fantastic to assume that in a year when the net profits from the field would be nil and there was an actual loss the malguzar would be prepared to contribute his share and bear half of it. Had he supplied any working capital the position of course would have been entirely different and I consider that the trial Court's view of the case, namely, that the essential question was whether the plaintiff had or had not contributed anything towards the working expenses of cultivation, is correct. The result is that the appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Nagpur 140

MACNAIR, J.C.

Chotelal—Plaintiff—Appellant.

v.

Sarwan—Defendant—Respondent.

Second Appeal No. 359 of 1930, Decided on 18th March 1932, against decree of Dist. Judge, Chhindwara, D/- 22nd March 1930.

*** Civil P. C. (1908), S. 47—Suit by decree-holder auction-purchaser for recovery of possession of property purchased is not barred under S. 47—Civil P. C. (1908), O. 21, R. 95.**

A suit brought by the decree-holder auction purchaser for recovery of possession of the property purchased in the execution of his decree is not barred by the provisions of S. 47, the question relating to the delivery of the property purchased by him, not being a question relating to execution, discharge or satisfaction of the decree: *A.I.R.* 1932 *Pat.* 80 (*F.B.*); 8 *P.R.* 1918; *A. I. R.* 1928 *Oudh* 199 (*F.B.*); *A. I. R.* 1930 *Rang.* 61, *Foll.*; *A.I.R.* 1925 *Pat.* 478; 31 *All.* 82; 40 *All.* 216; *A. I. R.* 1924 *Bom.* 429, *not Foll.*; *A.I R.* 1926 *Cal.* 798 (*F.B.*), *Dist.* [P 141 C 1]

R. R. Dandige—for Appellant.

R. K. Manohar—for Respondent.

Judgment.—The plaintiff alleged that he obtained a decree against the defendant, attached the plaint property and purchased it at a Court sale held on 24th June 1921. He did not obtain possession through the Court and instituted a suit eight years after the date of purchase. The defence which I have to consider is that the suit was not maintainable and the plaintiff's remedy was by an application under S. 47, Civil P. C. The learned District Judge, in first appeal has held that the suit was not maintainable. He states that while the Allahabad and Bombay High Courts take an opposite view, he prefers to follow the view taken by the High Courts of Calcutta, Madras and Patna which have been followed in an unreported case in this Court.

The Patna case cited by the learned District Judge is *Askaran Baid* v. *Raghunath Prasad* (1). The question has been reconsidered by a Full Bench consisting of five Judges in *Tribeni Prasad Singh* v. *Ramasray Prasad Chaudhuri* (2). The Full Bench overruled *Askaran Baid* v. *Raghunath Prasad* (1). A very large number of rulings on the point were considered. It was pointed out that in two reported cases the Judges of the Madras High Court doubted the correctness of the view taken in that province, but maintained that view on the ground of a settled cursus curiae. It was also pointed out that there were a large number of the decisions of the Calcutta High Court to the effect that a suit such as the one I am considering was maintainable and that this question did not

(1) A.I.R. 1925 Pat. 478=88 I. C. 104=4 Pat. 126.

(2) A. I. R. 1932 Pat. 80=136 I.C. 49=10 Pat. 670 (F.B.).

directly arise in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* (3).

The learned District Judge has referred to *Mt Bhagwati* v. *Banwarilal* (4), *Buddhu Misir* v. *Bhagirathi Kunwar* (5) and *Hargovind Fulchand* v. *Bhudar Raoji* (6). The Allahabad and Bombay High Courts have adhered to the view that the suit with which I am dealing is maintainable. This view has also been adopted by the Lahore High Court in *Chotha Ram* v. *Mt. Karmon Bai* (7); the Oudh Chief Court in *Gayabakhsh Singh* v. *Rajendra Bahadur Singh* (8) and the Rangoon High Court in *J. A. Martin* v. *S. M. Hashim* (9). It is then clear that the balance of authority is against the view taken by the learned District Judge.

The reasons given by the learned Judges of the Patna Full Bench appear to me very strong. It is not desirable to reproduce these reasons in full, but I shall attempt to reproduce very shortly a part of the reasoning. S. 47, Civil P.C. lays down:

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

I assume that in the suit with which I am dealing the parties must be considered to retain the character of parties to the original suit. I have still to consider whether the question to be decided relates to the execution, discharge or satisfaction of the decree. If the plaintiff had been a stranger purchaser, it would not, in my opinion, have been possible to hold that the suit necessarily raised any question relating to the execution of the decree. The stranger purchaser might have made use of the summary procedure allowed by R. 95, O. 21, Sch. 1, Civil P. C., a rule which finds place along with rules regarding the execution of decrees. but he did not; he filed a separate suit for which a period of limitations had been laid down in Art. 138, Lim. Act. The fact that the auction-purchaser happens to be the decree-holder does not seem to affect the consideration whether or not the suit raised a question relating to the execution of the decree. Some such suit may raise a question relating to the execution, discharge or satisfaction of the decree; for example, a question whether the property of which possession is sought was or was not sold or the nature of the rights which were brought to sale. It may be that in a suit such points cannot be determined, but in the suit I am considering there is nothing to indicate that any such question is raised.

The existence of R. 95, O. 21, does not seem to affect the question which I am considering. Many applications under this rule do raise questions which have reference to the execution of the decree. The Full Bench of the Calcutta High Court in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* (3), were considering an application which did raise such a question. What they held was that an appeal lay from an order passed in consequence of the decision of that question. It does not follow that all orders passed on applications under R. 95 decide questions which have some reference to the execution of the decree much less does it follow that the decree-holder who did not wish to avail himself of the provisions of R. 95 but filed a separate suit which raised no question relating to the execution of the decree was in some way to be considered to be agitating such a question.

I therefore hold that the suit was maintainable. The decree of the learned District Judge is set aside and the case is remanded for decision on the merits. It is ordered that the court-fee will be refunded. Costs in this Court will be borne by the respondent; counsel's fee Rs. 20.

R.M./R.K. *Decree set aside.*

(3) A.I R. 1926 Cal. 798=95 I. C. 491=53 Cal. 781 (F.B.).
(4) [1909] 31 All. 82=1 I.C. 416 (F.B.).
(5) [1917] 40 All. 216=42 I.C. 936.
(6) A. I. R. 1924 Bom. 429=83 I. C. 932=48 Bom. 550 (F.B.).
(7) [1918] 8 P.R. 1918=44 I.C. 169.
(8) A. I. R. 1928 Oudh 199=110 I C. 83=3 Luck 182 (F.B.).
(9) A. I. R. 1930 Rang. 61=126 I. C. 209=8 Rang. 162.

A. I. R. 1932 Nagpur 141

MACNAIR, J. C.

Yeshwant Rao Shantaram—Applicant.

v.

Secretary, High Court Bar Association Nagpur—Non-applicant.

Civil Revn. No. 578 of 1930 Decided, on 21st January 1932, against order of Addl. Dist. Judge, Nagpur, D/- 8th November 1930.

(a) Legal Practitioners Act (as amended in 1926). S. 36 (1), Explanation—It is not necessary that every member should receive notice of meeting.

It is not necessary that the meeting should be summoned by a method different from that usually adopted when meetings of the association are held or that every member of the association should receive notice of a special meeting. [P 142 C 2]

(b) Legal Practitioners Act (as amended in 1926), S. 36 (1), Explanation—Facts on which resolution is based not disclosed—Still resolution is ordinarily sufficient in absence of cogent evidence in rebuttal.

Under S. 36 (1), Explanation, the resolution is valuable evidence even though the facts on which the resolution is based are not disclosed. In the absence of any other cogent evidence, the resolution if duly passed should ordinarily be regarded as sufficient for declaring a person to be a tout. The proof of any occupation which involves attendance at Courts for particular purposes is not very material evidence in rebuttal. [P 143 C 1]

(c) Legal Practitioners Act (as amended in 1926), S. 36 (1), Explanation—Meeting convened to declare *A* to be tout—Resolution declaring *B* to be tout--Resolution is not within explanation so far as *B* is concerned.

Where the meeting is specially convened for the purpose of declaring *A* to be or not to be a tout and the resolution declares *B* to be a tout, the resolution in so far as *B* is concerned is not such a resolution as is contemplated by the explanation to S. 36. The High Court will set aside an order passed declaring *B* as a tout based on such a resolution as that resolution is not valid evidence so far as *B* is concerned : *A.I.R* 1930 *All.* 752, *Rel. on.* [P 143 C 1]

(d) Legal Practitioners Act (as amended in 1926), S. 36 (1), Explanation—It is not necessary that every member present should consider evidence.

It is not necessary that the members present should consider the evidence themselves. It is sufficient if they find reason to believe that the report, prepared by a subcommittee appointed for the purpose, is prepared with impartiality and care and support the resolution because of the report. [P 142 C 2]

T. J. Kedar—for Applicant.

H. S. Gour, *S. Y. Deshmukh*, *N. M. Deshmukh* and *N. T. Mangalmoorti*—for Non-applicant.

Order.—This order will govern the disposal of Civil Revisions Nos. 582 to 587 of 1930 and No. 3 of 1931. S. 36, Legal Practitioners Act 18 of 1879, enables District Judges to frame and publish a list of persons proved to their satisfaction habitually to act as touts. It is universally admitted that such action is necessary in order to lessen malpractices which are common. An explanation was added to Cl. (1), S. 36, clearly in order to make it less difficult to take action under the section. The Explanation is as follows :

"The passing of a resolution, declaring any person to be or not to be a tout, by a majority of the members present at a meeting, specially convened for the purpose of an association of persons entitled to practise as legal practitioners in any Court or revenue office, shall be evidence of the general repute of such person for the purposes of this subsection."

The High Court Bar Association of Nagpur resolved to co-operate with the District Judge in combating the existing evil in the manner indicated by the Explanation. The members of the High Court Bar who devoted time and trouble to this end deserve the thanks of the public. The method adopted by the High Court Bar Association appears to have been judicious. A subcommittee was appointed to inquire and prepare a report for submission to a meeting of the association. When the report was ready, a special meeting was convened and a resolution was passed declaring certain persons to be touts: after due inquiry the Additional District Judge found that the applicants before me were proved habitually to act as touts. I first consider the arguments which apply to the cases of all applicants except Gaikwad. It is first urged that there is no proof that notice of a special meeting was circulated to all the members of the Bar Association in time to enable them to attend the meeting. A certified copy of the notice issued has been filed. The original was not filed because it was not demanded. The meeting was convened for a day 8 days after the date borne by the copy of the notice. There is no reason to think that the notice was not circulated in the manner usually adopted when meetings of the Association are held. The law does not require that this meeting should be summoned by a method different from that usually adopted or that every member of the Association should receive notice. I agree with the learned Additional District Judge that the meeting was convened in accordance with law. I add that 39 persons, a considerable proportion of the members of the Association, took the trouble to attend the meeting.

It is next urged that the members present at the meeting should have considered the evidence for themselves. The law does not require this: it was sufficient if the members present found reason to believe that the report had been prepared with impartiality and due care and

supported the resolution because of the report. The next point urged is that as the statements before the Sub-committee were not disclosed before the Additional District Judge, the resolution should be treated as very weak evidence. I agree that the evidence would have been stronger if the applicants had had an opportunity of examining the facts on which the resolution was based; but the Explanation to S. 36 (1), Legal Practitioners Act, makes it clear that the resolution is valuable evidence. It is next urged that it is very difficult for a person declared by the resolution to be a tout to give rebutting evidence and that, in the absence of cogent rebutting evidence, the resolution should not be accepted as sufficient evidence. When the Explanation was added the framers of the law must have been aware of the difficulty of producing evidence either in support or in rebuttal of the resolution. It must have been intended that, in the absence of any other cogent evidence, the resolution, if duly passed, should ordinarily be considered sufficient. It would not be proper for me in revision to consider in detail the rebutting evidence produced by the non-applicant. My predecessor has held by an order, dated 14th July 1931, that the High Court's power of interference in these cases is very limited in extent. I fully agree with the learned Additional District Judge that proof of any occupation which involves attendance at Courts for particular purposes is not very material : there is no doubt that some persons who have such occupation also act as touts. I therefore dismiss the applications of all the applicants except Gaikwad. The ground urged on behalf of Gaikwad is different. The Sub-committee did not recommend that Gaikwad should be declared a tout. The meeting was convened :

" to consider the names of those persons who are found by the Tout Suppression Committee to be habitual touts and to take such steps against them under the Legal Practitioners Act as necessary."

The facts were then that the meeting was specially convened for the purpose of declaring *A* to be or not to be a tout, while the resolution declared *B* to be a tout. In my opinion, then the resolution, in so far as Gaikwad is concerned, is not such a resolution as is contemplated by the Explanation to S. 36. Legal Practitioders Act: it might, of course, have been different if the meeting had been convened for declaring any out of a class of persons to be or not to be touts. The learned Additional District Judge has not relied on any evidence other than the passing of the resolution. There is then no valid evidence that Gaikwad is a tout. There is in my opinion no doubt that, in accordance with the view taken by my predecessor, it is necessary for me to interfere in revision with regard to Gaikwad. In *Badri Prasad* v. *Emperor* (1), such an order was set aside on the ground that the resolution could not be used as evidence. The defect in the resolution cannot be said to be merely one of form. Had the notice indicated that Gaikwad might be declared to be a tout, some member or members of the Association might have made a point of being present to give information or to vote in favour of Gaikwad. The order declaring Gaikwad to be a tout is therefore set aside.

P.N./R.K. *Revision allowed.*

(1) A.I.R. 1930 All. 752=(1930) Cr. C. 1008=128 I.C. 603=32 Cr. L. J. 159=5 All. 939.

* A. I. R. 1932 Nagpur 143

MACNAIR, J. C.

Abdul Rashid—Plaintiff—Appellant.

v.

Abdul Wahid and *others* — Defendants —Respondents.

First Appeal No. 57 of 1928, Decided on 30th November 1931.

*** Civil P. C. (1908), S. 96 — Appeal against decree passed on review — Appellant can ask for increase of amount awarded by original decree — Civil P. C. (1908), O. 47, R. 1.**

An application for review of part of a decree may be allowed and when such application has been granted, the entire case is not re-opened. But even though the whole case be not reopened, there must be a fresh decree, and there is no provision limiting the extent to which this decree can be attacked in appeal. Hence although the plaintiff-appellant would have been barred from asking for relief if the application for review had been rejected, he can after a decree has been passed on review ask in appeal against that decree that the amount awarded by the original decree should be increased ; 43 *Cal.* 178, *Ref.* [P 144 C 1,2]

Fida Hussain and *Rahim Khan*— for Appellant.

M. R. Bobde, *A V. Wazalwar* and *D. K. Mehta*—for Respondent.

Order.—The plaintiff appellant, a co-sharer in three villages sued the defendant-respondent, who is the lambardar of these villages for his share of village

profits for three years. He obtained a decree for over Rs. 4,000. The defendant applied for review of judgment. It is clear that he did not wish the entire case to be re-opened. In the application he asked that the finding regarding what is really a single item should be reconsidered and that the decretal amount should be reduced by Rs. 3,200. The application was granted but the Judge clearly did not intend to re-open the entire case. The parties were given an opportunity to make statements regarding the extent to which the decree was affected by the correction of a mistake apparent on the face of the record. After hearing the parties on this point, he delivered a fresh judgment and held that Rs. 4,012-8 0 should be deducted from the amount previously decreed. This judgment does not discuss the findings regarding numerous items as the mistake did not affect these findings. The plaintiff has appealed from the decree passed after review. In this appeal he seeks for a decree for a larger sum than that granted to him by the orginal judgment, urging that items with which the proceedings in review had no application should be varied. The respondent has filed a preliminary objection. He urges that as the plaintiff did not appeal against the original decree and the review was granted only to a limited extent, the appeal must be limited to items which were considered in the review proceedings.

It is true that an application for a review of part of a decree may be allowed and that when such an application has been granted, the entire case is not reopened. I may refer to *Janki Nath Hore* v. *Prabhasini Dasee* (1), and the cases there cited. But even if it be assumed that an appeal against the original decree challenging items with which the review proceedings had no connexion could have been heard and decided, in spite of the fact that the original decree would be varied on review, I do not think that the appellant can now be precluded from challenging such findings in appeal. It is not a general principle that a party, who does not care to file an appeal can never ask that the decree should be varied in his favour, although the other party seeks to vary the decree in the opposite direction. If the other party files an appeal, the party who has not appealed can file cross objections. It is not then contrary to principle to hold that the plaintiff, who would have rested content if the decree for over Rs. 4,000 in his favour had not been attacked can now ask for more than what was originally decreed. No authority is quoted for the proposition that the appellant's claim must be limited in the manner desired by the respondent. I find nothing in the language of the Code to support this contention. Even if the whole case be not reopened, there must be a fresh decree, and there is no provision limiting the extent to which this decree can be attacked in appeal. I therefore hold that although the appellant would have been barred from asking relief if the application for review had been rejected he can now ask that the amount awarded by the original decree should be increased. The objection is therefore dismissed.

K.N./R.K. *Appeal allowed.*

(1) [1915] 43 Cal. 178=30 I. C. 898.

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* A. I. R. 1932 Nagpur 144

NIYOGI, A. J. C.

Kisan and *others* — Plaintiffs — Appellants.

v.

Yeshwant and *others* — Defendants — Respondents.

Appeal No. 188-B of 1930, Decided on 8th July 1931, against appellate decree of Second Addl. Dist. Judge, Amraoti, D/- 17th February 1930.

*** Civil P. C. (1908), O. 34, R. 1—Trespasser in possession of deceased mortgagor's property cannot represent his estate — Foreclosure decree against them cannot bind mortgagor's lawful heir not impleaded in foreclosure suit.**

Trespassers in possession of the mortgaged property of a deceased mortgagor cannot effectively represent the mortgagor's estate so as to make the foreclosure decree obtained against them binding on the real lawful heir of the mortgagor, who was not impleaded in the foreclosure suit : 8 *Cal* 370 ; 21 *Cal.* 311 ; 12 *Bom.* 101 and 20 *Bom.* 338, *not Appr.* ; 7 *All.* 822 (*F. B.*) and 43 *Bom.* 412, *Appr.* ; 26 *Mad.* 230 ; 31 *I. C.* 920 ; 52 *I. C.* 509 and *A. I. R.* 1927 *Bom.* 131, *Dist.* ; 25 *Bom.* 337 (*P. C.*), *Explained.* (*Other cases Considered*). [P 147 C 2]

M. R. Bobde—for Appellants.

M. B. Kinkhede, *M. D. Khandekar* and *A. L. Halve*—for Respondents.

Judgment.—This appeal arises out of a suit for redemption instituted by the appellants against the mortgagees Yeshwant defendant 1 and Laxman, defendant 2, and the assignee of a moiety of their interest, Motiram, defendant 3. The suit

was decreed in the Court of first instance, but was dismissed in appeal. The plaintiffs have preferred this second appeal. The property comprised in the mortgage deed originally belonged to Udebhan. He mortgaged the property on 14th August 1903 to Yeshwant and Laxman, defendants 1 and 2. Udebhan died in 1912; his widow Mt. Tulsa Bai left his family by remarriage in 1914 and Jani Bai, Udebhan's daughter, became his heir. Yeshwant and Laxman, defendants 1 and 2, instituted Civil Suit No. 211 of 1918 on 21st March 1918 against Mt. Jani, Udebhan's daughter and one Govinda, who was Udebhan's sister's husband. Mt. Jani died during the pendency of this suit and her mother Tulsa Bai was brought on record as her legal representative on 8th August 1918. Govinda was alleged to have been in actual possession of the property comprised in the mortgage. That suit ended in an ex parte preliminary decree on 13th February 1919 and it was followed by an ex parte final decree passed on 19th July 1920. Pursuant to this final decree the mortgagees, defendants 1 and 2, obtained physical possession of the property. Later on they sold a moiety of the property to Motiram, defendant 3.

Kisan, plaintiff 1, claims to be the rightful heir to Mt. Jani Bai according to the Hindu law since under the school of Hindu law prevailing in Berar, Jani Bai, as daughter, had become the absolute owner of the property which devolved on her. Plaintiff 2 is an assignee of part of the property from Kisan. They have both joined in filing this suit out of which this appeal arises for redemption of the fields Survey Nos. 105/2 and 161/2 on the ground that Kisan's interest in the equity of redemption was not represented in Civil Suit No. 211 of 1918. The defendants pleaded that Jani's marriage was not in an approved form, but this plea was found against the defendants, and both the Courts below have concurrently held that Kisan was, under the Hindu law as obtaining in Berar, the lawful heir to Jani Bai. Another plea raised by the defendants was that Mt. Tulsa Bai and Govinda being in possession of the property comprised in the mortgage effectively represented the estate so as to render the decree passed against them effectively binding on Kisan, plaintiff 1, notwithstanding that he was not impleaded in the mortgage suit. The lower appellate Court upheld the defendants's plea and dismissed the suit.

It is urged for the appellants that Mr. Tulsa Bai and Govinda could not effectively represent Kisan in whom was lawfully vested the equity of redemption, and that the decree passed against the former parties could not affect the interest of the latter. Reliance is placed on *Muhammad Junaid* v. *Aulia Bibi* (1), *Madovarayudu* v. *Subbamma* (2), *Kalliappan Servaikaran* v. *Varadarajulu* (3), *Pukhraj Jeshraj* v. *Jamsetji Rustum* (4), *Lalsa Rai* v. *Udit Rai*, *A. I. R.* 1924 *All.* 717 and *A. Narasimmaiah* v. *Jawanthraj Sowcar* (5). On the other hand it is contended for the respondents that Mt. Tulsa Bai and Govinda being in actual possession of the assets of the mortgagor Udebhan or his daughter Mt. Jani effectively represented the estate, since in any case, being intermeddlers with the deceased's estate, they became their legal representatives and the decree obtained in good faith against them was effective to bind the interests of Kisan. Reliance is placed on *Kadir Mohideen* v. *Muthukrishna Ayyar* (6), *Dip Narain Rai* v. *Lachman Upadhiya* (7), *Ramaswami Chettiar* v. *Oppilamani Chetti* (8), *Bachu Soorayya* v. *T. Chinna Anjaneyalu* (9), *Gnanambal Ammal* v *Veerasami Chetty* (10), *Taniabai* v. *Ranganath* (11) and *Chhaganlal* v. *Jayaram* (12).

It may be conceded that when a decree is obtained against a person as a representative of the estate as in the case of a Hindu widow or the executors or administrators of the estate of a deceased person, it may bind all parties claiming interest in the property as heirs of the deceased debtor. The question is whether this principle is capable of application in a mortgage suit. The case of a suit by a creditor against some of the coheirs of a

(1) A I.R. 1920 All. 323=61 I. C. 947=42 All. 497.
(2) [1916] 35 I. C. 124.
(3) [1910] 33 Mad. 75=3 I. C. 737.
(4) A.I.R. 1927 Bom. 63=100 I. C. 185=50 Bom. 802.
(5) A.I.R. 1928 Mad. 159=101 I. C. 110.
(6) [1903] 26 Mad. 230=12 M. L. J. 368.
(7) A.I.R. 1925 All. 479=87 I. C. 799=47 All. 466.
(8) [1910] 33 Mad. 6=4 I. C. 1059.
(9) [1919] 52 I. C. 509.
(10) [1915] 31 I. C. 920.
(11) A.I.R. 1926 Nag. 476=96 I. C. 963.
(12) A.I.R. 1927 Bom. 131=100 I. C. 956=51 Bom. 125.

Mahomedan, bears a close analogy to this case and the principles applied in former class or cases may serve as a guide in determining the plea raised in the present case. In *Muttyjan* v. *Ahmed Ally* (13), the excluded heirs were held to have been bound by a decree obtained by the creditor against the other heirs on the principle that suits by creditors were in the nature of administration suits. In *Amir Dulhin* v. *Baij Nath Singh* (14), the analogy of the rule relating to an executor de son tort was applied and was brought into play to render the decree passed against some co-heirs being on those who were not impleaded in the suit. The principle however was not accepted in *Jafri Begum* v. *Amir Muhammad Khan* (15). The reasoning of the Allahabad High Court was stated by Mahmood, J., as follows :

"To hold that a decree obtained by a creditor of the deceased against some of his heirs will bind also those heirs who were no parties to the suit amounts to giving a judgment inter partes, or rather a judgment in personam, the binding effect of a judgment in rem, which the law limits to cases provided for by S. 41, Evidence Act. But our law warrants no such course, and the reason seems to be obvious. Mahomedan heirs are independent owners of their specific shares, and if they take their shares subject to the charge of the debts of the deceased, their liability is in proportion to the extent of their shares. And once this is conceded, the maxim *res inter alios acta alteri nocere non debet* would apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family."

The Bombay High Court in cases *Khurshetbibi* v. *Keso Vinayek* (16) and *Davalava* v. *Bhimaji Dhondo* (17), followed the principle adopted by the Calcutta High Court, but latterly it recognized that the principle was not sound. In *Bhagirthibai* v. *Roshanbi* (18) the Calcutta view was considered and rejected on the ground that it is a mistake to call a suit by a creditor to establish a single debt against the estate of a deceased person, a creditor's administration suit, since there is a difference in substance as well as in form between the two kinds of suits. Thus it would appear that although one of the co-heirs is in possession of the entire estate he cannot effectively represent the interest of others who were excluded from the suit because their interests are distinct. The disqualification to represent the excluded heirs' interest would be all the greater when the person impleaded is not the lawful heir or appointed by some legal process as the representative of the estate.

It is contended for the respondents that Mt. Tulsa Bai and Govinda were at any rate intermeddlers and as such became legal representatives within the meaning of S. 2 (11), Civil P. C., and accordingly they were competent to represent the aggregate of interests held in the equity of redemption. In *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (6), this view was enunciated, but since the decision of that case the provisions of the Civil Procedure Code have undergone amendment. In view of the wording of S. 368, Act 14 of 1882, their Lordships were of opinion that a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on record in place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit, and in the absence of any fraud or collusion the decree passed in such a suit would bind the estate. But in O. 22, R. 4, the expression "any person whom he alleges to be legal representative of the defendant" is replaced by the expression "the legal representative of the deceased defendant." Now under the Code of 1908 it is the duty of the plaintiff to search out the real legal representative and not merely allege that so and so is the legal representative. It is on this ground that *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (6), was not followed in *Pukhraj Jeshraj* v. *Jamsetji Rustum* (4). *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (6) is also distinguishable from the present case, in that in the reported case out of three sons and two daughters left surviving him by the deceased the eldest son was impleaded as the legal representative. One of the legal representatives who claims under an identical right, it may be conceded, may represent the interests of others since his interest is conterminous with theirs. *Gnanambal Ammal* v. *Veerasami Chetty* (10), and *Bachu Soorayya* v. *T. Chinna Anjaneyalu* (9) did not treat of mortgage suits.

(13) [1882] 8 Cal. 370=1 C.L.R. 346.
(14) [1894] 21 Cal. 311.
(15) [1885] 7 All. 822=(1885) A. W. N. 248 (F.B.).
(16) [1887] 12 Bom. 101.
(17) [1895] 20 Bom. 338.
(18) [1919] 43 Bom. 412=51 I. C. 18.

When a decree on an unsecured debt incurred by the deceased is passed against the person in actual possession of the deceased's assets, the decree is made payable out of the assets in the hands of the person in possession and he has simply to account for the assets which came to his hands. Therefore whether the person in possession of the assets holds an interest in the assets or not, is immaterial. The position of a lawful heir and that of an intermeddler is legally the same in respect of the deceased's assets and their liability to discharge the contractual obligations of the deceased. It is unnecessary to examine other cases in detail since they proceed on the principle that a creditor's suit against the legal representatives is in the nature of an administration suit. The distinction between a mortgage suit and a suit for recovery of money becomes clear from the decision of their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (19). In this case some of the legal representatives of a deceased Mahomedan mortgagor were brought on record and it was contended that they could lawfully represent the interests of those who were not brought on record. With reference to this contention their Lordships observed at p. 313 as follows;

"And possibly it might have been held that Nabibaksh's authority extended to representing him in Waliram's suit. But by no possibility could it be considered that he was represented by the widows or infant son of his deceased brother. In fact, his interest in the property seems to have been ignored altogether."

Thus it would appear that unless the party brought on record can fully represent the entire estate the decree obtained against him cannot bind the interest excluded from the suit. No doubt in *Malkarjun* v. *Narhari* (20), their Lordships of the Privy Council held that when a person was, after investigation, brought on record as heir, although erroneously, he can effectively represent the estate in execution proceedings so as to render unimpeachable a judicial sale in favour of a stranger. The decision rested on the principle that:

"strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do (*Ibid p.* 347).

Chagganlal Sakarlal v. *Jayaram Deoraj* (12) is not apposite since in that case the person who came forward as the real claimant was a party in the suit in which a wrong person was brought on record and he neither contested the suit, nor the capacity of the wrong person to represent the estate. The fact that the portion of the judgment dealing with this question was omitted from the report in *Chagganlal Sakarlal* v. *Jayaram Deoraj* (12), is significant to show that this view was not regarded as final. That the opinion of the Allahabad High Court is not crystallized will be clear from the divergent views taken in *Dip Narain Rai* v. *Lachman Upadhiya* (7), which simply follows *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (6) and *Muhammad Junaid* v. *Aulia Bibi* (1) and *Lalsa Rai* v. *Udit Rai*, *A. I. R.* 1924 *All.* 717.

In my opinion mortgage suits stand on a special footing. The persons who are entitled to redeem are specified in S. 91, T. P. Act. No one who does not belong to one or the other category mentioned in that section can claim to redeem. O. 34, R. 1, makes it obligatory on the mortgagee to implead all persons having an interest in the mortgage security or in the right of redemption. The question is whether Mt. Tulsa Bai and Govinda, who were only trespassers, were rightly brought on record. Trespassers are not entitled to redeem. Assuming that by intermeddling with the estate they became the legal representatives of the deceased debtor, they could not obviously represent the interest of the lawful heir as Kisan was. Since Kisan was the only claimant entitled to lawful possession of the assets of the deceased he alone could represent the entire estate. Mt. Tulsa Bai and Govinda held the estate adversely to him and therefore became legally incompetent to represent the interest of the real claimant. The form of the preliminary decree in a foreclosure suit shows that the mortgagee has to extinguish "the right to redeem the property" before he can obtain possession. The final decree in a foreclosure suit declares that:

"the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property."

Thus it is evident that the defendant must be a person who can effectively represent the aggregate of the rights of redemption held in the estate. In my

(19) [1904] 32 Cal. 296=32 I. A. 23=8 Sar. 734 (P.C.)
(20) [1900] 25 Bom. 337=27 I. A. 216 (P.C.).

opinion Mt. Tulsa Bai and Govinda were not competent to represent Kisan's interest in the estate. They could not be regarded as representatives of the estate as a whole. Therefore the decree passed against them would obviously not be binding on Kisan. For these reasons I set aside the lower appellate Court's decree and restore the decree passed by the Court of first instance. The result is that the appeal is allowed and the suit is declared with costs in all Courts.

S.N./R.K. *Appeal allowed.*

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STAPLES, A. J. C.

Premchand —Appellant.

v.

Ram Sahai and *another*—Respondents.

Second Appeal No. 314 of 1929, Decided on 14th September 1931.

(a) Transfer of Property Act (1882), S. 55 (1) (c)—False information given whether on inquiry or otherwise about income or rental of property—There is misrepresentation.

Any information regarding the income or the rental of the property to be sold is a relevant question within S. 55 (1) (c) and it is the duty of the seller to answer such a question to the best of his information. If he gives an answer which he knows to be false he is guilty of a breach of duty and misrepresentation. Further if he volunteers any information about the income, he is certainly bound to give true information. [P 149 C 1, 2]

(b) Contract Act (1872), S. 19—Remedies under S. 19 cannot be availed of unless party is actually deceived and he had no means of discovering truth.

Under S. 19 the party whose consent is obtained by fraud or misrepresentation may insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true. But it must be proved that the consent of the party who claims to avoid the contract is caused by fraud or misrepresentation and that he is actually deceived. Further even if the party is deceived by fraud or misrepresentation he cannot avoid the contract if he had the means of discovering the truth with ordinary diligence; 11 *Mad.* 419 and *A. I. R.* 1914 *Cal.* 661: *Dist.* [P 150 C 1, P 151 C 1]

(c) Contract Act (1872), S. 19—Agreement entered through misrepresentation—Promisee can avoid contract, but he cannot sue for damages under S. 19.

When consent to an agreement is caused by misrepresentation, the promisee can either avoid the contract and ask for specific performance under para. 2 of S. 19, but he cannot sue for damages for S. 19 gives no right to sue for damages. [P 151 C 2]

M. R. Bobde—for Appellant.

Vivian Bose and *P. N. Rudra*—for Respondents.

Judgment.—The appellant had brought a suit claiming refund of proportionate purchase money by way of damages, and his suit was dismissed. On appeal however the District Judge reversed the decree of the trial Court, and instead granted the appellant a decree for Rs. 504 as damages with interest at 6 per cent. per annum. He has again appealed claiming a larger sum. The defendants-respondents, on the other hand, have filed cross-objections, alleging that there was no misrepresentation, that in any case the contract was not induced by the alleged misrepresentation, and that the suit therefore should be dismissed. At the hearing the learned counsel for the respondents further argued that in any case the exception to S. 19, Contract Act, would apply, as the plaintiff-appellant had the means of discovering the truth with ordinary diligence.

The appellant through his next friend Ballulal purchased an eight-annas share in Mauza Sohagi from the respondent Ramsahai for Rs. 7,500 on 25th February 1926. Briefly, the allegation that he makes is that it was represented to Ballulal, who made the contract by Ramsahai that the gross income of the village was Rs. 749-8-0 and that the price of Rs. 7,500 was fixed accordingly; subsequently however Ballulal discovered that the income was less and that the area of the khudkast land was also less. He therefore claims that there was a misrepresentation on the part of Ramsahai and that the contract was induced by that misrepresentation. The trial Court held that there was no misrepresentation, that consent to the agreement was not caused by such misrepresentation and that in any case Ballulal had the means of discovering the truth with ordinary diligence. It is unfortunate that the lower appellate Court has not considered this question whether Ballulal had the means of discovering the truth with ordinary diligence within the meaning of the exception to S. 19, Contract Act, nor has he considered the question whether the consent to the agreement was caused by the misrepresentation. All that the Judge has considered is whether there was deliberate misrepresentation and whether the purchase price was fixed on the amount falsely represented to be the income. Now, it seems clear from the statement of the parties and their

evidence that the contract was first settled and that the question of income was only considered for fixing the price, From the evidence I am of opinion that Ballulal would have purchased the village even if the real income as it is at present had been shown, but probably he would have offered a lower price. It seems then that the only remedy that the plaintiff has under S. 19 is to avoid the contract, as it is impossible to put him in the position in which he would have been if the income had been truly represented.

In the written statement filed by the defendant it was clearly pleaded that the plaintiff was not entitled to any refund and that he had no cause of actien, and that, even supposing that the statements in the plaint were true, the plaintiff could not have the contract rescinded in part and sue for proportionate damages. This plea was considered by the trial Court and it was held in the finding on issues 2 and 3 that there was no agreement for a refund of a proportionate price in the sale deed and that no refund could be allowed either under any such agreement or law. This aspect of the case unfortunately has not been considered by the lower appellate Court. The District Judge has contented himself with finding that there was misrepresentation by Ramsahai and has not considered the question whether such representation gave any right to the plaintiff to sue for damages.

The appeal is only as regards the amount of compensation that should be allowed by way of damages ; but before considering this question it will be necessary to consider whether the plaintiff-appellant had any claim to damages at all, or whether the suit should have been dismissed. The learned counsel for the respondents has argued that the case is governed by S. 55 (1), T. P. Act, and S. 19, Contract Act. He argued that under S. 55 (1), T. P. Act, the seller was not bound to disclose the income of the property. It is true that such a duty is not specifically enumerated in the various clauses of that section, but at the same time under Cl. (c) the seller is bound to answer to the best of his information all relevant questions put to him by the buyer in respect of the property or the title thereto. Now, I am certainly of opinion that any information regarding the income or rental of the property would be a relevant question and that therefore it was the duty of the seller to answer such a question to the best of his information. If therefore he gave an answer that he knew to be false, he was guilty of a breach of duty and misrepresentation. Further I am of opinion that, even if it was not the duty of the seller to give information regarding the income of the property if no question regarding the income was put, still, if he volunteered any information about the income, he was certainly bound to give true information; that is, he may not have been bound to give any information at all, but if he went out of his way to give any information he was bound to give true information and not false. The fact, then, that he gave information which has been found to be false must be held to be deliberate misrepresentation.

The finding that there was misrepresentation is in the main a finding of fact and cannot be disturbed in second appeal. Apart from that I am of opinion that the finding is correct. In the first place, there are the clear statements in the sale deed itself (Ex. P-1) regarding the area of the khudkasht land and the income of the village, and in the receipt (Ex. P-4) the amount of income is again definitely put down under the signature of Ramsahai, the respondent. Then again in Ex. P-2, which is a note made by the respondent from settlement jamabandis, the area of the khudkasht land and the income are given as they were at the settlement, and there is some reason to believe that the respondent represented that that was the present area of the khudkasht land and the income of the village. The oral evidence has been considered by the lower appellate Court, and it is chiefly a case of the oath of the appellant's next friend Ballulal against the oath of the defendant-respondent Ramsahai. In the circumstances I do not think any interference with the finding of the lower appellate Court would be justified, and I accept the finding that there was deliberate misrepresentation on the part of Ramsahai.

It remains however to be considered whether such misrepresentation givse the plaintiff-appellant in the present case any cause of action. I am of opinion that it does not, for two reasons : firstly, because I do not think that Ballulal was

deceived by the misrepresentation and, secondly, even if he was actually deceived, I am of opinion that the exception to S. 19, Contract Act, would apply, as Ballulal had the means of discovering the truth with ordinary diligence. I would here note that under the Contract Act no distinction has been drawn as regards remedies between fraud and misrepresentation. Fraud has been defined in S. 17 of the Act and misrepresentation has been defined in S. 18 of the Act, but the remedy for both is given by the same S. 19. In English law there is a distinction between innocent misrepresentation and wilful misrepresentation or fraud: as a general rule, innocent misrepresentation never gives a cause of action for damages, but it is ground for resisting an action for breach of contract or for specific performance and also for asking to have the contract set aside: see *Newbigging* v. *Adam and R. S. Adam* (1) and *Derry* v. *Peek* (2). In the case of wilful mirepresentation or fraud the injured party has two remedies: one of action for damages for deceit, which is an action in tort or ex delicto, and the other on the contract. In the second case he may treat the contract as binding and may demand fulfilment of those terms which misled him, or damages for such loss as he has sustained by their nonfulfilment, or he may avoid or repudiate the contract by taking steps to get it cancelled on the ground of fraud. He will not have any remedy however unless it can be proved that he was actually deceived: see *Horsfall* v. *Thomas* (3).

Under S. 19, Contract Act, the remedy of avoiding the contract is given, and further there is a remedy that the party whose consent was caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. These remedies, in substance, are the two remedies given in English law on contract in a case where consent has been induced by fraud; but both under English and Indian law it must be proved that the consent of the party who claims to avoid the contract was caused by fraud or misrepresentation and that he was actually deceived. I have already stated that in the present case I do not think that Ballulal's consent was caused by the misrepresentation of Ramsahai, and I would now give my reasons for that finding. In the first place the contract was not settled all at once. Negotiations were opened by one Mihilal, who has been examined as P. W. 2 and who is acquainted with both parties. He came to Ballulal at Jubbulpore and told him that the village share was for sale and that he might purchase it if he wished to. Ballulal said that he should bring Ramsahai and satisfy him about the truth of the parcha, or extracts from village papers which he had brought regarding the village. Some days afterwards Mihilal and Ramsahai both came to Ballulal. Ramsahai is said to have brought Ex. P-2 at that time, and then the price was settled, Rs. 500 was paid as earnest money and the receipt (Ex. P-4) was written and executed.

It may be noted that from the evidence of Mihilal and of Ballulal himself it appears that the paper (Ex. P-2) was shown to Ballulal when the negotiations were first opened, and he returned it to get it signed by Ramsahai. Now in the interval Ballulal, who lives in Jubbulpore, could certainly have verified the truth of the information contained in Ex. P-2. I would point out that Ballulal is a Parwar Bania, about 50 years of age, and also owns malguzari land. He is presumably a man of some business acumen, and being a malguzar he must be acquainted with revenue papers. He would hardly accept the statement contained in a slip of paper like Ex. P-2, which obviously is not a certified copy of any revenue paper, but only an extract privately made, without verifying it. It seems to me from reading his evidence and that of Ramsahai that Ballulal laid a trap for Ramsahai and, knowing the information in Ex. P-2 to be incorrect, or rather not to represent the present state of affairs, he got Ramsahai to sign it and, as it were, to make himself responsible for the correctness of it, and then fixed the price thinking that he would then be able to get a reduction later by suing for damages. I am of opinion, then, that Ballulal's consent was not induced by the incorrect statements in Ex. P-2 and that he was not actually deceived. He would have

(1) [1887] 34 Ch. D. 582.
(2) [1889] 14 A. C. 337=58 L. J. Ch. 864=61 L. T. 265=38 W. R. 33=54 J. P. 148=1 Meg. 292.
(3) [1862] 31 L. J. Ex. 322=1 H. & C. 90=8 Jur (n.s.) 721=6 L. T. 462=10 W. R. 650.

bought the village even if correct information had been given, but he chose to accept, or pretend to accept, the incorrect information to enable him to obtain a reduction of the price later. I would find therefore that Ballulal was not deceived in the matter and that his consent was not induced by the incorrect information given.

Apart from this I am of opinion that, even if Ballulal had been deceived, still the exception to S. 19, Contract Act, would apply, as he had the means of discovering the truth with ordinary diligence. I would here point out that there is a difference in this matter apparently between English law and the law as laid down in the Contract Act. Under English law the fact that a party who is induced to contract by misrepresentation might by ordinary care have ascertained that the representation was false is no defence to an action for rescission if the party was really deceived: see *Venezuela Central Ry. Co.* v. *Kisch* (4); but under the exception to S. 19, Contract Act, even if the party is deceived by misrepresentation or by silence, fraudulent within the meaning of S. 17 of the Act, he cannot avoid the contract if he had the means of discovering the truth with ordinary diligence. In *Morgan* v. *Government of Haidarabad* (5), it was held that this exception would not apply where there had been active concealment of an important fact in order to deceive the other party and to induce him to enter into the contract; but in the present case I do not think that the evidence will warrant a finding that there was such active concealment on the part of Ramsahai. In *Jogendra Nath Goswami* v. *Chandra Kumar Mozumdar* (6) it was held that the plaintiff had not the means of discovering the truth with ordinary diligence, but it was not held that, if the plaintiff had the means of so discovering the truth, the exception would not apply.

In the present case I am of opinion that Ballulal had the means of discovering the truth with ordinary diligence. As noted above, Ex. P-2 is obviously not a complete copy of the revenue papers nor is it a certified copy. Ballulal must have been aware that it was only a private note, or memorandum and he could have verified its truth or otherwise by a reference to the revenue papers. Ballulal lives in Jubbulpore himself, and the Patwari Babulal also lives in Jubbulpore. He further admitted on cross-examination that he has been patwari for the last 23 or 24 years and that he has known Babulal apparently during that period. The contract was entered into in Jubbulpore according to the evidence of both parties, and it would have been easy for Ballulal to have gone to the Deputy Commissioner's office and to have obtained copies of revenue papers. I would further point out that Mihilal, who acted as a go-between in negotiating the agreement, must almost certainly have known the true state of affairs, and he has known Ballulal for the last five or six years. He has further admitted on cross-examination that Ballulal has purchased a share in Mauza Chatti, where he resides, through him. It would seem therefore that, if Ballulal had questioned him, he could have told him the true state of affairs regarding the village share purchased from Ramsahai. I am of opinion, then that Ballulal had the means of discovering the truth with ordinary diligence and that the exception to S. 19, Contract Act, applies.

I am of opinion then that the plaintiff-appellant cannot avoid the contract under S. 19, Contract Act. I would further point out that, even if it were held that he could avoid the contract under that section, his only remedy would be to avoid the contract and that he could not claim damages or compensation; at most, under para. 2 of S. 19 he could claim that the contract should be performed and that he should be put in the position in which he would have been if the representations made had been true. Such a condition however is obviously impossible in the present case as neither the area of the khudkasht land nor the rental of the tenancy land can be increased. The only remedy, then would be to avoid the contract, and it may be noted that S. 19. Contract Act, gives no right to sue for damages. Whether there is such a right to sue in tort for damages in the case of a contract induced by fraud, need not perhaps be decided in this case, but I am of opinion that usu-

(4) [1867] 2 H. L. 99=36 L. J. Ch. 849=16 L. T. 500=15 W. R. 821.
(5) [1888] 11 Mad. 419.
(6) A. I. R. 1914 Cal. 661=24 I. C. 193=42 Cal. 8.

ally such a right will not exist and that only in special circumstances would there be an action in tort for damages where damages hed been sustained apart trom the contract. As a general rule, the only remedy would be an action on the contract either for avoidance or for specific performance under the conditions laid down in para. 2, S. 19, Contract Act. In the present case I am of opinion that the view taken by the trial Court is correct and that the plaintiff-appellant has no cause of action.

I therefore set aside the decree of the lower appellate Court and instead restore the decree of the trial Court dismissing the suit of the plaintiff-appellant. Costs of the appeal in both Courts and of the cross-objections will be borne by the appellant, who will also bear the costs of the suit.

P.N./R.K. *Decree set aside.*

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* A. I. R. 1932 Nagpur 152

STAPLES, A. J. C.

Gokuldas Chunnilal—Applicant.

v.

Commissioner of Income-tax—Opposite Party.

Misc. Judl. Case No. 41 of 1931, Decided on 29th February 1932.

(a) Income-tax Act (1922), Ss. 23 (4), 30 (1), 43 and 66 (2) — Reference under S. 66 (2) held competent.

The question whether a person is rightly declared an agent under S. 43 and the further question whether when an assessment is made under S. 23 (4) the proviso to S. 30 (1) bars an appeal though the appeal is not against the assessment but against the order of the income-tax officer declaring the assessee to be liable are questions of law and the reference under S. 66 (2) to the High Court on those questions is competent: *A. I. R.* 1928 *Lah.* 864 and *A. I. R.* 1928 *Rang.* 108, *Rel. on. A. I. R.* 1930 *Lah.* 1014; *A. I. R.* 1930 *P. C.* 54, *Ref.* [P 153 C 1]

*** (b) Income-tax Act (1922), Ss. 30 and 43—Appeal against order declaring person to be agent of foreigner is not barred.**

The clause "denying his liability to be assessed" in S. 30 (1) is wide enough to cover a case of an assessee who denies his liability to be declared as an agent under S. 43. Therefore an appeal against the order of an income-tax officer declaring any person to be an agent of foreigner is not barred by S. 30 (1). [P 153 C 2]

M. R. Bobde and *R. A. Mande*—for Applicant.

D. N. Chaudhuri— for Commissioner of Income-tax.

Order.—This order will also govern the disposal of Miscellaneous Judicial Case No. 42 of 1931, the applicant being the same and the facts also being similar. These are applications under S. 66 (3). Income-tax Act, the Commissioner of Income-tax having refused to state a case to the High Court in spite of an application under S. 66 (2) of the Act.

The applicant is Gokuldas Chunnilal, the proprietor of a firm at Arvi in the Wardha District, and he was assessed to income-tax. He was further assessed under S. 43 of the Act as agent of two firms at Indore, with whom he had business dealings upon certain accounts shown by him with regard to those dealings. The order was passed by the Income-tax Officer Wardha, on 29th April 1929 and notice was issued under S. 22 (2) of the Act to Gokuldas to make a return. Gokuldas did not make a return but filed an appeal before the Assistant Commissioner. The Assisstant Commissioner, by an order dated 30th September 1929, rejected the appeal as premature as no assessment had been made, and advised Gokuldas to make an application for revision to the Commissioner. Gokuldas did not do so and as no return was made under S. 22 of the Act, the income-tax officer made the assessment under S. 23 (4) of the Act on 13th February 1930. Gokuldas then made an appeal to the Assistant Commissioner, who rejected it on 18th July 1930. An application for reference under S. 66 (2) of the Act was then made to the Commissioner, who dismissed it on the ground that under S. 30 of the Act there was no provision for an appeal against the order of an income-tax officer declaring any person to be an agent of a foreigner and that the applicant's remedy lay in a revision application to the Commissioner. The Commissioner further held that the income-tax officer's order under S. 23 (4) having been correctly made, the Assistant Commissioner was wrong in entertaining the appeal even on the point of the applicant's liability and that therefore it was not competent for him to refer the matter to the High Court for a decision on the point of law.

I am of opinion that the view taken by the Commissioner is wrong and that the applicant cannot be shut out from a reference to this Court in this manner. The learned Counsel who appeared for the applicant relied on *Nawalkishore Kharaitilal* v. *Commissioner of Income-*

tax Delhi (1) and on *Commissioner of Income-tax Bombay* v. *Bombay Trust Corporation Ltd.* (2) but I would point out that in the first case an assessment had already been made for the year 1923-24 under S. 43 of the Act and apparently no objection was made and then, for the succeeding years 1924-25 and 1925-26, when notices under S. 22 (2) were served and no returns were made and assessments were made under S. 23 (3), it was held that the cases were rightly treated as "no return" cases. In the present case however the applicant at once appealed to the Assistant Commissioner against the order under S. 43 his appeal was dismissed as premature and then when an assessment was made under S. 23 (4), he again appealed and his appeal was rejected. The second case, which is a decision of their Lordships of the Privy Council seems to me to be a decision on merits, viz , whether the assessee was an agent or not under S. 43, of the Act, but does not decide the question whether a reference should be made under S. 66 of the Act or not on a point of law in this matter: on the contrary, it assumes that a case had been rightly stated under S. 66 (2) of the Act.

There seems to me to be no doubt that a point of law does arise in this matter, viz., whether the applicant was rightly declared an agent under S. 43 of the Act, and a second point also arises, viz., whether, when an assessment has been made under S. 23 (4) of the Act, the proviso to S. 30 (1) bars an appeal, though the appeal is not against the assessment but against the order of the Income-tax Officer declaring the assessee to be liable. That a reference should be made in such a case has been held in *Duni Chand* v. *Commissioner of Income-tax* (3) and also in *Commissioner of Income-tax* v. *A. R. A. N. Chettiyar Firm* (4). I quote the following passage from the latter case at pp. 22 and 23:

"That being my finding, I shall now consider the preliminary objection. Though the income-tax authorities have in my judgment rightly assessed the firm under S. 23 (4), Income-tax Act, the question at issue was whether they had rightly done so, and the Commissioner was justified in referring that objection to this Court for a ruling. It would not be in the interests of justice to put such a construction on the proviso to S. 30 (1) as to prevent this Court from inquiring into the case submitted whether the income-tax authorities had acted legally in assessing under S. 23 (4). As the firm has failed in its contention, I would direct them to pay the Commissioner's costs, seven gold mohurs."

It is true that in the present case it would have been better if the applicant had applied to the Commissioner in revision when his appeal was first rejected by the Assistant Commissioner as premature on 30th September 1929, or if he had then requested the Commissioner to state a case under S. 66; but the fact that he did not do so will not deprive him of his right after his appeal had been heard on merits by the Assistant Commissioner. I would further point out that, in my opinion, the Assistant Commissioner was wrong in dismissing the first appeal of the applicant as premature on 30th September 1929 and that he should have then considered the question of the applicant's liability under S. 43; and I would further point out that the Commissioner was, in my opinion, also wrong in holding, as he has done in his order of 21st October 1930, that under S. 30 of the Act there is no provision for an appeal against the order of an Income-tax Officer declaring any person to be an agent of a foreigner. S. 30 lays down that:

"(1) any assessee objecting to the amount or rate at which he is assessed under S 23 or S. 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to make a fresh assessment under S. 27, or to any order against him under sub-S. (2) S. 25 or S. 28, made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order."

The clause "denying his liability to be assessed" under this section is surely wide enough to cover a case of an assessee, who denies his liability to be declared an agent under S. 43 of the Act. Lastly, I would point out that the Commissioner in the present case happened to be the same person as the Assistant Commissioner owing to officiating promotion at the time when the order of 21st October 1930 was passed and, as he was sitting as an appellate Court against his own order, he should not have dismissed the reference without very strong grounds. Not being satisfied with the correctness of the Commissioner's deci-

(1) A. I. R. 1930 Lah. 1014=132 I. C. 857.
(2) A. I. R. 1930 P. C. 54=121 I. C. 532=57 I. A. 49=54 Bom. 216 (P. C.).
(3) A. I. R. 1928 Lah. 864=113 I. C. 312=9 Lah. 464.
(4) A. I. R. 1928 Rang. 108=110 I. C. 29=6 Rang. 21 (F. B.).

sion, I require him to state a case and to refer it to this Court under S. 66 (3) of the Act. Costs of this application will be borne by the Commissioner. I fix pleader's fees at Rs. 100 for the two cases.

P.N./R.K. *Application allowed.*

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* A. I. R. 1932 Nagpur 154

MACNAIR, J. C.

Lakmichand—Plaintiff—Appellant.

v.

Janardhan and *another*—Defendants—Respondents.

Second Appeal No. 432 of 1929, Decided on 10th March 1932, against decree of Addl. Dist. Judge, Nagpur, D/- 18th January 1929.

*** (a) Transfer of Property Act (1882), S. 92 — Mortgagor redeeming subsequent mortgagee with intent to obtain his rights can exercise his sight of redemption.**

A mortgagor who has redeemed a subsequent mortgage, with the sole intention of obtaining the rights of the subsequent mortgagee is entitled to exercise the right of redemption which that mortgagee could exercise. The new S. 92 does not state that the mortgagor, on redeeming property snbject to a mortgage, can in no circumstances, obtain the right of a redemption which that mortgagee might have. Ordinarily a mortgagor has a right to redeem a mortgage effected by him. The principle to which the section is intended to give legislative sanction is that he who removes another's burden steps into the shoes of the person whose rights constitute the burden. [P 155 C 1, 2]

A was the owner of certain absolute occupancy fields. These fields were mortgaged by *A* in 1900 to *B* and in 1909 to *C*. *B* brought a suit in 1912 and obtained a final decree for sale in 1914: in these prceedings *C* was not impleaded. A few days after the decree for sale was passed, *A* sold his rights to *D*. In 1916, in execution of the sale decree, the mortgaged property was brought to sale and purchased by *E* who obtained possession in 1918. In 1921 *C* sued upon his mortgage: he impleaded *E* who did not wish to redeem but pleaded paramount title: *D* paid the amount due on the mortgage of *C*. *D* then brought a suit against *E* to redeem the prior mortgage effected by *A* in favour of *B*.

Held: that he was entitled to redeem the mortgage: *A. I. R.* 1931 *Mad.* 110, *Dist.*; 43 *Cal.* 69, *Ref.* [P 155 C 2]

(b) Transfer of Property Act (as amended in 1929), Ss. 63 and 92—Trial Judge deciding redemption suit before 1929 — Appeal must be decided according to law prior to 1929.

Where a redemption suit has been decided by the trial Judge before S 92 was enacted by Act 20 of 1929, the appeal against that decree must be decided in accordance with the law as it stood prior to 1929. [P 155 C 1]

M. B. Kinkhede and *M. R. Indurkar* —for Appellant.

M. R. Bobde—for Respondents.

Judgment.—It will in my opinion facilitate apprehension of the points of law involved in this appeal if each person or group of persons who obtained rights in the property under dispute is or are designated by a single letter. *A* then was the owner of certain absolute occupancy fields. These fields were mortgaged by *A* in 1900 to *B* and in 1909 to *C*. *B* brought a suit in 1912 and obtained a final decree for sale in 1914: in these proceedings *C* was not impleaded. A few days after the decree for sale was passed, *A* sold his rights to *D*. In 1916 in execution of the sale decree, the mortgaged property was brought to sale and purchase by *E* who obtained possession in 1918. In 1921 *C* sued upon his mortgage: he impleaded *E* who did not wish to redeem but pleaded paramount title: *D* paid the amount due on the mortgage of *C*.

The suit out of which this appeal arises is a suit to redeem the mortgage effected in favour of *B* brought by *D* against *E*. The lower appellate Court appears to have held that since the plaintiff *D* agreed to the discharge of *E* from the suit brought in 1921, his redemption of *C's* mortgage gives him no right against *E*. The Judge has also held that *D* cannot maintain the suit since *C's* suit is barred by time. It is admitted before me that the sale by *A* to *D* gave the plaintiff *D* the right which *A* had formerly possessed and nothing more. The mortgage of *C* was satisfied out of the consideration for the sale to *D*. *D* cannot then use the mortgage of *C* as a shield unless the mortgagor *A*, in the peculiar circumstances of this case, could do so: *Har Shyam Chowdhuri* v. *Shyam Lal Sahu* (1). The lower appellate Court in my opinion has not drawn the proper conclusion from the fact that *E* did not claim to redeem the mortgage of *C* but pleaded paramount title. *E* might have pleaded that he had obtained the entire equity of redemption, that no relief could be claimed against *A* or *D*, and that any decree passed should give neither *A* nor *D* any right of redemption but should determine the rights of himself and *C*. He chose to plead paramount title and clearly, if *C* had obtained

(1) [1916] 43 Cal. 69=31 I. . 22.

a decree, he could not have urged in subsequent proceedings that *C's* decree had been obtained against persons who had no interest in the property. Similarly after *D* had redeemed *C's* mortgage, he cannot plead that *D* had no interest in the property and was merely a volunteer.

The main question then which has to be decided is whether a mortgagor against whom a final decree has been passed can by redeeming a subsequent mortgage obtain a right to redeem a prior mortgage. It was urged by the respondents that S. 92, T. P. Act, should be applied to the facts of this case: but before this section was enacted, this suit had been decided by the trial Judge. It seems clear then from S. 63, Act 20 of 1929 that this appeal must be decided in accordance with the law as it stood prior to 1929. S. 92 is based on principles which had been accepted by Courts of law; but this appeal must be decided with reference to these principles and not with reference to the words used in the section. In my opinion these principles permit a mortgagor, who has redeemed a subsequent mortgage, with the sole intention of obtaining the rights of the subsequent mortgagee, to exercise the right of redemption which that mortgagee could exercise. It is quite clear that such was the intention of *D*. When *D* purchased the property, he had some hope that he might be able to challenge the validity of *B's* mortgage: but he must have abandoned this hope when he allowed *E* to obtain possession of the mortgaged property: he could not have hoped five years later to prove that *E* had never any right to possession against him. Again it is certain that he did not pay the amount due to *C*, because of any personal liability: *C* was bound to attempt to recover the mortgage debt from the right of redemption which he undoubtedly had against *B* before he could obtain a personal decree against *A*, so as to attach, the consideration for the sale to *D* remaining in *D's* hands.

I remark that if *D* had purchased *C's* rights instead of paying off *C's* mortgage, his right to redeem *B* could not have been challenged. The new S. 92, T. P. Act, does not state that the mortgagor, on redeeming property subject to a mortgage can in no circumstances obtain the right of redemption which that mortgagee might have. Ordinarily a mortgagor has a right to redeem a mortgage effected by him. The principle to which the section is intended to give legislative sanction is that he who removes another's burden steps into the shoes of the person whose rights constitute the burden. When *C* brought his suit he was the only person entitled to redeem *B*; but by satisfying *C's* mortgage debt, *D* removed the liability of *B* to be redeemed by *C* with the intention that he should step into the shoes of *C* and should in my opinion be allowed to do so. The respondents' counsel has drawn my attention to the judgment in *Pichaiyappa* v. *Govindaraju*, *A. I. R.* 1931 *Mad.* 110. This judgment can be distinguished on two grounds: in the first place *D* cannot be considered a mere volunteer at the time he made the payment, since the mortgagee had chosen not to rely on the sale to himself but to allow *C* to sue the mortgagor on his mortgage deed. In the next place the principle on which *Pichaiyappa* v. *Govindaraju*, *A. I. R.* 1931 *Mad.* 110, was decided allowed subrogation where the money was paid under an implied agreement that the prayer would be subrogated and *B's* conduct in withdrawing from the suit may well amount to such an implied agreement.

It is admitted by the respondents that *D* is not prevented from maintaining the suit, *C's* suit may be barred by time: I agree that this is the law. I hold therefore that *D* is entitled to redeem *E*. The decree of the lower appellate Court is therefore set aside. The appeal must be reheard as the amount due on *B's* mortgage has not been determined by the lower appellate Court. Costs incurred in this Court in Second Appeal No. 392 of 1926 and in subsequent proceedings will be borne by the respondents. There will be no certificate of refund of court-fees in the appeal now decided by me. The costs prior to the former second appeal will follow the event.

K.N./R.K. *Appeal allowed.*

A. I. R. 1932 Nagpur 156

NIYOGI, A. J. C.

Sadasheo Appa Wani—Decree-holder—Applicant.

v.

Punjabrao and *others*—Judgment-debtor—Decree holders—Non-Applicants.

Civil Revn. No. 320-B of 1930, Decided on 9th January 1932, against order of Sub-Judge, First, Class, Morsi, D/- 1st November 1930.

Civil P. C. (1908), S. 73 and O. 21, R. 89—Amount voluntarily deposited by judgment-debtor under O. 21, R. 89, is liable to be rateably distributed.

The expression "assets held by the Court" in S. 73 is wide enough to cover such money as comes into the custody of the Court otherwise than by coercive process. Consequently where a sale is held of the judgment-debtor's property and the judgment-debtor with the permission of the Court privately sells some of the property sold in auction and deposits the amount payable to decree-holder under O. 21, R. 89, such deposit though voluntarily made in the Court is available for rateable distribution among other decree-holders: 36 *Bom.* 156, *Dist. and Criticized*; *A. I. R.* 1919 *Bom.* 152; *A. I. R.* 1926 *Bom.* 242; *A. I. R.* 1922 *Cal.* 19 and *A. I. R.* 1920 *Cal.* 785, *Rel. on.* and 40 *Cal.* 619, *Ref.*

[P 157 C 1, 2]

B. R. Mandlekar—for Applicant.

W. B. Pendharkar and *S. R. Bobde*—for Non-Applicants.

Order.—The applicant Sadasheo Appa obtained a decree for payment of money in Civil Suit No. 84 of 1928 against Punjabrao and Wamanrao, non-applicants 1 and 2. Similarly Hemraj, Narayandas and Hazarimal, non-applicants 3 to 5, together and Balkrishna and Dhondo, non-applicants 6 and 7, together, obtained decrees against the same judgment-debtors respectively in Civil Suits Nos. 93 of 1928 and 50 of 1924. Sadasheo Appa actively prosecuted execution proceedings, whereas the other two sets of decree-holders applied for execution and claimed rateable distribution under S. 73, Civil P. C. The execution proceedings were pending before the Collector. Sadasheo Appa purchased on 4th July 1930 the judgment-debtors' fields which were put to auction and deposited the purchase money in Court. Thereon the judgment-debtors, with the permission of the Court privately sold some out of the fields purchased in auction by Sadasheo Appa and deposited the amount payable to Sadasheo Appa on his decree with 5 per cent as compensation in accordance with O. 21, R. 89. On receipt of the Collector's report the lower Court, Sub-Judge First Clsss, Morsi, ordered rateable distribution of the amount among the three sets of decree-holders. Sadasheo Appa, who claimed the entire amount for himself, has moved this Court in revision.

The applicant Sadasheo Appa claims priority over the decree-holders on the ground that the amount having been voluntarily deposited in Court for satisfaction of his own decree, it could not be treated as "assets held by the Court" so as to be available for rateable distribution under S. 73, Civil P. C. It is also contended that the deposit resulted in the removal of Sadasheo Appa's attachment under which alone the other decree-holders' claims were enforceable. Reliance is placed on *Sorabji Coovarji* v. *Kala Raghunath* (1) and *Harai Saha* v. *Faizlur Rahman* (2).

It may be readily conceded that the payment of the decretal amount in Court resulted in setting aside the sale held at the instance of Sadasheo Appa, but I fail to see how it would make the attachment inoperative. This contention seems to be quite foreign to the case and does not merit serious consideration. The real point for determination is whether the money deposited can be regarded as assets held by the Court within the meaning of S. 73, Civil P. C. The case of *Sorabji Coovarji* v. *Kala Raghunath* (1) is distinguishable on facts. In that case the judgment-debtor deposited the decretal amount with incidental costs in Court under O. 21, R. 55, Civil P. C. It was held that the money deposited was not available for rateable distribution among other decree-holders who had applied for execution. The reason was that the money in deposit was not regarded as assets within the meaning of S. 73, Civil P. C., as it was not realized in course of execution but was voluntarily paid by the judgment-debtor. The view propounded in this case was criticized in *Nathmal* v. *Maniram* (3). Pratt, J., observed as follows at p. 978 (of 21 *Bom. L. R.*):

"I venture to doubt whether this is not too restrictive a construction under the amended section in which the words sale or otherwise' have been dropped and in which there is merely

(1) [1912] 36 Bom. 156=12 I. C. 911.
(2) [1913] 40 Cal. 619=18 I. C. 839.
(3) A. I. R. 1919 Bom. 152=53 I. C. 599=21 Bom. L. R. 975.

an implication that the assets should have been realized or obtained in execution proceedings."

The scope of S. 73, Civil P. C., will be evident on a comparison with the corresponding provisions of the old Codes of 1882 and 1859. Under S. 270 of the Code of 1859 the decree-holders were only entitled to priority in the order of their attachment. The principle of rateable distribution was for the first time introduced in S. 295 of the Code of 1882. In S. 73, Civil P. C., 1908, the words "where assets are held by the Court" have been substituted for the words "whenever assets are realized by sale or otherwise in execution of a decree" which occurred in S. 295 of the Code of 1882, and the words "before receipt of such assets" have been substituted for the words "prior to the realization." The present S. 73 does not lend validity to the view that the money realised by the Court under pressure of execution is alone capable of a rateable distribution and not that which is voluntarily paid by the judgment-debtor in the course of the execution proceedings. "Assets held by the Court" is an expression which is wide enough to cover such money as comes into the custody of the Court otherwise than by a coercive process. The Bombay High Court has recently dissented from the view enunciated in *Sorabji Coovarji* v. *Kala Raghunath* (1) and gave effect to the view taken in *Nathmal* v. *Maniram* (3), in *Indaji* v. *Cooverji* (4). It is evident that the authority of *Sorabji Coovarji* v. *Kala Raghunath* (1) is exhausted even in the Bombay High Court.

The recent view of the Calcutta High Court has also been against it. In *Ghisullal Agarwalla* v. *Todarmull Agarwalla* (5) their Lordships of the Calcutta High Court expressed their dissent from *Sorabji Coovarji* v. *Kala Raghunath* (1) and ruled that the words "assets held by the Court" should not receive narrow or limited construction. In *Noor Mahomed Dawood* v. *Bilasiram Thakursidass* (6) at p. 520 (of 47 *Cal.*) Rankin, J., exhaustively dealt with the point in these words :

"I see no support in these considerations or in the section or the rule for a theory grounded upon the 'voluntariness' of the payment into Court. This is, I think out of place as regards payments into Court under stress of execution. Such payments, if made to the decree-holder, may and indeed must be regarded as accord and satisfaction made by the parties, thus bringing the decree to the position of a satisfied decree. But if made into Court under O. 21, they cannot without anomaly be treated otherwise than as the results of an execution would be treated. The debtor is allowed to arrive at the same result by means less distressing to him but there is no difference in the result, because the debtor chooses the more convenient means. The money paid with whatever motive, if paid to the Court, is paid upon terms of the Code whatever they may be. These terms, as I read S. 73, have been laid down so that distinctions in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in Court, are now no part of the definition of the assets that are subject to the distribution rateably. The object of the new Code in using larger language can only be to avoid anomaly. To introduce a distinction on the strength of the voluntariness of the payment or the purpose of the debtor, is I think to cut down the language and intention of the Code upon a principle which is inapplicable to the subject-matter and which if applicable is very difficult to imply."

It would thus appear that the view taken in *Harai Saha* v. *Faizlur Rahman* (2) is no longer held to be authoritative.

In the Madras High Court also their Lordships expressed their dissent from *Sorabji Coovarji* v. *Kala Raghunath* (1) in *Thiraviyam Pillai* v. *Lakshmana Pillai* (7). Although R. 89, O. 21, specifically mentions payments to the decree-holder, it cannot be interpreted so as to make the money not available for rateable distribution, since it is only an intimation to the judgment-debtor as to the amount he is to pay for the purpose of getting the sale set aside. If the auction-purchaser deposits the purchase money in Court, there is no question that it is available for distribution among the various decree-holders. One fails to see why if the decretal amount was voluntarily paid by the judgment-debtor or with a view to set aside the sale, that money could not be rateably distributed only because the judgment-debtor voluntarily pays the money into Court. Whatever money is realized in execution at the instance of one decree-holder becomes assets held by the Court within the meaning of S. 73, Civil P. C., for the benefit of all decree-holders who have applied for execution before the receipt

(4) A. I. R. 1926 Bom. 242=93 I. C. 852.
(5) A. I. R. 1922 Cal. 19=70 I. C. 539.
(6) A. I. R. 1920 Cal. 785=59 I. C. 453=47 Cal. 515.
(7) [1918] 41 Mad. 616=47 I. C. 538.

of the assets. Of course if the judgment-debtor satisfies the claim of the active decree-holder privately, that is, without making any deposit in Court, the question is different.

The order for rateable distribution passed by the lower Court is therefore correct. The application is dismissed with costs. Pleader's fees Rs. 25.

P.N./R.K. *Application dismissed.*

A. I. R. 1932 Nagpur 158

STAPLES, A. J. C.

Samrathmal Marwadi—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 306 of 1931, Decided on 18th December 1931, against order of Sess. Judge, Bhandara, D/- 23rd July 1931.

(a) Penal Code (1860), Ss. 499 and 500—Accused uttering words meaning that complainant was turned out by officer at public auction of Government Forest produce — Such words are defamatory.

At a public auction of the Government Forest produce the officer asked that persons not bidding should go away. The accused subsequently in the presence of witnesses said that the complainant was turned out by the officer.

Held: that the words "*nikal diya*" or turned out in the above circumstances amounted to defamation of the complainant. [P 159 C 1]

(b) Criminal P. C. (1898), Ss. 222 and 225—Charge of defamation clear and unambiguous — Accused not liable to be misled — Though exact words of defamation not used in charge accused held to be in no way prejudiced—Penal Code (1860), S. 500.

The accused was charged for defamation. The charge was clear and unambiguous and such that the accused was not liable to be misled by the charge as framed. The charge did not contain the exact defamatory words.

Held: that in the above circumstances the accused was in no way prejudiced: 30 *Cal.* 402 and *A. I. R.* 1925 *Cal.* 1121, *Ref.* [P 159 C 1]

(c) Evidence Act (1872), S. 55—Civil suit—General and not particular evidence of character of complainant is admissible and relevant for awarding damages.

Evidence under S. 55 about the character of a person is relevant in connexion with the amount of damages in civil cases. At the same time only general evidence of character or reputation can be given and not for instance, evidence of a particular conviction: *A. I. R.* 1923 *Lah.* 225, *Ref.* [P 159 C 1]

P. S. Kotwal—for Applicant.

Vivian Bose—for the Crown.

Jakatdar and *B. P. Shukla*—for Complainant.

Order.—The applicant was convicted by the First Class Magistrate, Balaghat, under S. 500, I. P. C., and sentenced to a fine of Rs. 100. His appeal was dismissed by the Sessions Judge, Bhandara. He has now made this application for revision. An auction of forest produce was held at Balaghat by Mr. Carr, the Conservator. The applicant Samrathmal and the complainant Ghanshamdass are forest contractors. It is not quite clear what happened at the auction but it appears that Mr. Carr made some statement to the effect that the contractors who did not wish to bid should go away. The applicant made a statement in this connexion and said in the presence of witnesses that Ghanshamdass had been turned out by Mr. Carr. The applicant has denied that he uttered these words and, in fact, pleaded that he was not there at all; but that plea cannot, I think, be accepted and was rightly rejected by the Courts below.

The other ground now put forward by the counsel for the applicant is that the words used were not defamatory. A good deal of argument was put forward as regards the meaning of the words "*nikal diya*" or "*nikal jave*" but I am of opinion that the clear and plain meaning of the words, which have been deposed to by three witnesses for prosecution as uttered by the applicant, is that Ghanshamdass was turned out at the time of auction by Mr. Carr. Whether Ghanshamdass was or was not turned out, there can, I think, be little doubt that for the applicant to report the fact and possibly to exaggerate what happened must have the effect of lowering Ghanshamdass's reputation. There can also be little doubt that that was the intention of Samrathmal in making the statement. It may be noted that the applicant has not stated what words he actually used; in fact, it would be difficult for him to do so, because, as already stated above, his plea was that he was not there at all and that he made no statement.

I cannot accept the argument that the words used were not defamatory, nor can, I think, the applicant plead justification within the meaning of the first exception to S. 499, I. P. C. It is not alleged that Mr. Carr was guilty of any oppressive action or that it was for the public good to report what he had done.

There does not, in fact, seem to be any intention of the applicant to make such a report for the public benefit or that any action should be taken against Mr. Carr. I would agree with the lower Courts then, in holding that the words imputed to the applicant were uttered by him and that they amounted to defamation. Another argument put forward by the learned counsel for the applicant was that the charge was defective and that under S 222, Criminal P. C., the words used must be mentioned in the charge. In this connexion reference was made to *Bishwanath Das* v. *Kehab Gandhbanik* (1) and *Pratap Chandra Guha* v. *Emperor*, *A. I. R.* 1925 *Cal.* 1121. I would point out however that the charge is clear and, although the exact words used are not given in the charge, there is no ambiguity, nor can the applicant have been misled in any way. The words used have been given by the prosecution witnesses, and therefore the applicant cannot have been under any disability in the matter. It was argued that the words "through peon" have been added in the charge whereas the Court has held that those words were not uttered. I do not however think that the applicant has been in any way prejudiced by the inclusion of those words, and I would refer to S. 225, Criminal P. C. The case that the applicant had to meet was clear, and that will be seen from his own statement in defence. I hold therefore that the applicant was not in any way prejudiced.

The only other ground put forward by the learned counsel for the applicant was that the complainant was not a man of good character and that fact should have been taken into consideration in fixing the amount of fine and in awarding damages. The learned counsel referred to *Devidayal* v. *Emperor* (2). It is true that evidence under S. 55, Evidence Act, about the character of a person is relevant in connexion with the amount of damages in civil cases, and a case of defamation is a quasi civil case. At the same time only general evidence of character or reputation can be given and not for instance, evidence of a particular conviction. In the present case the only evidence adduced by the applicant was that the complainant was once found guilty of using false weights. Such evidence is inadmissible in evidence under S. 55, Evidence Act and according to the ruling cited. As the case stands, I see no grounds for interference in revision and dismiss the application maintaining the conviction and sentence passed by the Magistrate.

B.V./R.K. *Application dismissed.*

(1) [1903] 30 Cal. 402=7 C. W. N. 74.
(2) A I. R. 1923 Lah. 225=73 I. C. 805=24 Cr. L. J. 693=4 Lah. 55.

A. I. R. 1932 Nagpur 159.

STAPLES, A. J. C.

Krishnarao and *another*—Plaintiffs—Appellants.

v.

Secretary of State and *another*—Defendants—Respondents.

Second Appeal No. 224 of 1928, Decided on 3rd September 1930, from decree of Dist. Judge, Bhandara, D/- 25th January 1928, in Civil Appeal No. 91 of 1927.

(a) C. P. Local Self-Government Act (1883), S. 9—Land-owners had right to hold bazars on their land — English law as to market does not apply to India.

Prior to the Local Self-Government Act (1920), the land-owners had a right to hold markets or bazars upon their land provided that they did not infringe the rights of others and the holding of such markets would include the levying of market fees or tolls. The English law relating to markets based upon a grant by the Crown would have no application to India : 32 *All.* 193; 11 *C. W. N.* 1128 and *A. I. R.* 1920 *Cal.* 255, *Ref.* [P 160 C 2]

(b) C. P. Local Self-Government Act (1920), S. 27—Realising of nistar dues for ten years does not give right to levy tolls.

Realizing of nistar dues for ten years is not such a long usage as would entitle the landholder to levy fees or toll. [P 161 C 2]

M. B. Kinkhede—for Appellants.

K. K. Gandhe and *D. N. Choudhry*—for the Government.

Judgment.—The appellants, who are minors, are zamindars in the Balaghat District, and brought a suit through their mother as next friend against the Secretary of State and the District Council, Balaghat, for a declaration that they had a right to recover bazaar dues with regard to the weekly bazaar that was held every Sunday at mouza Mau within their zamindari, and for a perpetual injunction restraining the defendants from interfering with that right. Their suit was dismissed by the Sub-Judge, First Class, Balaghat, and their

appeal was also dismissed by the District Judge, Bhandara. They have now preferred this second appeal. The facts have been fully stated in the judgments of the Courts below. It has been established that a bazaar has been held for a number of years on the appellants' land at Mahu and also that the appellants have been realising some money from persons attending the bazaar. It has been held however by the Ccurts below that the appellants have been realizing this money as compensation for nistar from the persons using the malguzari jungle adjacent to the bazaar, and that such dues levied on account of nistar would not be fees or tolls that could be levied upon persons attending the bazaar as such. It follows therefore that the appellants, by simply proving that they had charged persons attending the bazaar fees for cutting wood or for other nistar from malguzar jungle, would not prove that they had any right to levy bazaar dues as such.

As regards the finding that the money realized by the appellants was on account of nistar and not on account of market fees or tolls, I am of opinion that the decisions of the Courts below are correct. There is the clear and unmistakeable documentary evidence on the subject, and the statements of the appellants contained in that evidence, that they had no right to levy any market dues. Reference need only be made to the copy of the Commissioner's order (Ex. P-1), copy of the Deputy Commissioner's order (Ex. P-4), copy of the Settlement Officer's report (Ex. 1 D-1), copy of the Commissioner's order (Ex. 1 D-5) and copy of the village wajibularz (Ex. 1 D-8). The appellants have made a clear admission, as noted in the orders of the Commissioner (Exs. P-1 and 1 D-5), that they have no right to levy any bazaar dues, and that admission must, I think, bind them. In the wazibularz, moreover, it is clearly laid down that no one is entitled to ugahi (collection of bazaar dues) in the bazaar, and that the mukaddam of the village decides the disputes regarding bethki (market stalls). I therefore uphold the finding of the Courts below that the money realized by the appellants was on account of nistar for use of the malguzari jungle and not a levy of bazaar fees or tolls.

On this finding it would appear that the decision of the Courts below is correct and the appeal must be dismissed; but I would pass some remarks upon the legal aspect of the case As far as I can ascertain, there was no clear law regulating bazaars or markets in these provinces prior to the enactment of the C. P. Local Self-Government Act, 4 of 1920, beyond the inclusion of markets as one of the matters, which were placed under the control and administration of the District Council and Local Boards under S. 9 of the former Local Self-Government Act in these provinces, Act 1 of 1883. No particulars were laid down in that Act as to how the District Council was to control markets and, in particular, there is no mention of fees or tolls, neither is the question of the rights of landowners to hold markets touched upon, nor is any mention made of private markets. There would however appear to be a right recognized in land-owners to hold markets or bazaars on their land, and that there is such a right has been held in *Sadanand Pande* v. *Ali Jan* (1), *Nanda Kumar* v. *Emperor* (2) and *Hem Chandra* v. *Kisto Chandra* (3). The earlier decision of *Sukhdee Prasad* v. *Nihal Chand* (4) has been distinguished in *Sadanand Pande* v. *Ali Jan* (1), and, in any case, it will not have much importance now, because it deals chiefly with some old Bengal regulations which have now been declared obsolete or repealed. As the laws stood, I think it must be held that land-owners had a right to hold markets or bazaars upon their land, provided that they did not infringe the rights of others and the holding of such markets would, it seems, include the levying of market fees or tolls.

The English law relating to markets based upon a grant by the Crown would have, I think no application to India. At the same time, it cannot, I think, be argued that Government is not empowered to introduce legislation with regard to markets or to curtail the rights of land-owners with regard to markets, as necessarily markets are a matter concerning the public. In the C. P. Local Self-Government Act of 1920, definite legislation has been enacted with regard

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(1) [1910] 32 All. 193=5 I. C. 288.
(2) [1907] 6 Cr. L. J. 321=11 C. W. N. 1128.
(3) A. I. R. 1920 Cal. 255 = 47 Cal. 1079 = 58 I. C. 879.
(4) [1907] 29 All. 740.

to markets. In the first place, a distinction has been drawn in S. 2, Cls. (3) and (4) between a public market and a private market. Then in Ss. 23 and 24 powers have been given to the Local Government and the District Council with regard to public markets. Ss. 25 to 34 deal with private markets. Under S. 26 it is enacted first, that no person shall establish or maintain a private market except under a license granted by the District Council, and secondly, that the District Council, as regards markets lawfully in existence on the date on which this Act comes into force, shall, and as regards other markets may grant a license under sub-S. (1), subject to such conditions as to sanitation, drainage, water-supply, width of paths and ways, weights and measures to be used and rents, fees and tolls to be charged, in such markets, as the District Council may think fit. Under S. 27 it is enacted that no person shall levy fees or tolls as specified in S. 24 until he has obtained a certificate recognizing his right from the Deputy Commissioner and a license from the District Council and in S. 28 the circumstances, which the Deputy Commissioner should take into consideration in deciding whether to grant a certificate or not are laid down. Now in the present case, there is no sanction of the Local Government to the levy of fees or tolls, and as pointed out above, it is clearly laid down in the wajibularz that no one is entitled to collect such tolls. The only ground then on which the appellants could sueceed is that they are entitled to levy the fees or tolls by long usage.

In the present case however it has been found on the evidence that the appellants have only been recovering money from persons attending the bazar since 1916, whilst the suit was brought in 1926, i. e., it has been found that the appellants have only been recovering money from persons attending the bazar for a period of ten years before the suit. This finding has been upheld by the lower appellate Court in para. 2 of the judgment, and it is, I think a finding of fact by which I am concluded. As held then by the lower appellate Court the appellants must fail on both grounds, namely, that the money they realized was money that they took as compensation for nistar in the malguzari jungle and secondly, that even such nistar dues have only been realized by them for about ten years before the suit, and therefcre there was no such long usage as would entitle them to levy fees or tolls.

The argument put forward by the learned counsel for the appellants, that the Local Self-Government Act was not meant to be retrospective, has, I think, no force. There is no question in the present case of interfering with what may have been done in the past: the only question is whether the appellants have proved a right owing to long usage ofe levying fees and tolls and it has been held that they have not proved such a right. Under S. 28 of the Act, then the Deputy Commissioner was justified in refusing to grant the certificate mentioned in S. 27 and that refusal relates to the future, i. e., to the levying of fees and tolls after the Act came into force. The question therefore of whether the Act had retrospective effect or not does not arise.

Another reason for holding that the suit brought by the appellants should be dismissed is that it is barred under S. 80 (1), Land Revenue Act, as not having been brought within one year from the date of the assessment being offered to the proprietors under the last Settlement. Under S. 78, Land Revenue Act, it is the duty of the Settlement Officer to ascertain and record the custom of each village in regard to certain specified rights, and according to S. 279 of the C. P. Settlement Code, which relates to the village wajibularz, one of the subjects, which is to be treated in the wajibularz, is the dues from bazars or sarais, and therefore such dues would be recorded under S. 78 (c), Land Revenue Act. As noted above there is a distinct mention in the village wajibularz (Ex. 1, D-8) that no one has a right to realize bazar dues in this village, and that entry having been made under S. 78, Land Revenue Act, and no suit having been brought by the appellants within one year, their suit would not be barred and the entry is conclusive against them. The appeal therefore fails and is dismissed. Costs of the appeal will be borne by the appellants. Other costs as ordered by the Courts below.

B.V./R.K. *Appeal dismissed.*

* A. I. R. 1932 Nagpur 162

STAPLES, A. J. C.

Sugandhabai—Applicant.

v.

Kesarbai and *others*—Non-Applicants.

Civil Revn. No. 123-B of 1931, Decided on 28th January 1932, against decree of Dist. Judge, Amraoti, D/- 28th February 1931.

(a) Hindu Law — Applicability — Jains — Widow.

Even among the Jains a widow has only a power of disposition over her husband's self acquired property: *A. I. R.* 1930 *Nag.* 225, *Foll.*

[P 162 C 1]

*** (b) Insurance—Presumption is that it is personal and for benefit of assured's heirs—Hindu Law, Joint family.**

A policy of life insurance is usually a personal contract between the person who is called the assured and the Insurance Company. It is true no doubt that an insurance policy could be taken out for the benefit of the joint family, but the presumption would be against that as a rule, and it must be proved that the policy was taken out with that intention and that the premia were paid out of joint family funds. In the absence of any proof to that effect the correct presumption is that the policy was taken out as a personal policy for the benefit of the personal heirs of assured. [P 162 C 2]

Order.—This is an application for revision of the order of the District Judge, Amraoti, dismissing an appeal of the applicant against an order of the Sub-Judge, First Class, Darwah, refusing her a succession certificate in respect of a policy of insurance upon the life of her deceased husband. The applicant claimed the succession certificate on the grounds that under the Jain law she was entitled to the property of her deceased husband and, secondly, that the policy was the self-acquired property of her husband, as the premia were paid by him out of his separate earnings and not out of the joint family funds. On the first point the L. A. C. had held that the Jains are governed by Hindu law except so far as such law is varied by custom, and that no such custom as is pleaded by the applicant is proved in the present case. This finding is, in my opinion, correct, and it would appear that a widow would only have a power of disposition over her husband's self-acquired property even among the Jains. For this view I would refer to *Trimbakdas* v. *Mt. Mathrabai* (1).

On the other question I am not satisfied that the decision of the Courts below is correct and it seems to me that the finding that the policy was not the self-acquired property, but joint family property is an inference and not a finding of fact, arrived at on the evidence on record. It is no doubt true that in the case of a joint family possessing joint family property, onus of proving that certain property is self-acquired and not joint property is upon the person asserting it. In the case of an insurance policy however I am of opinion that the presumption would not hold good. A policy of life insurance is usually a personal contract between the person who is called the assured and the Insurance Company. It is true no doubt that an insurance policy could be taken out for the benefit of the joint family, but the presumption would be against that as a rule, and in my opinion it would have to be proved that the policy was taken out with that intention and that the premia were paid out of joint family funds. In the absence of any proof to that effect, I am of opinion that the correct presumption is that the policy was taken out as a personal policy for the benefit of the personal heirs of the assured. In the present case this presumption is strengthened by the evidence on record. There is actual evidence to show that Babusa, the assured, paid the instalments from his own earnings. I would refer to the deposition of Khandsa A. W. 1. The L. A. C. has rejected the evidence of this witness, but, I think, on insufficient grounds. Then there is the important fact that there is no mention in the account books of the joint family of any payment on account of the insurance premia. Nor has any evidence whatever been adduced on behalf of the non-applicants to show that the premia were paid out of joint family funds. There is also the fact that at the time of the partition beween the brothers this policy was not mentioned as being part of the family assets. It seems clear from this that the policy was taken out by Babusa himself and that the non-applicants were not aware of the policy. Had they been so, they would have demanded that it should be shown as an asset at the time of the partition or, if they did not make such a demand, it would amount to an admission that it was not family property or that it was the personal property of Babusa. In any case, unless it is presumed that Babusa was guilty of fraud, the pay-

(1) A. I. R. 1930 Nag. 225=27 N. L. R. 75=124 I. C. 609.

ments must have been made by him personally, as otherwise they must find place in the family accounts. There is no suggestion that Babusa fraudulently paid the premia out of family funds and did not show the debits in the accounts and therefore I am of opinion that it must be held that he made payments himself out of his own personal funds.

As I am of opinion that the Courts below have taken a wrong view of the matter and have gone upon a wrong presumption in respect of the insurance policy in holding it to be family property in the absence of evidence to show that it was so and in fact against the evidence which proves that it was his personal property. I set aside the finding and instead find that the insurance policy upon life of Babusa, the deceased husband of the applicant Sugandhabai, was his personal property and that as such it belongs to the applicant as the heir of her deceased husband and that she is entitled to a succession certificate. I grant her a certificate accordingly. Costs of this application will be borne by the N. A. who will also bear the costs in the Courts below. I fix pleader's fee in this Court at Rs. 25.

R.K. *Application allowed.*

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* A. I. R. 1932 Nagpur 163

NIYOGI, A. J. C.

Rangoo Ramji—Plaintiff—Appellant.

v.

Harisa and *another* — Defendants — Respondents.

Second Appeal No. 291-B of 1930, Decided on 12th February 1932, against decree of Third Addl. Dist. Judge, Amraoti, D/- 24th July 1930.

(a) Will —Interpretation of — Principles stated.

The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator: *Roddy* v. *Fitzgerald*, 6 *H. L.* 823 and *A. I. R.* 1925 *P. C.* 105, *Foll.* [P 164 C 1]

*** (b) Deed—Construction of—Title of deed should be taken into consideration—Words of donation are not inconsistent with document being will.**

Although it is true that the mere name or title of the document is not a safe guide to the determination of the character of the writing yet it is equally true that the title given by the executant himself to his writing cannot be eliminated from consideration. The words of donation used in a deed are not necessarily inconsistent with the document being a will. Whether the gift was to operate in praesenti, or in future has to be gathered from the other recitals in the document. Having regard to the repetition of the word Mrityupatra four times in the document in connexion with the gift, there can be no room for contention that the gift was to be operative after the death of the executant: *A. I. R.* 1924 *Nag.* 236, *Ref.* [P 164 C 1, 2]

*** (c) Succession Act (1925), S. 90—Will—Effect of—Property at testator's death is disposed of.**

A will has the same effect as if it were executed at the time of the testator's death. Unless there are expressions in the will to indicate a contrary intention it must be presumed that the testator intended to dispose of all his property answering the description of moveable property (jangammal) existing at his death. No contrary intention is shown by the mere use of a possessive adjective in the case of such a generic gift; nor by a description of the property as being that of which the testator is seized or possessed. A description of the property as that which the testator "now" owns or occupies, according to the circumstances may, but, prima facie does not show such a contrary intention as to exclude after-acquired property of the specified nature: 38 *Mad.* 369; *A. I. R.* 1927 *Mad.* 383 and 30 *Mad.* 369, *Ref.* [P 165 C 1, 2]

T. L. Sheode—for Appellant.

G. R. Mudholkar—for Respondents.

Judgment.—This second appeal arises out of a suit instituted by the appellant for recovery of Rs. 1,750 deposited by one Pandurang with whom she lived as his mistress on the basis of Pandurang's will dated 4th September 1915. The suit having been dismissed in the two Courts below, the plaintiff has preferred this appeal. It appears that Pandurang recovered from very serious illness in the year 1915 and out of consideration for the tender services rendered by Mt. Rangoo, the appellant, he executed a will on 4th September 1915 in favour of Mt. Rangoo. The terms of this will form the subject of controversy in this suit. The trial Court construed the will as being operative only as a gift. The lower appellate Court was of the opinion that the terms of the document indicate

that it was to operate as a will and not as a gift : but as no specific mention of the amount deposited with Harisa, defendant 1, was made in the will which was executed nearly 13 years before the deposit was made, it held that the plaintiff, although a legatee under the will, was not entitled to the amount. Perusing the recitals of Ex. P-1, which is styled as a will, I have very little doubt that it was not intended to be anything but a will. Principles of interpretation of testamentary documents, as in the case of others, are well settled. They were laid down with great clearness in *Roddy* v. *Fitzgerald* (1) at 876, which were followed by their Lordships of the Privy Council in *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao* (2) at 641 (of 48 *M. L. J.*) They are as follows:

"These rules are perfectly plain and clear. The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible to place the Court in the position of the testator."

It is urged for the respondents on the strength of *Rambhat* v. *Lakshman Chintaman* (3), *Tirugnapal* v. *Ponnammal Nadathi* (4), *Muhammad Abdul Ghani* v. *Fakhr Jahan Begam* (5) and *Brijraj Singh* v. *Sheodan Singh* (6), that the mere name or title of the document is not a safe guide to the determination of the character of the writing. It may be conceded that it is so, but the title as has been given by the executant himself to his writing cannot be eliminated from consideration. The appropriate method of construing such documents is the one indicated by their Lordships of the Privy Council in the aforementioned case. In the document in question the executant mentions that he was 58 years old and that he had passed through serious illnesses and that Mt. Rangoo who had been living with him for 35 years had rendered him great service especially during the time of his last illness. These expressions considered along with the fact that the testator being a mukhtiar, that is a Court-going agent, and conversant with legal affairs, impart to the title given by him to the document particular significance. Much stress is laid on such recitals as the words "dilo ahe" which mean "it is given" and it is contended that the executant of this document intended to make a gift and not a will. The words of donation used are not necessarily inconsistent with the document being a will. Whether the gift was to operate in praesenti, or in futuro has to be gathered from the other recitals in the document. Having regard to the repetition of the word Mrityupatra four times in the document in connexion with the gift, there can be no room for contention that the gift was to be operative after the death of the executant. In *Zuglai* v. *Ratan*, *A. I. R.* 1924 *Nag.* 236 the words used were much stronger, namely, 'lagalich dili,' meaning immediately given, but it was held considering the drift of the document as a whole that that expression did not imply gift in praesenti, but that it was intended to mean that the property was to go to the donee. I have therefore no hesitation in agreeing with the lower appellate Court that the document which bears the title of a will was intended to be in reality a will and not a gift-deed.

The next question is as regards the property which was disposed of by the will. The property is described in one place as the moveables in his possession, that is pots, etc., as well as gold articles, and in another place it is declared that the property was the testator's self-acquired property and that he made Mt. Rangoo owner of it. The generic word used is 'jingi' with reference to his moveable property. There is absolutely no mention of any immovable property. It is therefore evident that the testator desired to make Mt. Rangoo the owner of all his moveable property, which he described as his self-acquired property. On the other hand, it is expressly mentioned that his mother and brothers did not prove useful to him and that there-

(1) [1858] 6 H. L. C. 823.
(2) A. I. R. 1925 P. C. 105 =52 I. A. 214 = 48 Mad 312=87 I. C. 324.
(3) [1880] 5 Bom. 630.
(4) A. I. R. 1921 P. C. 89=58 I. C. 228.
(5) A. I. R. 1922 P. C. 281 =49 I. A. 195 = 25 O. C. 95=44 All. 301=63 I. C. 254 (P. C.).
(6) [1913] 35 All. 337=40 I. A. 161 = 19 I. C. 826 (P. C.).

fore he made a gift of all his property exclusively to Mt. Rangoo. The intention clearly expressed is that Mt. Rangoo was to take the property to the exclusion of the testator's own relatives.

The next question is whether the sum of Rs. 1,750 which he deposited on 7th March 1928 with Harisa, defendant 1, should be considered to have been covered by the will. Evidence is not clear as to whether the testator possessed any cash on the day of the will, but even on the assumption that he did not, I do not see any reason why the will should not operate on the deposit. In *Bodi* v. *Venkataswami Naidu* (7) it was held that a will has the same effect as if it were executed at the time of the testator's death. It must therefore follow that it would take effect with respect to the property existing at the testator's death. Mere lapse of time and change of circumstances will by themselves not operate to revoke a will : see *Subba Reddi* v. *Doraisami Bathen* (8). S. 90, Succession Act expressly provides that the description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator. This is in accordance with the rule of English law embodied in the Wills Act of 1837, under which the will has to be construed with reference to the real estate and personal estate comprised in it to speak and to take effect, as if it had been executed immediately before the death of the testator, and as if the condition of things to which it refers in this respect before the death of the testator unless contrary intention appears by the will : see 28 Halsbury's Law of England, para. 1311. In the same paragraph it also stated the rule that no contrary intention is shown by the mere use of a possessive adjective in the case of such a generic gift : nor by a description of the property as being that of which the testator is seized or possessed. A description of the property as that which the testator "now" owns or occupies, according to the circumstances may, but, it appears prima facie does not, show such a contrary intention as to exclude after-acquired property of the specified nature. Applying this principle of construction to such expressions as *mazamhanoon aslela* and *jingi paiki maze jawal* occurring in the will, would not be restricted to the property which the testator owned at the time of the will, but would be extended to include property which he left at his death. This was the view taken in *A. Gramani* v. *Danakoti Ammal*, *A. I. R.* 1927 *Mad.* 383 in dealing with an identical question. In this case their Lordships of the Madras High Court pertinently observed as follows:

"Although it is true that there are no express words indicating that the testator intended to provide for subsequent acquisitions, it is equally true that the will contains nothing to show that he wished to exclude them from its operation."

Unless there are expressions in the will to indicate a contrary intention it must be presumed that the testator intended to dispose of all his property answering the description of moveable property (jangam mal) existing at his death.

For the forgoing reasons I hold that the amount deposited, which is the subject-matter of the suit, falls within the purview of the will and that Mt. Rangco being the sole legatee is entitled to it. The result is that the appeal succeeds, the lower appellate Court's decree is set aside and the plaintiff's suit is decreed with costs in all the Courts.

K.N./R K. *Appeal allowed.*

(7) [1915] 38 Mad. 359=21 I. C. 73.
(8) [1907] 30 Mad. 369=17 M. L. J. 269.

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* A. I. R. 1932 Nagpur 165

GRILLE, A. J. C.

Kanchedilal and *others*—Defendants—Appellants.

v.

Kanhai and *others* — Plaintiffs—Respondents.

Appeal No. 616 of 1928, Decided on 8th March 1932, against appellate decree of Dist. Judge, Saugor, D/- 17th August 1928.

(a) Evidence Act (1872), S. 115—Mortgage in presence of real owner without protest—Mortgage not result of want of protest —No estoppel against real owners.

After the death of a limited owner the person in possession mortgaged his properties in the presence of the reversioners. Subsequently the mortgagee purchased the property.

Held : that unless it was proved that the omission to protest or the acquiescence of the reversioners caused the purchasers to take the mort-

gage they cannot plead estoppel against the reversioners: 52 *All.* 248, *Rel. on.* [P 167 C 2]

* (b) **Transfer of Property Act (1882) S. 41 —Entry in revenue papers after contest—Entry does not make person entered ostensible owner—Transferee from him is not protected.**

A person cannot be said to be an ostensible owner with the consent of the true owner on the basis of an entry in the revenue papers when the ostensible owner's name was entered in the revenue papers in the face of the opposition of the true owner, and was only entered as he was in possession at the time. A transferee from such person in possession cannot be protected as if he would have taken reasonable care to ascertain the right of the transferor he would have found that the right was contested: *A. I. R.* 1915 *P. C.* 103 and *A. I. R.* 1929 *Oudh* 160, *Rel. on.* [P 168 C 1]

(c) Transfer of Property Act (1882), S. 41 —No misleading by real owner in breach of duty— Real owner is not estopped— Evidence Act, (1872), S. 115.

The rule that one who, knowing his own title stands by and encourages a purchase of property as another's, will not be allowed to dispute the validity of the sale implies a wilful misleading of the purchaser by some breach of duty on the owner's part : 9 *Bom.* 86, *Rel. on.* [P 168 C 2]

D. N. Chaudhri—for Appellants.

S. B. Gokhale—for Respondents.

Judgment.—The judgment in this appeal will also cover that in the connected Second Appeal No. 109 of 1929. The only point arising for determination in this appeal is the applicability of S. 41, T. P. Act, to the purchase of a village share made by Kanchedilal, Pancham and Murlidhar from one Siyaram in the year 1922. The case has a somewhat unusual history which necessitates the setting out of the circumstances in some detail. One Shiamle owned a two annas share in Mauza Magrone. He died many years ago leaving a widow Mt. Nonibahu who was taken in the keeping of one Hanuman Beragi, and a son Raghubar who predeceased his mother, who succeeded to a limited interest on his death without issue. Mt. Nonibahu had a son, Siyaram by Hanuman. Shiamle had left three cousins, namely, Khunni, Ladley and Kannai who were his reversioners. After the death of Nonibahu in 1916 Siyaram applied to have the mutation entered in his name of the two annas share. This was opposed by Khunni, Ladley and Kannai, who claimed to be the reversioners. As it was admitted that Siyaram had been in possession the Tahsildar although he considered that they appeared prima facie to be reversioners, recorded Siyaram as in possession and directed the objectors to substantiate their claim in a civil Court. In 1917 Siyaram mortgaged this share to one Lachmanprasad and subsequently in 1922 he sold the share to the sons of Lachmanprasad, Kanchedilal, Pancham and Murlidhar, Lachhmanprasad being at that time and even now alive.

The reversioners then brought suits admittedly within limitation, for possession of their shares. They were not brought all in the same Court: Kanhai who along with one Rajju had purchased the share of Ladley the year before brought a suit for possession of a one anna four pies share in the Court of the Second Subordinate Judge, First Class, Saugor, and Mewalal and Shridhar sons of Khunni, who is dead, along with Rajdhar, who had purchased a half of their eight pies share, brought a suit in the Court of the Subordinate Judge, Second Class, Saugor, within two months of each other. The suit in the Court of the First Class Subordinate Judge was decided first in favour of the defendants. In appeal the decision was reversed and the plaintiffs' claim was decreed. The suit in the Court of the Second Class Subordinate Judge was also decided in favour of the defendants but in appeal the judgment of the lower Court was upheld. Both the appeals were decided by the District Judge, the first on 17th August 1928 and the second on 2nd November 1928. In both cases appeals have been preferred to this Court, the first being No. 616 of 1928 where Siyaram's purchasers are the appellants and the second No. 109 of 1929 where the sons of Khunni with Rajdhar are the appellants and Siyaram's vendees are the respondents.

It is settled beyond dispute that Khunni, Ladley and Kannai were the reversioners and that their suit was brought within time. It was raised as a defence in the original trials that at the time when Siyaram mortgaged the village share to Lachhmanprasad, the father of the ultimate purchasers that the reversioners were present when the mortgage was discussed and they raised no objection to the proposals.

In the Court of the Subordinate Judge Second Class this was held to amount to an estoppel which prevented the sons of the deceased Khunni who were the plaintiffs in that Court from succeeding in

their claim. On the same evidence in the Court of the Second Subordinate Judge, First Class, this was held not to amount to an estoppel, but that Judge dismissed the plaintiffs' claim on the ground that they had not proved that they were the revisioners. This decision was set right in appeal by the District Judge who held correctly that they were the reversioners and had actually filed papers to prove it, which had been overlooked in the trial Court. In this appeal the question of estoppel was not raised at all and there is no reference to it in the judgment. Apparently the counsel for the respondent vendees in that appeal neglected to support the finding of the trial Court on the ground that the question of estoppel had been wrongly decided and it is now contended on behalf of the appellant-vendees in Second Appeal No. 616 of 1928 that it should be held that the acquiescence of the reversioners did operate as an estoppel and the Subordinate Judge, First Class, was wrong in his decision on the point. In the appeal against the decision of the Subordinate Judge Second Class by the reversioners, which was on the point of estoppel only, the District Judge affirmed the finding of the lower Court and held that the acquiescence did amount to an estoppel. Against this finding the reversioners have now appealed and the common question which arises out of both appeals is whether the conduct of the parties amounted to an estoppel or no and whether Siyaram's vendees took reasonable care to ascertain that Siyaram had power to make the transfer and that the transferees acted in good faith.

A peculiar feature in the evidence of the case is, that of the witnesses who speak to the presence of the reversioners at the time the discussion in respect of the mortgage was going on, only one of them, namely, Uddet, says that the reversioners said anything at all about the mortgage and he has given incompatible versions. In the Court of the Second Class Subordinate Judge on 26th March 1928 Uddet stated that the reversioners said that Lachhmanprasad should take the mortgage after advancing the money. Two days later in the Court of the First Class Subordinate Judge he said that Khunni, Ladlay and Kanhai did not then speak a word and did not then object to the mortgage. Another unusual feature is that Lachhmanprasad, who eventually took this mortgage, which was executed later on at Saugor and not in the village where the discussion took place, has not gone into the witness-box to give evidence as to what the reversioners did or did not say at the discussion, or even as to their presence there. Lachhmanprasad was the guardian of one of the defendants and was actually present in Court and he is the person who is alleged to have been influenced by the actions of the reversioners. His was the very best evidence that could have been obtained as to the effect on him in inducing him to take the mortgage.

The learned District Judge has commented on the fact that it is not easy to ascertain what Uddet and his fellow witnesses were doing in the village, which was not their own, on this occasion. It would have been more pertinent to inquire and discuss what the reversioners were doing in the village which was not their own. It is true that Siyaram said that he took them along with him in order to assist him in raising a loan. One would have expected the statement to have been received with considerable incredulity in view of the fact that only a year before this these people had admittedly contested his application in the mutation proceedings connected with the property he wanted to mortgage. However, it has been found as a fact that these persons were present and that finding must be accepted. I am satisfied that the silence of the reversioners when the mortgage was being negotiated cannot act as an estoppel. S. 115, Evidence Act, reads:

"When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit, or proceeding between himself and such person or his representative, to deny the truth of that thing."

It has certainly not been proved by the vendees that the omission to protest or the acquiescence of the reversioners caused Lachhmanprasad to take any action in respect of the mortgage. His taking of the mortgage was in no way the result of their silence. He would have taken the mortgage in any case whether they had been there or no and their passivity had no consequence whatever on his action. He met Siyaram for

the purpose of discussing the terms and those terms would have been arrived at whether the reversioners were present or no. Further I am satisfied that the vendees cannot claim the protection afforded by S. 41, T. P. Act. It is admitted that they made no inquiry whatsoever at the time when they purchased the property. The purchase was made by their father Lachhmanprasad on their behalf. It is also admitted that Lachhmanprasad made no inquiry at the time of taking the mortgage in 1917. The inaction of the reversioners at the time the negotiations were proceeding does not amount to an implied consent of Sitaram's title within the meaning of S. 41, T. P. Act. That section begins with the words:

"Where, with the consent, express or implied of the persons interested in immovable property a person is the ostensible owner of such property . . ."

Sitaram became ostensible owner on the death of his mother in 1916. The most elementary inquiry by the mortgagee or subsequent purchaser would have revealed the fact that his name has been entered in the mutation register and further that his claim to have his name recorded had been disputed by the reversioners. His ostensible ownership would to a person making an inquiry be based on the entry in the mutation register and manifestly, that ostensible ownership could not be with the consent of the reversioners, who had expressly opposed it and denied his claim. The transferee by S. 41, is only protected by the proviso that he has acted in good faith after taking reasonable care to ascertain that the transferor had power to make the transfer. It is admitted that so far from taking reasonable care, he took no steps whatsoever. In *Nageshar Prasad* v. *Pateshri Partab Narain Singh* (1) their Lordships of the Privy Council emphatically endorsed the opinion of the High Court of Allahabad that a person cannot be said to be an ostensible owner with the consent of the true owner on the basis of an entry in the Revenue papers, when the ostensible owner's name was entered in the Revenue papers in the face of the opposition of the true owner, and was only entered as he was in possession at the time. The circumstances in that case afford to that extent an exact parallel to the one now before me. In *Jagmohan Dass* v. *Indar Prasad* (2) it was held that:

"only those persons are entitled to claim protection under S. 41, T. P. Act (4 of 1882) who in spite of necessary inquiry have not been able to discover who the real owner of the property is and who have in full belief that the person making a transfer in their favour is the person really entitled to that property, taken the transfer from him. If the transferee has not made necessary inquiries about the title of the real owner the protection afforded by the said section is not available to him."

To the same effect is the decision in *Muhammad Shafi* v. *Muhammad Said* (3) the ruling which also fortifies my opinion on the question of estoppel. Further, the case of *Baswantupa Shidapa* v. *Ranu* (4) affords a close parallel to the present case where it was held that the acquiescence of the real owner when the claimant sued the wrong person in respect of certain property would not deprive the true owner of his rights. The rule that one who, knowing his own title, stands by and encourages a purchase of property as another's, will not be allowed to dispute the validity of the sale implies a wilful misleading of the purchaser by some breach of duty on the owner's part. There was no such wilful misleading in the present case: the reversioners had no duty towards the mortgagee at all and in respect of the actual sale five years later there is not a shred of evidence that they knew anything about it. The claim of the reversioners in each case to their share of the property must succeed. Second Appeal No. 109 of 1929 accordingly succeeds and the defendants-respondents must pay the appellants' costs throughout. Second Appeal No. 616 of 1928 fails and is dismissed with costs.

M N./R.K. *Order accordingly.*

(1) A. I. R. 1915 P. C. 103=34 I. C. 673.

(2) A. I. R. 1929 Oudh 160=115 I. C. 97=4 Luck. 597.

(3) A. I. R. 1930 All. 847=52 All. 248=122 I. C. 871.

(4) [1885] 9 Bom. 86.

* A. I. R. 1932 Nagpur 169

MACNAIR, J. C. AND STAPLES, A. J. C.

Ramrao and *others*— Plaintiffs — Appellants.

v.

Gopala Patil— Defendant — Respondent.

First Appeal No. 5 of 1930, Decided on 30th January 1932, against decree of Second Addl. District Judge, Nagpur, D/- 5th November 1929, in Civil Suit No. 57 of 1929.

(a) Contract Act (1872), S. 74 — Provision to pay compound interest at double original rate in case of default is penal — Creditor is sufficiently compensated if he is allowed compound interest at original rate or simple interest at enhanced rate.

A provision to pay compound interest at double the original rate in case of default is to be regarded in the nature of the penalty and where there is an agreement to pay compound interest at an enhanced rate on default in punctual payment of the principal with simpie interest at a lower rate the creditor would receive reasonable compensation if he were given either compound interest at the original rate or simple interest at the enhanced rate. The methods however may lead to different results and some reason should be given for following one of them in preference to the other. Where the original rate of interest is 10 annas per cent per mensem and the loan is for a long period during which payment is to be made by instalments compound interest at 10 annas per cent per mensem would form adequate compensation for the failure to pay on the due dates: 34 *Cal.* 150 (*P. C.*) and 6 *N. L. R.* 109, *Rel. on.* [P 170 C 1]

*** (b) Transfer of Property Act (1882), S. 84—Tender of money is not bad simply because it is less by Rs. 2-3-0 than amount considered to be adequate compensation to creditor—Contract Act (1872), S. 74.**

The amount of compensation under S. 74, Contract Act, which is due to a creditor for default of debtor cannot be determined with great accuracy and consequently a tender of money under S. 84, T. P. Act, is not bad simply because it is less by Rs. 2-3-0 than the amount considered to be adequate compensation to a creditor under S. 74 for default of a debtor: 34 *I. C.* 825, *Ref.* [P 170 C 2]

M. R. Bobde, and *B. R. Mandlekar*— for Appellants.

W. R. Puranik and *M. D. Khandekar* —for Respondent.

Judgment.—The plaintiff-appellants acquired an interest in mortgaged property by a deed, dated 10th July 1925, and deposited in Court the sum of Rs. 30,745-5-0 on 7th August 1925; as the amount was not acccepted by the mortgagee they filed the suit out of which this appeal arises. The mortgagee, defendant 5, alleged that the mortgagors had orally agreed to sell the mortgaged property to him; he had filed a suit for specific performance of the alleged agreement some weeks before the deposit was made; as he claimed to be entitled to the right of redemption in the property he disputed the plaintiffs' right to redeem the mortgage. He further contended that according to the terms of the bond, the amount due on the deed on the date of the deposit amounted to over Rs. 42,000. The plaintiffs' suit was stayed until the decision of the suit of the mortgagee. The mortgagee's suit was finally dismissed so that the main question which had to be decided was the sufficiency of the tender. The learned trial Judge has held that the deed contains a stipulation by way of penalty and that the mortgagee was entitled to much less than Rs. 42,000: but that the amount due on the day on account of principal plus reasonable compensation for the failure of the mortgagee to make payments at the time stipulated exceeded the amount deposited; he allowed the mortgagee defendant 5 interest up to the date which was fixed for payment and passed a preliminary decree for redemption declaring the amount due on that day to be Rs. 46,395-13-0. In appeal the main ground urged is that the deposit should have been held to be sufficient and to have caused interest to cease to run from the date of the deposit.

It is quite clear that the stipulation in the bond for payment of compound interest at Rs. 1-4-0 per cent per mensem was a stipulation by way of penalty. The original rate of interest was 10 annas per cent per mensem and the loan was for a long period during which payment was to be made by instalments. We are not shown any reason for a deliberate contract to pay compound interest at double the rate in case of default. The mortgagors were women. There is every reason for treating the provision to pay compount interest at double the original rate in case of default as a provision intended to guarantee prompt payment. Their Lerdships of the Privy Council stated in *Sundar Koer* v. *Raj Sham Kri shen* (1) at p. 158:

"Compound interest is in itself perfectly legal but compound interest at a rate exceeding the

(1) [1907] 34 Cal. 150=34 I. A. 9=5 C. L. J. 106=11 C. W. N. 249 (P. C.).

rate of interest on the principal moneys being in excess of and outside the ordinary and usual stipulation may well be regarded as in the nature of a penalty."

In *Dandu* v. *Somnath* (2) it was held that where there was an agreement to pay compound interest at an enhanced rate on default in punctual payment of simple interest at a lower rate, the creditor would receive reasonable compensation if he were given either compound interest at the original rate or simple interest at the enhanced rate. We agree that one or other of these methods provides adequate compensation in the great majority of cases. The methods however may lead to very different results and some reason should be given for following one of them in preference to the other. In the case we are considering the mortgagee contemplated that for many years he should receive interest at 10 annas per cent per mensem. Presumably he would have been ready to invest sums repaid on similar terms and therefore compound interest at 10 annas per cent per mensem would form adequate compensation for the failure to pay on the dates fixed. But the amount of the deposit made was calculated by allowing simple interest from the dates of default at Re. 1-4-0 per cent per mensem, and in the plaint it is urged that this calculation provided reasonable compensation. Admittedly a sum smaller by some thousands of rupees would have been due if the alternative method had been followed and the mortgagee had been allowed compound interest at 10 annas per cent per mensem. It must therefore be considered that a fair estimate of the amount of reasonable compensation is reached by allowing simple interest at the double rate, Re. 1-4-0, from the dates of default The trial Judge however has calculated the amount due on the mortgage in a way which appears to us complicated. He allowed interest, after default in payment of the first and second instalments, on the whole amount of these instalments though the instalments included accrued interest. After default of a third instalment when the whole sum became due, he again allowed interest at Re. 1-4-0 per cent per mensem both on the principal and on the interest which had accrued up to that date. It is therefore clear that, in addition to allowing interest at the double rate, he has allowed considerable sums as interest on interest. We think that no sum should habe been allowed in excess of the amount reached by calculating simple interest on the defaulted principal at the enhanced rate. The fact that there were several defaults does not make the rule less applicable. The method of calculation adopted by the plaintiffs for calculating the amount due was, therefore a proper one.

The learned trial Judge has approved of the defendant's contention that he was not bound to accept the amount tendered because it fell short of the amount due according to the plaintiffs' method of calculation by Rs. 2-3-0. We assume that *Subbai Goundan* v. *Palani Goundan* (3) was rightly decided, and that a deficiency of a few annas, due to miscalculation, prevents interest from ceasing, even if the mortgagee bases his refusal of the deposit on a reason other than the trivial deficiency. But we think the learned Judge has not considered the fact that the amount of compensation which is due for failure to pay money at a certain time cannot be determined with great accuracy. By applying a certain rough and ready rule, we reach the result that Rs. 16,248 would adequately have compensated the defendant on 7th August 1925; surely it is impossible to say that a sum different from this sum by only Rs. 2-3-0 would not form an adequate compensation. Again it is very probable that a sum less by some thousands of rupees calculated by allowing compound interest throughout at 10 annas per cent per mensem would have formed adequate compensation. Taking this fact into consideration it is impossible to state that the amount tendered did not include an adequate compensation.

The respondent's counsel urges in support of the lower Court's decree that the bond contained provision for the payment of interest up to the date fixed for the last instalment if the mortgagors desired to redeem prior to that date. This provision seems inconsistent with the provision that in case of three defaults the entire amount of the bond due on the bond became at once payable. The respondent, who contended that the amount due on the deed was Rs. 42,000, did not claim anything on account of the provision on which he now relies. We

(2) [1919] 6 N. L. R. 109=7 I. C. 547.

(3) [1916] 34 I. C. 825.

hold therefore that the provision has no application when, after three defaults, the whole amount has become payable.

In view of the finding that the tender was sufficient, it is unnecessary to decide whether or not, if the tender had been insufficient, the defendant's conduct in delaying decision of this suit by putting forward an untenable claim of the right of redemption makes it proper to disallow interest on the amount which remained in deposit. We remark however that the trial Judge has stated his opinion that the refusal to accept the tender was not quite justified. If the defendant had objected to receipt only on the ground that the amount was insufficient, this point could apparently have been decided within a few months; it is then owing to the untenable plea that the plaintiffs' money has remained in deposit for years.

The appeal therefore succeeds. The tender was adequate and, under the provisions of S. 84, T. P. Act, interest ceased from the date of tender. There is no force in the contention that S. 83 requires deposit of an amount calculated in accordance with the penal provisions of the bond; such an amount is not due on the mortgage. We therefore vary the decree in the manner which is desired by the memorandum of appeal. The amount due is Rs. 30,745-5-0 and we extend the date fixed for payment to a date one month hence. As the respondent is entirely responsible for this litigation, he must pay the costs in both Courts.

P.N./R.K. *Appeal allowed.*

A. I. R. 1932 Nagpur 171

MACNAIR, J. C.

Manoharlal—Defendant — Appellant.

v.

Kanhaiyalal—Plaintiff— Respondent.

Second Appeal No. 504 of 1930, Decided on 14th April 1932, against appellate decree of Dist. Judge, Saugor, D/- 25th April 1930.

Transfer of Property Act (1882), Ss. 91, 92 and 100—Sadar lambardar paying revenue of patti lambardar gets charge over patti — C. P. Land Revenue Act (1917), Ss. 122 and 123.

The sadar lambardar of a mahal by his payment of land revenue to the Government of the patti of a lambardar obtains a first charge over the estate. He can then enforce this first charge by bringing to sale a portion of that estate.

[P 172 C 1]

J. Sen—for Appellant.

D. N. Chaudhuri—for Respondent.

Judgment.—The plaintiff-respondent is the sadar lambardar of Mauza Bhainsa. Defendant 1 was the lambardar of patti No. 2 of that village and under S. 188, Land Revenue Act, it was his duty to pay to the sadar lambardar the land revenue for that patti. In Sambat 1982 and in Sambat 1983 he failed to pay the land revenue. He sold a half-share in his patti to the defendant-appellant Manoharlal. The plaintiff sued to recover the sum paid by him with interest by sale of the share of Manoharlal. The Judge of first appeal has held that the plaintiff obtained a charge on the patti of the defaulting lambardar. In second appeal it is urged that the plaintiff did not acquire any charge. A number of cases are quoted in support of the proposition that where one of two cosharers in a revenue-paying estate pays the whole revenue in order to save, and so does save the estate, he is not entitled to a charge upon the share of the defaulting cosharers. This is a disputed proposition of law, but it does not appear necessary to decide it. Jenkins, C. J. and Crowe, J., in *Shivrao* v. *Pundalik* (1) followed the decisions in support of this proposition. Jenkins, C.J., has remarked:

"Now, as a general rule, unsolicited expenditure in respect of the property of another, even if made for the purpose of its preservation, gives no lien outside maritime law."

In the case I am considering the expenditure was not unsolicited. The plaintiff was sadar lambardar and was bound to pay to Government the revenue assessed on the patti in question: see 188, C. P. L. R. Act. The lambardar of the patti was bound to pay the revenue of that patti through the sadar lambardar under S. 123, Land Revenue Act. The defendant must be considered to have agreed to the appointment of the plaintiff as sadar lambardar, and this appointment placed the plaintiff in a position hardly distinguishable from that of a surety for the payment. It seems obvious from the principles of the Transfer of Property Act that by making such payments the plaintiff obtained a charge over the patti. Under Ss. 91 and 92, T. P. Act, a surety for the payment of the mortgage debt who redeems the property subject to the mortgage is subrogated to the rights of the

(1) [1902] 26 Bom. 437=4 Bom. L. R. 90.

mortgagee. S. 100 of the Act, makes the provisions which apply to a simple mortgage apply to a charge. S. 122, Land Revenue Act, states that land revenue is a first charge on the estate. The sadar lambardar then by his payment obtained a first charge over the estate. He can then enforce this first charge by bringing to sale a portion of that estate. It is next urged that no interest should be allowed. S. 157, Land Revenue Act, allows recovery of interest for such arrears. I see no reason why the money paid should not carry reasonable interest. The appeal therefore fails and is dismissed: costs on the appellant.

M.N. *Appeal dismissed.*

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* A. I. R. 1932 Nagpur 172

SUBHEDAR, A. J. C.

Emperor

v.

Sukhdeo—Accused.

Criminal Ref. No. 5-B of 1932, Decided on 5th May 1932 by Sess. Judge, Amraoti.

*** Stamp Act (1899), S. 30—Debtor delivering immovable property of more than Rs. 20 in satisfaction of debts—S. 30 does not apply—Creditor not bound to pass receipt—He cannot be convicted under Stamp Act (1899), S. 65 (a).**

Section 30 has no application to a case where any immovable property exceeding Rs. 20 in value is made over by a debtor to a creditor in satisfaction of a pre-existing liability. Where the liability under the promissory notes was extinguished by the execution by the debtor of a registered lease of his immovable property in favour of the creditor the creditor is not bound under S. 30 to pass any receipt to the debtor for satisfaction of the debts due on the promissory notes and his conviction under S. 65 (a) is illegal. [P 172 C 2, P173 C1]

A. R. Deshpande—for Accused.

Judgment.—On the allegation of one Ramu that his creditor one Sukhdeo had refused to pass a receipt for repayment of debts which he had satisfied, the Deputy Commissioner of Amraoti acting under S. 70, Stamp Act, sanctioned the prosecution of the creditor for an offence under S. 65 (a), Stamp Act. The case was tried by Mr. Gupta, Magistrate, First Class, Ellichpur, who convicted Sukhdeo of the offence under S. 65 (a) of the aforesaid Act and sentenced him to pay a fine of Rs. 40. The facts found and which are not disputed before me are shortly these: On the strength of two promissory notes Ramu had borrowed Rs. 25 from Sukhdeo and Rs. 12-8-0 from Sukhdeo's cousin Ramji. In satisfaction of these debts and in consideration of some cash Ramu executed in favour of Sukhdeo a registered lease of his field for five years. The deed of lease clearly recites that a part of the consideration of the lease was the extinction of the debts due on these two promissory notes. Sukhdeo however neither returned the discharged promissory-notes to Ramu nor passed a receipt of satisfaction of the debts though called upon by Ramu to do so. Against his conviction Sukhdeo moved the Sessions Court in revision. The learned Sessions Judge was of opinion that since the recitals in the deed of lease constituted a legal receipt of satisfaction of the debts the conviction of Sukhdeo for refusing to pass a separate receipt was not correct. He has therefore reported the case to this Court under S. 438, Criminal P. C. with a recommendation that the conviction be quashed.

On a Rule being issued to the District Magistrate to show cause against the reference that officer maintains that the view of the Sessions Judge is incorrect and that the creditor was bound to pass a separate receipt under the mandatory provisions of S. 30, Stamp Act, when the debtor demanded it. In my opinion both the learned Sessions Judge and the Deputy Commissioner have missed the real point for decision in the case. S. 30 of the Act runs as follows:

"Any person receiving any money exceeding Rs. 20 in amount, or any bill of exchange, cheque or promissory note for an amount exceeding Rs. 20 or receiving in satisfaction or part satisfaction of a debt any moveable property exceeding Rs. 20 in value, shall on demand by the person paying or delivering such money, bill, cheque, note or property, give a duly stamped receipt for the same."

It is only when a creditor receives any money exceeding Rs. 20 in amount or any moveable property of the like amount in value in satisfaction of a debt that the aforesaid section makes it obligatory on his part to pass a duly stamped receipt on demand being made by the person paying or delivering such money or property. The section in question has no application to a case where any immovable property exceeding Rs .20 in value is made over by a debtor to a creditor in satisfaction of a pre-existing liability. The facts found in

the present case leave no room for doubt that the liability under the promissory notes executed by Ramu in favour of Sukhdeo and his cousin was extinguished by the execution by the debtor of a registered lease of his immovable property in favour of the creditor. Sukhdeo was therefore not bound under S. 30, Stamp Act, to pass any receipt to Ramu for satisfaction of the debts due on the promissory notes. His conviction under S. 65 (a), of the aforesaid Act being thus clearly illegal is set aside. The fine if paid will be refunded to him.

M.N. *Revision allowed.*

A. I. R. 1932 Nagpur 173

STAPLES, A. J. C.

Deorao—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 440 of 1931, Decided on 7th April 1932, against order of Subdivl. Magistrate, Wardha, D/- 9th October 1931.

Criminal P. C. (1898), Ss. 236 and 237—Person charged with house-breaking can be convicted of receiving stolen property in appeal—It is better, but not necessary, to charge alternatively.

Where it is doubtful whether an accused person has committed theft or has only received stolen property, it is better to charge him in the alternative under the provisions of S. 236; but, where there has been an omission to make such an alternative charge, the accused person can still under S. 237 be found guilty of the offence with which he was not charged, but with which he could have been charged, under the provisions of S. 236 even by the appellate Court. So, where a man has been charged under S. 457 of house-breaking with intent to commit theft, he can be found guilty of receiving the property stolen at that house-breaking: *A. I. R.* 1926 *All.* 33, *Diss. from*: *A. I. R.* 1925 *P. C.* 130, *Rel. on.*; 33 *Mad.* 264, *Dist.*; *A. I. R.* 1914 *Cal.* 473, *Ref.*

[P 173 C 2; P 174 C 1]

A. V. Khare and *Ghate*—for Applicant.

Vivian Bose—for the Crown.

Order.—The applicant was convicted by the Subdivisional Magistrate, Wardha, under S. 457, I. P. C., and sentenced to rigorous imprisonment for a period of one year and a fine of Rs. 100, or in default to rigorous imprisonment for a further period of three months. In appeal the Sessions Judge, Wardha, altered the conviction to one under S. 411, I. P. C., but maintained the sentence. The applicant now applies for revision. The chief stand taken by the learned counsel for the applicant was that the conviction by the Sessions Judge under S. 411, I. P. C., was incorrect when the applicant had not been charged under that section. In support of his contention he relied principally on *Mula* v. *Emperor* (1). The learned counsel also cited *Padmanabha* v. *Emperor* (2); *Emperor* v. *Balwantsingh* (3) and *Mahadeogir* v. *Emperor* (4). As regards *Mula* v. *Emperor* (1) it has certainly been held by the learned Judge that in a case of this kind an appellate Court cannot convict an appellant under S. 411 when he has been charged and convicted by the trial Court under S. 457, I. P. C. The Judges in *Padmanabha* v. *Emperor* (2) only held that a person convicted of a substantive offence cannot be convicted in appeal of abetment of that offence. The two Nagpur cases are not really relevant and afford no help on the question now to be decided.

With all due respect to the learned Judge who decided the case in *Mula* v. *Emperor* (1), I am unable to agree with the view taken by him in this matter. It seems to me that this question is governed by Ss. 236 and 237, Criminal P. C. No doubt it would have been better, in a case of this kind where it is doubtful whether an accused person has committed theft or has only received stolen property, to charge him in the alternative under the provisions of S. 236; but, where there has been an omission to make such an alternative charge, the accused person can still under S. 237, be found guilty of the offence with which he was not charged, but with which he could have been charged, under the provisions of S. 236, Criminal P. C. I would refer in this connexion to *Begu* v. *Emperor* (5), where it was held that the conviction of persons, who had been convicted under S. 201, I. P. C., though they were charged only under S. 302, I. P. C., was warranted by S. 237, Criminal P. C. It seems to me that a fortiori, where a man has been charged under S. 457 of house-breaking with intent to commit

(1) A. I. R. 1926 All. 33=90 I. C. 150=26 Cr. L. J. 1494.
(2) [1910] 33 Mad. 264=11 Cr. L. J. 49=5 I. C. 145.
(3) [1904] 4 N. L. R. 71=8 Cr. L. J. 11.
(4) [1913] 9 N. L. R. 26=14 Cr. L. J. 135=18 I. C. 887.
(5) A. I. R. 1925 P. C. 130=88 I. C. 3=52 I. A. 191=26 Cr. L. J. 1059=6 Lah. 226 (P.C.).

theft, he can be found guilty of receiving the property stolen at that house-breaking. I would also refer to the decision in *Kali Charan Mukerjee* v. *Emperor* (6). I am of opinion therefore that the conviction of the appellant under S. 411, I. P. C., by the Sessions Judge, though the appellant was charged only under S. 457, I. P. C., was warranted by the provisions of S. 237, Criminal P. C. (The rest of the judgment is not material.)

M.N. *Application dismissed.*

(6) A. I. R. 1914 Cal 473=22 I. C. 148=15 Cr. L. J. 4=41 Cal. 537.

** A. I. R. 1932 Nagpur 174

NIYOGI, A. J. C.

Ganpatrao Devaji—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 19-B of 1932, Decided on 15th July 1932, against order of Sess. Judge, Amraoti, D/- 23rd November 1931.

** **(a) Child Marriage Restraint Act (1929), Ss. 5, 3, 4 and 6—S. 5 excludes bridegroom, parents or guardian.**

Section 5 contemplates strangers and excludes those who are punishable under S. 3 or S. 4 and S. 6, that is the bridegroom and the parent or guardian. [P 176 C 1]

(b) Interpretation of Statutes — Marginal notes—They cannot be referred to when not assented to by legislature.

The marginal notes cannot be referred to for an exposition of the meaning of the section only when there is no reason to believe that they were not assented to by the legislature : *A. I. R.* 1929 *All.* 53 (*F.B.*), *Rel. on.* [P 176 C 1]

(c) Interpretation of Statutes — Marginal notes.

When the terms of the section are obscure or ambiguous reference to the marginal note is permissible; *A. I. R.* 1929 *All.* 53 (*F.B.*), *Rel. on.* [P 176 C 2]

(d) Interpretation of Statutes—Reasonable doubt as to expression—Benefit of doubt is to be given to subject.

Where there is a reasonable doubt as to the expressions occurring in a section, according to the canons of interpretation the benefit of doubt must be given to the subject and against the legislature which has failed to explain itself; *Dock Co. at Kingston-upon-Hull* v. *William Browne*, 36 *R. R.* 459 ; *Secy. of State* v. *Scoble* (1903), *A. C.* 299; *E. I. Ry.Co.* v. *Secy. of State* (1905) 2 *K. B.* 413 and *A. I. R.* 1926 *Nag* 137, *Rel. on.* [P 176 C 2]

(e) Child Marriage Restraint Act (1929), S. 6—Father giving minor daughter in marriage is guilty under S. 6.

Where a person settles the match and gives his daughter in marriage to the bridegroom, he is guilty of promoting the marriage. But the father of the bride or bridegroom does not take any part in the actual solemnization of a Hindu marriage, his duty stops with the secular act of making a gift of the daughter. His case is covered by S. 6 as he not only makes a gift of his daughter (kanyadan) and thus promotes the marriage, but permits the solemnization, that is performance of the necessary religious rituals. [P 177 C 1]

** **(f) Child Marriage Restraint Act (1929), S. 6—S. 6 covers case where even one party is minor.**

The expression "when a minor contracts a child marriage" used in S. 6 is wide enough to cover a case of a marriage to which both parties are minors as well as to one to which one party is a minor. [P 177 C 1]

(g) Criminal Trial—Punishment—No twice punishment for same offence.

It is the fundamental principle of criminal law that a man cannot be punished twice for the same offence or for a substantive offence and its abetment such as aiding, instigating or not preventing the offence. [P 175 C 1]

T. L. Sheode—for Applicant.

P. Lobo—for the Crown.

Order.—One Ganpat Teli of Dhanora was adjudged guilty of offences punishable under Ss. 5 and 6, Child Marriage Restraint Act, by the District Magistrate, Amraoti, and sentenced to pay a fine of Rs. 250 in respect of each offence. His appeal having been dismissed by the Sessions Judge, Amraoti, he has moved this Court in revision. The facts of the case are not contested. The applicant Ganpat and Shivaji arranged a marriage between the former's daughter Susila, aged 9 years, and Shivaji's grandson Ramrao, aged 11 years, and the marriage was solemnized on 23rd May 1930 at Dhanora. Both the Courts below concurrently held that the applicant having taken part in the solemnization of the marriage and also having done some acts to promote the marriage or having permitted it to be solemnized or negligently failed to prevent it being solemnized he was guilty of two distinct offences punishable under Ss. 5 and 6, Child Marriage Restraint Act, and on this view two separate sentences of fine of Rs. 250 each were passed.

The only point that has been argued here is that the applicant could not be held guilty and sentenced in terms of S. 5 and that in any case having regard to S. 71, I. P. C., only one sentence ought to have been passed. The two sections which require to be interpreted in the case are as follows :

Section 5 :

"Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand

rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage,"

Section 6 (1):

"Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both."

It is manifest that S. 5 is worded in general terms without specifying the particular class of persons intended to be covered by it, whereas S. 6 is directed against particular persons, namely, a parent or a guardian of a minor who contracts a child marriage. The question is whether the legislature intended to impose a double penalty on the parent or guardian. It may be argued, as has been done by the Courts below, that the two offences are distinct, namely, (1) arising out of the performance of the child marriage, and (2) on account of doing any act to promote the marriage or permitting the solemnization or negligently failing to prevent the solemnization. In my opinion to treat these two offences as separate would be highly unreasonable. It is the fundamental principle of criminal law that a man cannot be punished twice for the same offence or for a substantive offence and its abetment such as aiding, instigating or not preventing the offence.

If a man commits a dacoity he cannot obviously be punished for dacoity as well as for aiding and instigating his confederates. Of course if the abettor does not participate in the actual commission of the crime, he would be guilty of abetment; if however he is even present at the commission of the crime the law will not regard him as being an abettor but would place him on the same footing as those who committed the substantive crime. This is the principle which is embodied in S. 114, I. P. C: see also S. 26, General Clauses Act (10 of 1897). It is therefore unreasonable to attribute to the legislature an intention to award punishment to the guardian for doing any act to promote the marriage (S. 6), and also to punish him for taking part in performance of the marriage (S. 5). On the principle underlying S. 114, I. P. C., if the guardian does anything to promote the marriage but is not present at the marriage, he will be punishable under S. 6, but if he is present at the marriage and participates in the ceremonies of the marriage he would be guilty of the substantive offence only as defined in S. 5 and cannot be separately punished for aiding, instigating or not preventing the marriage. This is on the assumption that S. 5 applies to a parent or a guardian. But the qnestion may well arise whether S. 5 applies at all to a parent or a guardian.

If a parent or a guardian participates in the marriage, can it be said that he "performs, conducts or directs" a child marriage? As the applicant is a Hindu I have to examine the case in the light of Hindu rituals. The Hindu marriage ceremonies have two aspects, one secular, another spiritual. The essential ceremonies are: (1) the gift of the bride by the father or any other person acting for the father to the bridegroom, known as kanyadan, (2) invocation of the invisible powers and the propitiation of them through the sacred fire hom, and (3) the bridegroom and bride walking together seven steps (saptapadi) uttering the sacred marriage vow to be complementary and loyal to each other in the vicissitudes of life and to share in common the dharma (piety), artha (material prosperity) and kama (joys of life). Now, of these three essentials No. 1, namely, kanyadan is purely a secular act, whereas Nos. 2 and 3, namely, hom and saptapadi constitute the spiritual part of the marriage ceremonies. The two last-mentioned rituals constitute what may be called the solemnization of marriage. In these ceremonies the parent or guardian of the bride has much less to do than the bridegroom himself. While the parent's function stops with the making of the gift, the bridegroom takes part in the hom as well as saptapadi, that is the solemnization of the marriage. It must therefore logically follow that if the parent of the bride is liable to punishment under S. 5, the bridgroom also, if above 18 years of age, would equally be punishable under that section. Thus one gets to the position that the legislature would punish the bridegroom also not only under S. 3 or S. 4 but also under S. 5. Ss. 3 and 4 provide punishment for "contracting" a child marriage and S. 5 for "solemnizing" a child

marriage. It must have become clear that the bridegroom contracts the marriage by taking part in solemnization of the marriage, (both mean one and the same thing), and yet the bridegroom would be liable to be punished twice as has already been shown. This is a strange and capricious result which the legislature could never have contemplated. It is therefore unreasonable to construe S. 5 so broadly as to include the bridegroom and the parent or guardian of a minor contracting party.

There is also another reason which appears to me to be very cogent for excluding the aforesaid persons from the purview of S. 5; it is this clause in S. 5:

" unless he proves that he had reason to believe that the marriage was not a child marriage."

From the assumption that the contracting party to a child marriage or parent or guardian is covered by S. 5, it would follow that it would be open to each of them to prove in defence that he had reason to believe that the marriage was not a child marriage. If the legislature conceded such a defence to the parent or the bridegroom when they are accused of offence punishable under S. 5, there is no reason why the same concession should have been denied to them when they are accused of offence punishable either under S. 3 or S.4 or S. 6. If a parent can raise this defence when accused of participating in the solemnization of the marriage that defence ought logically to be open to him when he is accused of doing any act to promote the marriage of permitting the solemnization of the marriage or negligently failing to prevent it. It is therefore evident that S. 5 contemplates strangers and excludes those who are punishable under S. 3 or S. 4 and S. 6, that is, the bridegroom and the parent or guardian.

The marginal note appended to S. 5 throws light on the scope and meaning of S. 5. It is "punishment for solemnizing a child marriage." I am aware of the controversy as to the relevancy of the marginal notes in the matter of construction of statutes. It appears however that the marginal notes cannot be referred to for an exposition of the meaning of the section only when there is no reason to believe that they were not assented to by the legislature. The point has been discussed at great length by King, J., *in Ram Saran Das* v. *Bhagwat Prasad* (1). His Lordship reviews the practice of the legislature in respect of marginal notes and concludes that they must be regarded as having been inserted in the statutes with the assent and authority of the legislature. On reference I find that the marginal notes were appended to the Child Marriage Restraint Bill when it was under discussion in the legislature. I am therefore in respectful agreement with his Lordship in the view taken by him and I am of opinion that when the terms of the section are obscure or ambiguous reference to the marginal note is permissible. That note indicates that S. 5 contemplates punishment of those who participate in the solemnization of a child marriage, such as the priests, kazis or the vakils, who being strangers are entitled to raise the defence that they had reason to believe that the marriage was not a child marriage as provided in S. 5.

From the foregoing discussion it must be apparent that there is at least a reasonable doubt as to the expressions occurring in S. 5 having been used with reference to parent or guardian. In such a case according to the canons of interpretation the benefit of doubt must be given to the subject and against the legislature which has failed to explain itself : see Maxwell's Interpretation of Statutes, p. 500. This principle was applied in the *Dock Co. at Kingston-upon-Hull* v. *William Browne* (2), *Secy. of State* v. *Scoble* (3), *E. I. Ry. Co.* v. *Secy. of State* (4), and also in a decision of this Court reported in *Ismail Panju* v. *Emperor* (5). Turning to the facts of the present case the applicant is proved to have settled the match and given his daughter in marriage to the bridegroom. He would be guilty of doing these acts "to promote the marriage." I have already shown that the father of the bride or bridegroom does not take any part in the actual solemnization of the marriage, but that his duty stops with the secular act of

(1) A.I.R. 1929 All. 53=113 I.C. 442=51 All. 411 (F.B.).
(2) 36 R. R. 459.
(3) [1903] A C. 299=72 L. J. K. B. 617=89 L. T. 1=51 W. R. 675=4 Tax Cas. 618=19 T.L.R. 560.
(4) [1905] 2 K.B. 413=74 L. J. K. B. 779=93 L. T. 220=54 W. R. 4=21 T.L.R. 606.
(5) A. I. R. 1926 Nag. 137=89 I. C. 523=26 Cr. L. J. 1387=21 N. L. R. 152.

making a gift of the daughter. His case therefore would be covered by S. 5 as he not only made a gift of his daughter (kanyadan) and thus promoted the marriage, but permitted the solemnization, that is, performance of the necessary religious rituals. On this view his conviction and sentence under S. 6 of the Act must stand.

As S. 6 speaks of a minor contracting a child marriage, a question may arise whether it would apply in cases contemplated in S. 3 or S. 4, that is, when an adult contracts a child marriage. I think it must apply since one of the contracting parties to the marriage would invariably be a minor. When an adult of 20 (S. 3) or 22 years (S. 4) marries a child, (a girl under 14 years), the parent or guardian of the child is liable to punishment under S. 6. It is thus evident that the expression "when a minor contracts a child marriage" used in S. 6 is wide enough to cover a case of a marriage to which both parties are minors as well as to one to which one party is a minor. For the reasons already stated the applicant's conviction under S. 5 cannot be sustained. He must therefore be acquitted of the offence punishable under S. 5 and his sentence of Rs. 250 is set aside. The fine, if recovered, will be refunded.

R.K. *Order accordingly.*

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* A. I. R. 1932 Nagpur 177

GRILLE, A. J. C.

Mt. Rukhmabai — Defendant—Applicant.

v.

Ganpatrao—Plaintiff—Non-Applicant.

Civil Revn. No. 159 of 1931, Decided on 11th April 1932, against order of Addl. Dist. Judge, Bhandara, D/- 22nd December 1930.

(a) Civil P. C. (1908), S. 115—Appeal from order granting review—Appellate Court confusing between reasons for review and order on review acts illegally—Revision lies—Civil P. C. (1908), O. 47, R 1.

Where in an appeal from an order granting review the lower appellate Court confuses the merits of the order passed on the admission of the application for review with the reasons entitling the Court to review its own order, it acts illegally and with material irregularity in the exercise of its jurisdiction. [P 179 C 1]

*** (b) Civil P. C. (1908), O. 41, R. 1—Omission to consider important facts on record is ground for review.**

If an omission to notice one particular provision of law is a satisfactory ground for entertaining an application for review much more so is the omission to consider important facts which are on the record and which the Judge himself immediately on passing his order realized that he had overlooked, and which in his opinion would have led him to pass an order materially different. Both are cases of an omission and not cases ot misapplication or of taking a wrong view of the law on the fully considered facts of the case. [P 179 C 1]

(c) Civil P. C. (1908), O. 41, R. 7—Rule allowing appeal from order granting review is controlled by R. 7.

Rule 1, O. 43, allowing appeal from order granting review is controlled by the provisions of O. 47, R. 7, and such an appeal can only be supported on one or other of the grounds set forth in that order. These grounds are that the application must be either in contravention of the provisions of R. 2, O. 4, or after the expiration of the period of limitation prescribed and without sufficient cause therefor: *A. I. R.* 1925 *All.* 364, *Ref.* [P 179 C 1]

*** (d) Civil P. C. (1908), O. 34, R. 3—Extension allowed once—Deposit of one-third before and two-thirds within three weeks—Extension is justified.**

In the proceedings for making a foreclosure decree final the mortgagor prayed for time. Within the time allowed he deposited one-third amount and within three weeks of the expiry of that time deposited the remaining two-thirds:

Held: that the deposit of one-third was an act of good faith as he had deposited the remaining two-thirds within the three weeks rightly allowed as grace. [P 179 C 2]

M. R. Bobde—for Applicant.

Y. V. Jakatdar and *M. K. Padhye*—for Non-Applicant.

Order. — This is an application in revision by the defendant against the order of the lower appellate Court setting aside an order in review passed by the trial Court in the defendant's favour.

The facts are as follows. A preliminary decree for foreclosure had been passed against Mt. Rukhmabai and she had been granted an extension of time before the decree was to be made final. On 26th August 1929 the plaintiff applies to have the decree made final and the case was fixed for hearing on the 19th October. On that date the Court passed the following order:

"The plaintiff by agent Anant. Defendant in person. She again prays for time. The plaintiff refuses to grant any more time. The decretal (sic) is not carrying any interest for the last more than a year. The defendant given time at the last time and that she was then expressly given to understand that she would have no more chances. The plaintiff is being put to a loss by extension of time. The defendant wants about six months time. It is not possible to grant so much time. In these circumstances it is not possible to grant any more extension of time to the defendant. Her prayer for time cannot therefore be granted. As the defendant has not raised any other contentions and as her prayer for extension of time cannot now be

granted I order that final decree for foreclosure shall now be passed in this case,"

Immediately after that order was passed—it is recorded on the order sheet—the Court continued as follows:

"After I finished writing this order sheet I noticed that certain matters which I ought to have taken into consideration while passing the final order escaped my notice though they are on record. I therefore direct the parties to appear before me at the next hearing. Case for 9th November 1929."

On that date the defendant applied for a review of the previous order which was granted after the plaintiff had been heard. The matter referred to by the learned Subordinate Judge in his postscript to the order of 19th October 1929 was that the defendant had paid into Court during the period of extension a deposit of one-third of the decretal amount and that this had escaped the Court's notice. Had it not escaped his notice the Judge would have granted a further extension of time. The entire balance was paid by the defendant into Court on 9th November 1929. The Court accordingly in review set aside its previous order and passed a decree for full satisfaction; the final decree contemplated by the order of 19th October 1929 was actually drawn up as the Judge realized the omission immediately after he passed that order. The order granting review of the order dated 19th October 1929 was strenuously contested by the plaintiff who filed an appeal in the District Court, Bhandara. The learned Additional District Judge allowed the appeal on the ground that the reason for granting review was not any other 'sufficient reason' mentioned in O. 47, R. 1, and was not a reason in any way analogous to a mistake or error apparent on the face of the record, following the decision in *Ramchandra* v. *Govindrao* (1). He held that the sole ground for refusing to extend the time was that time had once been extended on the strict condition that no further extension would be allowed, and that this position could not be varied in review. The order was set aside and the previous order of 19th October 1929 restored and the trial Court was directed ed to draw up a final decree for foreclosure. It is against this order that Mt. Rukhmabai applies in revision. The application is one which must succeed. The learned Additional District Judge has entirely misconceived the grounds on which an order granting review can be set aside. He has confused the merits of the order passed on the admission of the application for review with the reasons entitling the Court to review its own order. The confusion is apparent from the wording of para. 2 of the appellate judgment :

" It is contended on behalf of the appellant that even if there was omission on the part of the Court to notice this part payment still it was no ground under O. 47, R. 1, to grant review. The case therefore turns on the question whether the Court having missed the fact of the payment of Rs 325 was justified in reviewing the order making the decree absolute."

and then the Judge proceeded in para, 3:

" I must at once say that even conceding for the sake of argument that this payment was missed still as it could not be a ground for extension of time and the Court could not possibly review the order of making the decree final,"

(sic) and after discussing the propriety of extending time when time had once been extended, concludes the paragraph :

" under these circumstances I cannot see what was there to induce the Court to review its order dated 19th October 1929."

The real point is of course whether the trial Judge had any justification in law in reviewing his own judgment, The remaining matter as to the merits should be the subject of an appeal against the ultimate decree which the Court actually did pass as a result of reviewing its own judgment, namely, the decree in full satisfaction. The reason given by the trial Judge for admitting the application for review was that he had omitted to notice important facts which were on the record and noticed them immediately after writing the order. The order sheet will show by the words scored out that the Judge wished to cancel the order, which he had just written but considered that he was not entitled to do so. Had the order been written on a separate sheet of paper and not on an order sheet I have no doubt that the Judge would have destroyed and rewritten it. By fixing a fresh date there is no doubt that he actually invited Mt. Rukhmabai to put in an application for review, which she did on the date fixed and on the same date deposited the balance of the amount due. The question whether the Judge was right or wrong in granting an extension of time as a result of admitting the application to review is to be considered after the circumstances which led him to admit the application for review. In

(1) A. I. R. 1925 Nag. 266=87 I. C. 125=23 N. L. R. 53.

Mukundsa v. *Motiram* (2) it has been held that the omission to consider one of the provisions of a section of the Civil Procedure Code is a sufficient reason to entertain an application for review and that such an omission is analogous to a mistake apparent on the face of the record and would bring the case within the scope of the rule in *Chhajju Ram* v. *Neki* (3). If an omission to notice one particular provision of law is a satisfactory ground for entertaining an application for review which has been pointed out by the applicant, much more so is the omission to consider important facts which are on the record and which the Judge himself immediately on passing his order realized that he had overlooked, and which in his opinion would have led him to pass an order materially different. Both are cases of an omission and not cases of misapplication or of taking a wrong view of the law on the fully considered facts of the case.

The Additional District Judge in taking into account the merits of the question of granting an extension of time in considering whether the application should have been entertained at all has acted illegally and with material irregularity in the exercise of his jurisdiction. Further, it does not appear that the appellate Judge had any power to entertain an appeal against the order granting an application for review at all. Such an order under the provisions of O. 43, R. 1, Civil P. C., is appealable, but as will be apparent from the decision in *Narain Das* v. *Chiranji Lal* (4) that rule is controlled by the provisions of O. 47, R. 7, and such an appeal can only be supported on one or other of the grounds set forth in that order. These grounds are that the application must be either in contravention of the provision of R. 2, or R. 4, or after the expiration of the period of limitation prescribed and without sufficient cause therefor. None of these grounds apply and, consequently, I consider that no appeal against the order actually lay. The non-applicant seeks to support the order on the ground that his appeal was not only against the order granting review but also against the final decree passed in consequence of that order and that it was an appeal on the merits of the decision granting the extension of time. His appeal certainly states that it is against the final decree passed and ground No. 2 runs :

"That the learned lower Court should in absence of any special reason not have granted extension of time for depositing the remaining decretal amount after 19th October 29,"

but the prayer asks only that the order of the lower Court should be set aside and that a decree under O. 34, R. 3, debarring the defendant from redemption should be passed. There is no prayer for setting aside the decree for full satisfaction which was passed immediately on the order. It is evident from the tenor of the appellate judgment that the learned Additional District Judge did not consider that he was dealing with an application on the merits of the case. The conclusion runs :

"The result is that the order grantiug review is set aside and the order dated I9th October 1929 is restored. The trial Court will draw final decree for foreclosure. Costs will be paid by the respondent. Pleader's fee in this Court will be Rs. 10."

There is nothing about setting aside the decree for full satisfaction which had actually been passed. There remains the further question whether the case should be returned to the lower appellate Court for consideration on the merits of the case granting the extension of time and the final decree subsequent thereon. I do not consider that this is necessary. The merits have been fully discussed in the order of the trial Court granting a review and also, though on an improper basis, in the appeal, and the non-applicant has also argued the merits before me. The deposit of one third of the amount made before the order of 19th October 1929 has been taken by the trial Court as evidence of good faith on the part of the defendant who is a widow and was unrepresented by a pleader in the Court. The lower appellate Court holds the contrary view and considers that she was ill advised in making it. The good faith of the applicant has, I consider, been fully established by the fact that she had paid the full amount within three weeks of the date of the order of 19th October 1929 and on the date the trial Judge intimated that he was prepared to entertain an application for review of an order which he had inadvertently passed. The grace which the Judge contemplated on

(2) A. I. R. 1929 Nag. 73 =116 I. C. 645 = 25 N. L. R. 104.
(3) A. I. R. 1922 P. C. 112=72 I. C. 566 = 49 I. A. 145=3 Lah. 127 (P. C.).
(4) A. I. R. 1925 All. 364 = 86 I. C. 168 = 47 All. 361.

that day has been justified by subsequent events, and his comments on the conduct of the mortgagee who wished to obtain the whole of the property together with the amounts paid in an attempt to save it, are appropriate to the circumstances.

The learned Additional District Judge was not entitled to argue, as he does by implication, that the trial Court deviated from the truth in saying that the payment of Rs. 325 had been overlooked by him in passing its original order. As the trial Judge himself says, the very fact that he quoted his previous order in March regarding refusal to extend time almost verbatim is a proof that the subsequent payment had escaped his mind. In the circumstances the discretion of the trial Court was wisely and properly exercised and the decree for full satisfaction will stand. The application is consequently allowed and the judgment of the lower appellate Court is set aside. The non-applicant will pay the applicant's costs throughout. Pleader's fee in this Court Rs. 30.

M. N. *Application allowed.*

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* A. I. R. 1932 Nagpur 180

GRILLE, A. J. C.

Secretary of State and *another*—Defendants—Appellants.

v.

Nand Kishore — Plaintiff — Respondent.

Second Appeal No. 287 of 1928, decion 31st October 1931, against decree of Dist. Judge, Hoshangabad, in Civil Appeal No. 121 of 1927, D/- 1st March 1928.

***(a) Railways—Railway receipt for carriage of goods to via station on own line to station on foreign line—Rate quoted does not include rate chargeable from station on own line to station on foreign line.**

The words "for traffic to" constitute a phrase which is current in railway parlance to indicate that the rates are for carriage to a junction whence the goods will be transferred to a foreign line. [P 182 C 2]

Where a railway company quotes rates for carriage of goods from a certain station on the line of that company to another junction station on that line for traffic to a station on the foreign line, the rate so quoted is for carriage of goods from the station of despatch to the junction station and does not include the rate chargeable from the junction station to the station of destination on the foreign line: *Nag. S. A. No.* 323 *of* 1923, *Ref.* [P 182 C 2]

***(b) Railway—Company is not bound by wrong entry by station master in receipt.**

Even if the station master of the despatching station enters in the carriage forward receipt the rate as chargeable from that station to the station of destination, though it is really a rate chargeable up to the junction station, the railway company is not bound by the entry made by the station master: 35 *I. C.* 208, *Ref.*; *A. I. R.* 1926 *All*, 146, *Dist.* [P 184 C 1]

A. V. Khare, *W. B. Pendharkar* and *J. Sen*—for Appellant.

H. S. Gour, *W. R. Puranik* and *J. P. Dwidevi*—for Respondent.

Judgment.—The plaintiff Nand Kishore in this case brought a suit against the Secretary of State for India in Council through the Agent of G. I. P. Ry. and against His Exalted Highness the N. G. S. Ry. Co. through the Agent at Secunderabad for the recovery of Rs. 525-11-0, which he alleged had been unlawfully recovered by His Exalted Highness the N. G. S. Ry. in respect of three consigments of mowha flowers which the plaintiff had forwarded from Bagra, a station on the G. I. P. Ry., carriage forward to Hyderabad. The plaintiff alleged that he had entered into a contract with the G. I. P. Ry. for transference of the goods at the rate of fourteen annas three pies a maund and that an excess rate of four annas eight pies a maund had been illegally recovered from him at Hyderabad. The joint defence of the companies was that the rate of fourteen annas and three pies a maund represented the rate only as far as Wadi, which was the junction on the G. I. P. Ry. for Hyderabad, and the limit of their line in respect of the route by which the goods travelled, and that the excess charges claimed at Hyderabad represented the rate of four annas and eight pies for the distance from Wadi to Hyderabad on the N. G. S. Ry. and was correct. The trial Judge held that the rates advertised in the G. I. P. Ry. schedule covered the systems of both companies and decreed the plaintiff's suit against the N. G. S. Ry. and muloted the G. I. P. Ry. in its own costs as having wrongly defended a fair interpretation of the rates, advertised in their Circular. This Circular is Ex. D-11. In appeal by both the defendants the decision of the lower Court was upheld and the appeal was dismissed with costs. A second appeal is made by the G. I. P. Ry. naming both the plaintiff and the N. G. S. Ry. Co. as respondents.

Immediately on the presentment of the memorandum of appeal the N. G. S. Ry.

Co. presented a petition that they should be made co-appellants at the hearing of the appeal, as the appeal could not be determined without raising matters which are common to all the parties in the suit. As respondent 1 filed a suit and obtained his decree principally against respondent 2, the request was allowed at the hearing of the appeal as their cases are common, and the two railway companies have been arrayed as appellants as they were in the lower appellate Court.

The appeal must succeed; the case has been most carelessly tried and the decision of the lower Courts has been reached in total disregard of the bulk of the documentary evidence produced on behalf of the defendants and in direct contradiction of the inevitable conclusion to be drawn from such evidence. The consignments were despatched from Bagra in March 1926; they were booked to Hyderabad and the rate shown on the carriage forward receipt given to the plaintiff was fourteen annas three pies a maund, which was admittedly a concession rate which the plaintiff had obtained after correspondence with the G. I. P. Ry. Co. and which was published in their Supplement to Foreign Rate Circular No. 4 of 1925 on 31st August 1925 (Ex. D-11). The defendants contended that these concession rates were only operative as far as the G. I. P. Ry. Co. system is concerned and that for through bookings, which involve carriage on foreign lines, the rates of those foreign lines had to be added in respect of the distance covered thereon. They have produced correspondence between the G. I. P. Ry. and the plaintiff extending from August to December 1925 in which they specifically pointed out that the rates in the Circular, which have been discussed between the parties, were rates as for as Wadi only. Despite this the plaintiff booked these consignments in March following and complains that he booked goods on a contract with the company at fourteen annas and three pies a maund as far as Hyderabad. I will now examine the evidence which has been ignored in both the Courts below. (After discussing the evidence the judgment proceeded.) The reference heading does refer to reduced rates for mahuwa flowers from certain stations on the G. I. P. Railway to Hyderabad via Wadi ; that summarises the plaintiff's inquiry and if the body of the letter repeated that statement the plaintiff would have some cause for complaint ; but the body contains the limitation that the rates quoted are for the G. I. P. Railway only and do not extend to Hyderabad but to Wadi, the last junction on the G. I. P. Railway line. The essential wording is :

"Special rates from the stations mentioned in your above to via Wadi *for traffic to Hyderabad*."

The words underlined (italicized) constitute a phrase which is current in railway parlance to indicate that the rates are for carriage to a junction whence the goods will be transferred to a foreign line. It is true that these words may not be clear to a layman, but as to the interpretation of the words, there can be no doubt, and as I shall subsequently show if the plaintiff was deceived by these words and construed them as a rate up to Hyderabad, his delusion was removed by the Railway Company who made the position clear to him long before he sent his consignment from Bagra. The terms given in this letter and the terms given in the earlier letter R. C. 979/25, which is Ex. D-6, are reproduced in the schedule (Ex. D-11) where the destination is shown as "via Wadi for traffic to Hyderabad." The words "for traffic to Hyderabad" are significant as showing that the rates quoted are up to Wadi only, in respect of goods which are to be sent on to Hyderabad and if further confirmation were needed, I would refer to item 3-a in the same schedule which shows rates from via Jumna Bridge for traffic from Aligarh to Bombay, which indicates that the rate quoted for the particular commodity entered in Col. 1 can only operate from Jumna Bridge to Bombay, that is, from the time when the commodity is carried on the G. I. P. Railway, and may be booked from any station between Jumna Bridge and Aligarh on the foreign line, but, as the booking station is unknown, it should be obvious that no rate from it can be quoted. Even on the plaintiff's contention, which is supported in the lower Courts below, that this schedule (Ex. D-11) gives a complete rate from station to station. The interpretation of the term "via station" as opposed to the station itself in railway correspondence and publications is clearly set out by Hallifax, A. J. C., in Second Appeal

No. 323 of 1932, decided on 14th October 1924.

It was thus clear that the finding of the lower Court that the rates quotel by the company apply for the complete journey to Hyderabad is wrong. It remains to be seen whether the plaintiff had any reason for believing it to be right. In Ex. D-3, dated 4th December 1925 he complains that the Station Master at Bordhai is not prepared to book mahuwa flowers to Hyderabad at the rate of annas 15 per maund and quoted railway company's letter R. C. 797/25 which is Ex. D-6 which is reproduced as item 8 in the schedule. The reply to this is Ex. D-9, dated 10th September which runs:

"Your letter of 4th December 1925.

The special rate of Re. 0-15-0 per maund for mahwa flowers at O R. W./350-L from Bordhai applies up to via Wadi and not to Hyderabad. The N. G. S. Ry.'s proportion of Re, 0-4-8 per maund at R. R. from via Wadi to Hyderabad is to be added to G. I. P. Ry.'s proportion to arrive at the through rate and instructions have been issued to stations concerned accordingly."

This is a definite statement free from any railway technicalities that the rates mentioned holds good up to Wadi only and that the ordinary rates from Wadi to Hyderabad is to be added. The plaintiff's reply to this is Ex. D-4, dated 13th December 1925 in which he disputes the company's interpretation and claims that their previous letter and the published schedule leave no room for doubt that the rates quoted were from the various stations on the G. I. P. Ry. to Hyderabad (Deccan) and not up to Wadi only, on the faith of the letters and the circular issued for general use he entered into large transactions for the supply mahua flowers for delivery at Hyderabad and will be put to a great loss if the company is not prepared to order refund of the excess charge levied at Hyderabad. Despite the station master Bordhai's refusal he had sent mohua and the Station Master at Hyderabad had recovered excess on the carriage forward receipt at an additional rate of Re. 0-4-8 a maund in respect of the journey from Wadi to Hyderabad. The plaintiff threatened legal proceedings unless the excess is refunded : vide Exs. D-3 and D-9, D-4. To this the railway replied on 21st December 1925 (Ex. D 10) that the rates quoted were correctly quoted up to Wadi only and not up to Hyderabad and that the plaintiff's reading of the circular is wrong and invited him to take legal proceedings. Whether the plaintiff did take legal proceedings in respect of these earlier transactions is unknown but it is clear that although the rates laid down in Ex. D-11 had been specifically explained to him he again consigned mohua flowers to Hyderabad and that the Nizam's Guaranteed State Railway rate was added to the concessional rate on the amount to be recovered. In respect of this he brought a suit out of which this appeal arises.

The plaintiff in argument before me relies definitely on a contract entered into with the head office at Bombay and not with the station master at Bagra who, he claims was only carrying out the orders of the head office in forwarding the mohua at the rate which the plaintiff claimed to be correct. Now it has been assumed by the Courts all through that the station master at Bagra interpreted the contract in the same way as the plaintiff did and passed a receipt for the goods dispatched with only the rate up to via Wadi entered on the assumption that the rate covered the freight to Hyderabad and that in any case, if there has been a mistake the responsibility rests on the railway company. This however appears to me only an assumption and it is nowhere proved that the station master at Bagra did actually take this view. The receipts which the plaintiff obtained at Hyderabad and which are filed as Exs. P-1 and P-2 certainly show that the amounts of freight on the G. I. P. Ry. and the Nizam's Guaranteed State Railway are entered separately and added together and the foot-note to the receipt states that a receipt for freight charges will be given if required at the time of payment and a receipt for freight under charges or wharfage or demurrage charges will be given in each case. There is nothing to indicate that the freight on the Nizam's Guarantee State Railway on these receipts was entered as an under charge and that the amounts were not entered as two separate items in the carriage forward receipt given to the plaintiff at Bagra.

The plaintiff has claimed that only the rate of Re 0-14-3 a maund was entered on the original receipt given to him but he has adduced no evidence in proof of his contention and the receipts

which he has filed certainly do not bear out the contention. There is no reason to suppose that the station master at Bagra was any the less alive to his responsibility than the station master at Hyderabad who refused to consider that a special concession rate applied outside the G. I. P. Ry. system and it is in evidence from the plaintiff's own letter (Ex. D-4) that he did despatch mohua flowers before December 1925 to Hyderabad (presumably) from Bordhai and that the extra amount had been charged. The ordinary through rate to the final station could not be shown and entered as a definite sum as is shown on the general rate schedule and as in this case there was a reduction owning to the special commercial rate given by the G. I. P. Ry. over their own line. Railway companies are in no way empowered to give special concession rates for traffic over foreign lines and it is highly probable that the commercial rate as far as Wadi and the subsequent amount of the Hyderabad rate were entered as separate items at Bagra. The receipts filed are carbon copies and the crosses which are against the Hyderabad rates on these receipts are in ink and do not appear to have been written by the station officials. Even if the carriage forward receipt calculated the rate at Re. 0-14-3 a maund only the railway company is not bound by this entry of the station master at Bagra and the case is no in way parallel to that quoted in the lower appellate Court: namely, *Gulab Dei* v. *G. I. P. Ry.* (1). There the railway company used a larger wagon than was necessary and charged the despatcher at the higher rate applicable to large wagons when the consignment coul i have been sent in a smaller one. A case more nearly parallel is that of *Govind Ram* v. *G. I. P. Ry.* (2) where in all good faith the station master charged a consignor a special concession rate which was not applicable and the railway was not held liable by the contract and was held justified in refusing to deliver the goods on the plaintiff declining to make good the under-charge. Here the plaintiff claims that his contract was made with the head office. The plaintiff's interpretation of the contract had been expressly repudiated by the company three months before the consignment was dispatched and as has been shown the contract was clearly as stated by the railway company and not as by the plaintiff. The plaintiff already knew as I have shown from the correspondence originating on his complaint in respect of mohua flowers sent from Bordhai that an extra rate in respect of carriage forward consignment on the Nizam's Guaranteed State Railway was enforceable and had actually been enforced and yet he despatched the goods and claimed for a refund of that additional rate.

I may also add that the principal issue in the Court of first instance as to whether the suit would be demed to have filed against the Secretary of State for India in Council two months after the service of notice on him was inadequately tried in the Court of first instance. The suit was as a matter of fact filed less than two months after the notice but that ground of appeal has been waived and there is no need to discuss the matter further. The plaintiff's claim is entirely without foundation and should have been dismissed in the trial Court. The appeal succeeds and the decrees of the Courts below are set aside and the plaintiff's suit is dismissed with costs throughout.

K.N./R.K. *Appeal allowed.*

(1) A. I. R. 1926 All. 146=48 All. 217=90 I. C. 99.

(2) [1916] 35 I. C. 208.

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* A. I. R. 1932 Nagpur 183

GRILLE, A. J. C.

Kaluram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 80 of 1932, Decided on 8th June 1932, case reported by Addl. Sess. Judge, Hoshangabad.

(a) Criminal P. C. (1898), S. 488—Wife ill-treated—Husband's offer to take her back disingenuous—Separate maintenance is justified.

Where the wife has been ill-treated by her husband and that the husband's offer to take her back into his house is disingenuous and made only for the purpose of resisting her claim to maintenance, the claim to live separately and to be maintained is justified. [P 184 C 1]

*** (b) Criminal P. C. (1898), S. 488 — Allowance in grain is bad.**

An order fixing maintenance on a mixed basis of cash and grain is bad. The allowance to be made under S. 488, is one in cash only. [P 184 C 1]

S. K. Ghose—for Applicant.

Order.—The Honorary Bench Magistrates of Hoshangabad in an application made under S. 488, Criminal P. C. have awarded a wife maintenance under that section at the rate of four kuros of grain a month and Rs. 12 annually for clothes. The case has been referred by Additional Sessions Judge, Hoshangabad, on the ground that such an order is illegal. The learned Additional Sessions Judge also considers that it does not appear from the proceedings whether the wife has any just ground for living separate from her husband and that on this ground also the order is not justified. On the latter ground there is sufficient evidence that the wife has been ill-treated by her husband and that the husband's offer to take her back into his house is disingenuous and made only for the purpose of resisting her claim to maintenance. The claim to live separately and to be maintained is justified. The order however is a bad one in fixing maintenance on a mixed basis of cash and grain. It is clear from the wording of S. 488 (1), Criminal P. C., that the allowance to be made is one in cash only. The essential words are:

"Upon proof of such neglect or refusal, the Magistrate may order such person to make a monthly allowance for the maintenance of his wife at such monthly rate, not exceeding one hundred rupees, as the Magistrate thinks fit."

It is impossible to read into those words any other meaning than that the allowance shall be made in cash and not in kind whether of grain or clothing. It has been urged that as grain is a constant and the price of grain has fluctuated considerably of late years that an allowance of grain is a more sensible solution of the problem of maintenance than an allowance in cash. In certain circumstances this may be so, but the law does not allow it. Assuming that an allowance in grain were given approximating in value to Rs. 100, which is the maximum permissible under the section, fluctuation in the price might well for a particular month cause the value of the grain for that month to exceed Rs. 100 and contravene the section. Further the order would be bad even if it were permissible to allow payment in grain since the kind of grain was not specified in the order. The wife might expect payment in wheat, and the Court may have intended that the payment should be in wheat, but the husband according to the terms of the order, would be justified in paying in juar or one of the cheaper millets. The order in so far as it relates to the payment in grain is set aside and the case will be returned to the Court of the Bench Magistrates for the passing of a legal order.

R.K. *Order accordingly.*

END

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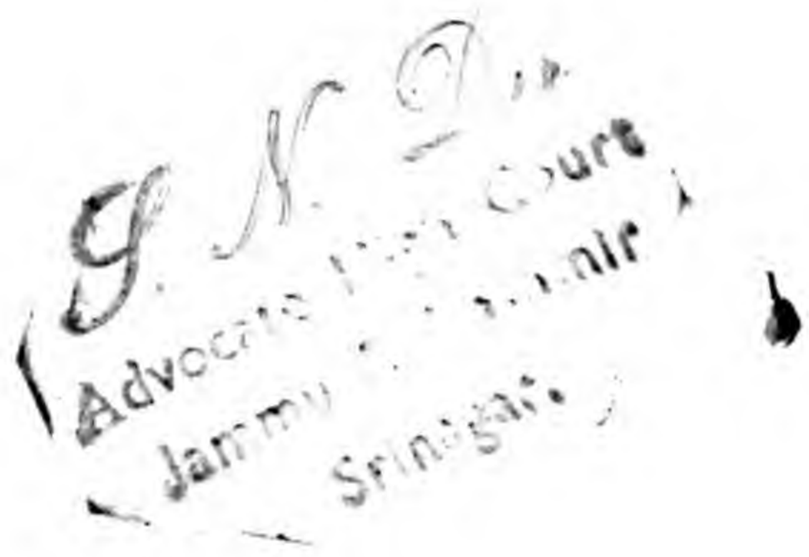
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Advocate
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COMPARATIVE TABLES

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Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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Please refer to COMPARATIVE TABLE *No I in* **A. I. R. 1932 Lahore.**

1932 Criminal Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. I in* **A I. R. 1932 Nagpur.**

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TABLE No. II

Showing seriatim the pages of ALL INDIA REPORTER, 1932 RANGOON with corresponding references of other REPORTS, JOURNALS, and PERIODICALS.

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	18 *Al CrR*	53	97	10 *Rang*	257		140 *I C*	853		1932*Cr C*	934
52	10 *Rang*	92		139 *I C*	460	150	10 *Rang*	317	193	10 *Rang*	495
SB	137 *I C*	206	98	10 *Rang*	124		139 *I C*	284		1932*Cr C*	935
54	135 *I C*	858		137 *I C*	431		1932*Cr C*	711		141 *I C*	256
55	10 *Rang*	82	101	10 *Rang*	215		33 *Cr L J*	758	195	19 *Rang*	475
	137 *I C*	200		138 *I C*	189	153	10 *Rang*	308		140 *I C*	162
56	10 *Rang*	85	103	10 *Rang*	199		139 *I C*	185	197	10 *Rang*	465
	137 *I C*	202		138 *I C*	201	154	10 *Rang*	438		140 *I C*	156

LIST OF CASES OVERRULED AND REVERSED A. I. R. 1932 RANGOON

Ma Paing v. Maung Shwe Hpah, (1927) 5 Rang. 296=A. I. R. 1927 Rang. 209=103 I. C. 568 (F.B).	Overruled in	A.I.R. 1932 P. C. 152
Ma Shopjambi v. Mubarak Ali, (1929) 7 Rang. 361=A. I. R. 1929 Rang. 273=120 I. C. 131.	„ „	A.I.R. 1932 Rang. 107 (F.B.)
Sein Done, Maung v. Ma Paw Nyun, (1930) 127 I. C. 378=A. I. R. 1930 Rang. 222.	Reversed „	A.I.R. 1932 P. C. 161

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1932
RANGOON HIGH COURT

* A. I. R. 1932 Rangoon 1

PAGE, C. J. AND SEN, J.

Saw Hla Pru—Appellant.

v.

S. S. Halkar and *another*—Respondents.

First Appeal No. 66 of 1931, Decided on 14th July 1931, against decision of Original Side of High Court, in Civil Regular No. 141 of 1930.

(a) Limitation Act (1908), Art. 90—Suit for damages for negligence against advocate—Suit is governed by Art. 90.

A suit in which damages for negligence are claimed by a client against an advocate of High Court is governed by Art. 90. [P 2 C 2]

*** (b) Limitation Act (1908), Art. 90—"Suit for negligence," meaning explained—Tort, negligence.**

A suit for negligence in Art. 90 means a suit in respect of some negligent act or omission and the words that the limitation shall run from the time when the neglect becomes known to the plaintiff mean from the time when the negligent act or omission becomes known to the plaintiff and not from the time when he realizes or concludes that the act was negligence. Whether the act is negligent or not does not depend upon the knowledge of the plaintiff, for the act or omission as a matter of fact is negligent or not negligent, whether the plaintiff was or was not aware of it. [P 2 C 2]

Leach and *Kyaw Zan*—for Appellant.

Burjorjee with *Loo Nee* and *Hay*—for Respondents 1 and 2.

Page, C. J.—In this case the plaintiff seeks to recover damages from two advocates of the High Court upon the ground that in the course of their duty as advocates they were guilty of negligence whereby he has suffered damages. The suit was dismissed with costs by my brother Das, J. The plaintiff has preferred the present appeal.

In my opinion the suit is misconceived, and must fail both upon the law and the facts. It appears that the plaintiff went through a course of training in law in England, and has held the post of Township Judge and Township Magistrate. He married Ma Wa, whose father, a wealthy Burmese gentleman, died in 1923, leaving an estate valued at some 20 lakhs. The share of Ma Wa in her father's estate amounted to Rs. 4,70,000 and under the Customary law of the Burmese Buddhists to which Ma Wa and her husband were subject the plaintiff became entitled to a vested interest in one-third of the share that Ma Wa inherited from her father. It appears however that the acquisition of this property by the plaintiff and his wife resulted not in happiness but in discord, and after a number of matrimonial disputes in 1925 the plaintiff brought two suits, No. 265 of 1925 against his wife Ma Wa for restitution of conjugal rights, and No. 266 of 1925 against his wife and her brothers for an injunction to restrain the defendants from interfering with the one-third share which the plaintiff claimed in the property that his wife had inherited from her father. Ma Wa in the same year brought a suit, No. 337 of 1925, against the plaintiff for divorce on the ground of his cruelty. The three suits were heard together, and on 28th May 1926 a compromise putting an end to the whole litigation was entered into by the plaintiff and Ma Wa. The compromise decree was in the following terms:

(1) That the parties have compromised Civil Regular No. 337 of 1925 as follows: (2) That there be a decree for divorce as by mutual consent between the parties. (3) That there be a declaration that Maung Saw Hla Pru (the defendant) is entitled to one-third of the joint interest

of the said Maung Saw Hla Pru and Ma Wa in the estate of U Sa Ye and Daw Sein at the time of the said U Sa Ye's death.

The compromise petition was signed by U Mya Bu and Dr. Ba Maw on behalf of the plaintiff, by Mr. Halkar and U Hla Tun Pru on behalf of the defendant, and also by the plaintiff and his wife Ma Wa personally.

Whether or not the plaintiff would be entitled to succeed in a suit for negligence against Mr. Halkar and U Hla Tun Pru, who had acted for him throughout this litigation, depended upon the construction of Cl. 3 of this compromise decree. In a subsequent suit, No. 460 of 1926, which was brought by the plaintiff against Ma Wa and others for the administration of the estate of Ma Wa's father, it was held both by the learned trial Judge and also by this Court on appeal that upon a true construction of Cl. 3 of the compromise-decree the plaintiff was debarred from claiming any mesne profits accruing in respect of the plaintiff's one-third share of the property that Ma Wa had received by way of inheritance from her father. For the purpose of the present suit it must be taken that the construction placed upon Cl. 3 of the compromise decree in Civil Regular No. 460 of 1926 was correct. It is not disputed that the plaintiff in the course of conferences with the learned advocates whom he had employed had expressed his desire to claim mesne profits in respect of his share in the property inherited by Ma Wa, and it must be taken that his right to claim these mesne profits was excluded by Cl. 3 of the compromise-decree. It follows therefore that if the view taken by the defendants that upon a true construction of Cl. 3 the plaintiff's right to claim mesne profits was not excluded was a construction so unreasonable that no skilled legal adviser would advise a client in that sense then, no doubt, in a suit which is otherwise maintainable the plaintiff would be entitled to recover damages for negligence against the defendants.

Now, the construction which the defendants were of opinion should be placed upon Cl. 3 was that it gave the plaintiff a right to a third share of the interest of his wife in the estate of her father as at the time of her father's death, and that it was clear that as from the time of Ma Wa's father's death that third share must be treated as belonging to the plaintiff, he would be entitled to recover, in proceedings filed in that behalf, such mesne profits in respect of the third share as had accrued since that date. In the view that the defendants took it could not be held, having regard to the terms of Cl. 3, that Ma Wa would be entitled to receive the profits accruing in respect of the plaintiff's one-third share from the time when the share had been allotted to him under the compromise decree. An advocate of this Court in the exercise of his profession is bound to exercise reasonable skill and prudence, but he is not expected to be infallible, and unless the Court is satisfied that the construction put upon Cl. 3 by the defendants was not such a construction as could reasonably be placed upon that clause by an advocate exercising reasonable skill and care, the plaintiff's suit for negligence against the defendants must fail. In my opinion it cannot be held that the construction which the defendants put upon the compromise decree was so unreasonable as to render them liable to damages for negligence in a suit filed by the plaintiff in that behalf.

The case, however does not rest there, because in my opinion, the plaintiff's suit is also barred by limitation. This suit, in which damages for negligence are claimed by a client against an advocate of this Court, is governed by Art. 90, Sch. 1, Lim. Act (9 of 1908) which runs as follows:

"90. Other suits by principals against agents for negligence or misconduct . . . 3 years . . . . when the neglect or misconduct becomes known to the plaintiff."

Article 90 is not happily worded, for the law knows nothing of negligence or misconduct in the abstract, and no cause of action can exist, and no suit will lie, that is founded on negligence or misconduct as such. A suit for negligence in Art. 90 means a suit in respect of some negligent act or omission, and in col 3, where it is prescribed that limitation shall run from the time when the neglect becomes known to the plaintiff, these words mean from the time when the negligent act or omission becomes known to the plaintiff. Whether the act is negligent or not does not depend upon the knowledge of the plaintiff, for the act or omission as a matter of fact is negligent or not negligent whether the plaintiff was or was not aware of it.

In my opinion limitation begins to run from the time when the plaintiff came to know of the negligent act, and not from the time when the plaintiff first realized or concluded that the act was negligent. Now, assuming for the purpose of construing Art. 90, that the defendants were guilty of negligence in omitting to make any reference to the plaintiff's claim to mesne profits in Cl. 3 of the compromise, it is common ground that the plaintiff was fully aware of the negligent conduct of the defendants on 28th May 1926 when the compromise was entered into. The advocates concerned in this litigation on both sides were uncertain whether the plaintiff was entitled to one-half or one-third of the mesne profits accruing in respect of the property inherited by his wife. It depended upon a question of Buddhist law which was not free from difficulty.

It was considered therefore advisable not to postpone the settlement of this litigation by delaying the compromise until it had been determined whether the plaintiff was entitled to a half or third share in the mesne profits, and although it was common ground that the plaintiff normally would be entitled to a one-third interest in the property inherited by his wife after their marriage, it must be borne in mind that if Ma Wa's suit for divorce had succeeded the plaintiff would not have obtained any share or interest in her property. No doubt, the learned advocates appearing on behalf of the plaintiff and the defendant respectively bore in mind all the circumstances obtaining at the time when the compromise was effected, and the advocates who represented the plaintiff were most anxious that no mention should be made of the claim to mesne profits in the compromise decree. The plaintiff however desired that his right to mesne profits should be set out specifically in the compromise decree. He was present at the time when the compromise was effected, and in the course of his evidence he stated that it was Mr. Halkar, one of the defendants, who had urged defendant 2, who was the junior advocate appearing for the plaintiff, to insert in Cl. 3 the words "at thetime of the said U Sa Ye's death." He stated that when Mr. Halkar

"made this suggestion, I protested at once to Halkar not to add these words."

Notwithstanding his protest however it was pointed out by Mr. Halkar that in his opinion the terms in which Cl. 3 was couched did not prevent the plaintiff from recovering such a share of the mesne profits as ultimately it would be ascertained that he was entitled to receive, and the plaintiff then consented to the omission of any reference to the mesne profits. In his evidence the plaintiff added:

"According to me there was no compromise as regards the mesne profits. We left that question as an open question."

It is quite obvious that on 28th May 1926, when the compromise was effected, the plaintiff was fully aware of the action of his advisers in deliberately leaving out of the compromise any reference to his claim for mesne profits. I am of opinion that the finding of fact to that effect by the learned trial Judge concludes the question of limitation against the plaintiff; for, in my opinion, if the plaintiff knew that his advisers were deliberately leaving out of the compromise decree any reference to his claim for mesne profits, and their conduct in so doing in fact amounted to negligence, on 28th May 1926 the plaintiff became aware of the negligent conduct of the defendants, and inasmuch as the present suit was not filed until 14th March 1930, that is to say, more than three years after the date on which the plaintiff first knew of the negligence of the defendants, by reason of Art. 90, Limitation Act, the plaintiff's suit is barred by limitation.

The learned advocate on behalf of the plaintiff however contended that upon a true construction of Art. 90, limitation does not commence to run until the plaintiff first comes to know that the act was a negligent act. Such a construction, to my mind, would result in defeating the very object for which Art. 90 was enacted. For instance, suppose in the present case that no suit had been brought after the compromise decree had been passed, and for many years the parties had assumed that the compromise was effected without negligence on the part of the plaintiff's advocates, notwithstanding the fact that no reference therein had been made to the plaintiff's claim to mesne profits, and then after ten years the plaintiff, who all along had been aware of the circumstances in which the compromise had been effected, came

to the conclusion that the action of the defendants in omitting any reference in the compromise decree to his share of the mesne profits was negligent conduct on their part, could it be contended that limitation would begin to run only from the time when he came to the conclusion that the defendants' action was negligent? Or again, suppose Chari, J., had held that the terms of Cl. 3 of the compromise decree debarred the plaintiff from obtaining mesne profits, it might reasonably be held that the plaintiff at any rate after Chari, J.'s judgment, must have known that the defendants were guilty of negligence; but suppose on appeal that the Court had come to the conclusion that there had been no negligence on the delendants' part because the failure to refer to mesne profits in Cl. 3 did not preclude the plaintiff from recovering these mesne profits in a subsequent suit, what would be the position of the plaintiff? Would he then be held to know of the defendants' neglect, or must he be taken to have forgotten the knowledge which he acquired when Chari, J., passed his decree? Or again, suppose the case was taken to the Privy Council, and the Privy Council restored the decree of Chari, J., when could it be said that the plaintiff came to know that the defendants' act in omitting any reference to the mesne profits in the compromise decree was a negligent act? According to the plaintiff's testimony in the present suit he was not satisfied, even after the judgment of Chari, J., that his right to mesne profits had been excluded from the compromise decree, and that he concluded that the act was a negligent act only after his application to the High Court for a review of the judgment of the High Court had been refused. A mere statement of the facts of the present case, and the difficulties that would arise if the construction for which the learned advocate for the appellant contends should be placed upon Art. 90 were accepted, are sufficient, in my opinion, to show that his contention is unsound and untenable.

For these reasons, in my opinion, both upon the law and upon the facts the appeal fails, and is dismissed with costs.

Sen, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Rangoon 4

PAGE, C. J. AND SEN, J.

Sahdeo—Plaintiff—Appellant.

v.

Maharaji and *another*—Defendants—Respondents.

First Appeal No. 69 of 1931, Decided on 13th July 1931, from decree of Original Side in Civil Regular Suit No. 605 of 1930, D/- 12th March 1931.

*** Guardians and Wards Act (1890), S. 25—Regular suit does not lie in cases where S. 25 applies.**

In cases to which S. 25 applies it is incumbent upon the guardian to proceed by way of application under the Guardians and Wards Act, and not by a regular suit.

The object of the legislature in enacting S. 25, Guardians and Wards Act, was that in cases to which that section applied, the guardian should be bound to seek redress as provided in the Act, and not otherwise: 42 *Mad.* 647, *Appr.* (*Case law discussed.*) [P 5 C 1]

M. A. Rauf—for Appellant.

C. Dantra—for Respondents.

Page, C. J.—This is a suit by a Hindu husband for an order that his minor wife should be restored to his custody as her guardian. The judgment of the lower Court and of this Court proceeds upon the footing: (1) that the suit was brought by the plaintiff as the guardian of his wife and not otherwise, and (2) that the plaintiff claimed that the custody of his wife should be restored to him as she had been removed from his custody by her parents. That this is the plaintiff's cause of action is clear from para. 3 of the plaint, and para. 7 of the written statement.

The learned trial Judge held: (1) that the plaintiff was a major at the time when he filed his suit, and (2) that having regard to the provisions of the Guardians and Wards Act (Act 8 of 1890), the remedy of the plaintiff lay in an application under S. 25, Guardians and Wards Act, and not by filing a regular suit. The suit was dismissed.

At the hearing of the appeal it was urged by the learned advocate for the appellant, that although the appellant was entitled to apply that the custody of his wife should be restored to him under the Guardians and Wards Act, he had an alternative right to file a regular suit in that behalf.

Now, it is common ground that before the passing of the Guardians and Wards Act, the plaintiff would have been entitled to file a regular suit for the restora-

tion of the custody of his minor wife, and it is urged on behalf of the appellant that the right which he possessed before the passing of the Act was not taken away by express terms or necessary implication by the Guardians and Wards Act. The Guardians and Wards Act does not purport to be exhaustive of all questions that arise with respect to the custody of a minor, but, in my opinion, in cases to which S. 25 applies it is incumbent upon the guardian to proceed by way of application under the Guardians and Wards Act and not by a regular suit. The case is concluded, in my opinion against the appellant both on principle and by authority. As was pointed out by *Ma Shwe Ge* v. *Maung Shwe Pan* (1) and *Sham Lal* v. *Bindo* (2) to hold that there were concurrent or alternative remedies open to a guardian who sought the restoration of the custody of a minor would lead to great inconvenience for it might be that there would be subsisting at the same time an order made in a suit by one person claiming to be the guardian of a minor for restoration of the minor to his custody, and also an order made on an application under the Guardians and Wards Act for an order that the custody of the minor should be restored to him. In my opinion the object of the legislature in enacting S. 25, Guardian and Wards Act, was that in cases to which that section applied, the guardian should be bound to seek redress as provided in the Act, and not otherwise. I am of opinion that the case is also concluded against the appellant by authority. In *Besant* v. *Narayaniah* (3), Lord Parker in delivering the judgment of the Privy Council laid down that

"the District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890."

That was a case in which a natural guardian sought to recover the custody of his minor sons. Prior to *Besant's* case (3), the same view had been expressed by the Allahabad High Court in *Sham Lal* v. *Binode* (2) and in *Utma Kuar* v. *Bhagawanta Kuar* (4), and after the decision of the Privy Council in *Besant* v. *Narayanaih* (3) the Chief Court of Lower Burma in *Arunachalam Pillay* v. *Iyamon* (5) held that the effect of the ruling of the Privy Council in that case was that proceedings by a guardian for restoration of the custody of a minor must be taken under the Guardians and Wards Act, and not by way of a separate suit. In *Sathi* v. *Ramandi Pandaram* (6) Wallis, C. J., when considering the effect of *Besant* v. *Narayaniah* (3) observed that:

"the question for decision was whether a civil suit not under the Guardians and Wards Act would lie in the civil Court. The Privy Council held that it would not, and assigned as the sole but sufficient reason for so holding the fact that the District Court had no jurisdiction in the case except under the Guardian and Wards Act. This I feel bound to construe as a ruling that the jurisdiction conferred by the Guardians and Wards Act was exclusive, and that the right of proceeding independently by civil suit no longer existed."

On the other hand the learned advocate on behalf of the appellant referred to *Sharifa* v. *Munekhan* (7) in which case the Bombay High Court held that the remedy by way of a regular suit in a proceeding in which an application might have been made under the Guardians and Wards Act was not ousted by that Act; but Jenkins, C. J., in the course of his judgment, observed that in so holding the Bombay High Court was concluded by an earlier decision of that Court and his Lordship added:

"It appears to me under the circumstances profitless to enter on any discussion of the question, for even if we disagreed with that decision we could only refer the matter to a Full Bench. When however the legislature comes to amend Act 8 of 1890 (which I trust may be at no distant date) it will, I think, be worthy of consideration whether the procedure under the Act should not be explicitly substituted for an ordinary suit, and the position of a father at the same time made clear."

Jenkins, C. J., therefore did not purport to express any opinion of his own as to whether, if the matter were open, he would have decided the question one way or the other. Reference was also made to *Ma Shwe Ge* v. *Maung Shwe Pan* (1) in which a Full Bench of the Chief Court came to the conclusion that in the circumstances of that case, inasmuch as "the person who claims to be the natural guardian had never had the custody of the minor," it could not be held that a regular suit was barred. In *Acharatlal Jokesandas*

(1) [1903] 2 L. B. R. 140.
(2) [1904] 26 All 594=1 A. L. J. 266=(1904) A. W. N. 135.
(3) A. I. R. 1914 P. C. 41=24 I. C. 290=41 I. A. 314=38 Mad. 807 (P. C.).
(4 A. I. R. 1915 All. 199=37 All. 515=29 I. C. 416.
(5) [1915] 8 L. B. R. 211=29 I. C. 768.
(6) [1919] 42 Mad. 647=53 I. C. 399 (F. B.).
(7) [1901] 25 Bom. 574=3 Bom. L. R. 167.

v. *Chimanlal Prabhudas* (8), the Bombay High Court was

"not prepared to hold that the dictum of the Privy Council in *Annie Besant* v. *Narayaniah* (3) to the effect that a suit inter partes is not the proper proceedings was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa* v. *Munekhan* (7);"

and Scott, C. J. added that

"S. 25 cannot apply to this case, for the ward has never left or been removed from the custody of his guardian."

In *Mathuraban* v. *D. Tewary* (9) Robinson, J., dissented from *Arunachalam* v. *Jyamon* (5) and followed *Ma Shwe Ge* v. *Maung Shwe Pan* (1)., but in *Mathuraban* v. *D. Tewary* (9) as in *Ma Shwe Ge* v. *Maung Shwe Pan* (1) S. 25 had no application for the plaintiff had never had the custody of the minor. For these reasons, in my opinion the law as laid down by the Full Bench of the Madras High Court in *Sathi* v. *Ramandi Pandaram* (6) was correct, and this appeal must be dismissed with costs.

Sen, J.—I agree.

K.N./R.K. *Appeal dismissed.*

(8) [1916] 40 Bom. 600=37 I. C. 215.
(9) [1918] 44 I. C. 753.

* A. I. R. 1932 Rangoon 6

PAGE, C. J. AND SEN, J.

J. G. Robinson—Appellant.

v.

Central Bank of India, Ltd.—Respondents.

First Appeal No. 78 of 1931, Decided on 21st July 1931, against decision of High Court on Original Side, in Civil Regular No. 346 of 1930.

*** (a) Negotiable Instruments Act (1881), S. 131—Whether collecting bank is guilty of negligence within S. 131 depends on circumstances of each case and is question of fact — Civil P. C. (1908), S. 100.**

Whether or not a collecting bank is guilty of negligence within S. 131 must depend on circumstances of each particular case and the question is purely one of fact. The test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused them to make inquiry. [P 8 C 1]

A clerk of a business agent presented a cheque to a collecting bank. The cheque was crossed and payable to and endorsed by a certain public officer and the cashier knew that the customer was a man of little means but the cheque was allowed to be collected and credited to the bank account of the said clerk without any further inquiry :

Held that under the above circumstances the bank was guilty of negligence because when the said clerk presented the cheque with a view to having it credited to his private account a cashier of ordinary intelligence and experience should have been put on inquiry whether or not the credit ought to have been made. Therefore the bank was guilty of negligence and could not get the protection of S. 131: *Commissioners of Taxation* v. *English, Scottish and Australian Bank Ltd.*, (1920) *A. C.* 683; *Morison* v. *London County and Westminister Bank*, (1914) 3 *K. B.* 356 and *Ross* v. *London County, Westminister and Parr's Bank Ltd.*, (1919) 1 *K. B.* 678, *Foll.*; *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins*, (1924) 1 *K. B.* 775 and *Commissioners of State Saving Bank* v. *Permewan Wright & Co.*, 19 *C. L. R.* 457, *Ref.*

(b) Civil P. C. (1908), S. 100—Existence of commercial usage is question of fact.

Whether a particular banking or mercantile usage exists or not is a question of fact. [P 8 C 2]

Leach—for Appellant.

F. Jeejeebhoy—for Respondents.

Page, C. J.—This is a suitbrought by the drawer of a crossed cheque against the respondent bank to recover damages for conversion or, in the alternative, for the value of the cheque as money had and received by the respondent bank to the plaintiff's use. The material section of the Negotiable Instruments Act (26 of 1881) is S. 131 which runs as follows:

"A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment."

Now it is not contended on behalf of the appellant that in connexion with the receipt of this cheque by the respondent bank the bank was not acting bona fide. The allegation of the appellant is that in receiving payment of this cheque and crediting the proceeds to the account of a customer the respondent bank was guilty of negligence. It is common ground that the customer to whose account the proceeds were credited had no title to the cheque, and that, as the cheque was not delivered to the Corporation, the plaintiff at all material times was the true owner of the cheque within S. 131. In these circumstances the plaintiff alleged that the respondent bank were guilty of conversion, or, in the alternative, that the plaintiff was entitled to recover the proceeds of the cheque as money had and received to his use.

It appears that on 12th October the cheque in question was drawn on Dawsons Bank, Ltd., Rangoon, in favour of the Corporation of Rangoon or order for Rs. 2,361-12-0. It was drawn on behalf

of the plaintiff J. G. Robinson by his attorney R. S. Dantra, and it is common ground that Mr. Dantra had authority to draw this cheque as the attorney and agent of the plaintiff. The cheque was drawn in favour of the Corporation of Rangoon in payment of municipal taxes due from the plaintiff to the Corporation. Now Mr. Dantra had in his employment a clerk, Manilal Shivchand Shah, who was known to Mr. Dantra, and to those who worked with and under him, as M. S. Shah. It so happened that Mr. Dantra at the time when this cheque was drawn was also the agent of Dawsons Bank, and there can be little doubt that Manilal Shivchand Shah had become acquainted, at any rate to some extent, with the nature of the business carried on by bankers. Mr. Dantra having drawn this cheque on behalf of the plaintiff in favour of the Corporation, handed the cheque to Shah with a direction that Shah should deliver it to the Corporation. Shah failed to do so, and nothing more is known about the history of this cheque until 9th December 1929, when Shah having forged what purported to be an endorsement on the cheque on behalf of the Corporation, proceeded to the respondent bank, and tendered this cheque over the counter to one of the clerks of the bank for collection. At the same time Manilal Shivchand instructed the bank to credit the proceeds of the cheque to a savings bank account which he had opened with the respondent bank on 8th October 1929 in favour of an infant girl Savitabai, of whom he asserted that he was the guardian. The clerk to whom the cheque was tendered accepted the cheque; endorsed it with a rubber-stamp to this effect " payee's endorsement guaranteed. For the Central Bank of India, Ltd., Agent," and took the cheque to one Tracy, who was the Assistant Accountant of the respondent bank, and at that time was acting as the Chief Accountant. What Tracy did after he had received the cheque may be stated in his own words:

" I received Ex. "A" (i, e., the cheque in suit) from Maung Nyun Pe (the clerk to whom the cheque had been tendered by Shah), with several other cheques. I remember receiving this cheque Ex. A, and I noticed that it was to order and was a crossed cheque payable to the Corporation of Rangoon. I also noticed that it purported to be endorsed by the Chief Superintendent of the Corporation of Rangoon. I did not know that there was such an official as the Chief Superintendent of the Corporation of Rangoon, I knew that Manilal Shivchand was not a person whose endorsement I could guarantee. That was why I did not sign the guarantee-stamp. I knew that there was a savings bank account which Manilal Shivchand had opened in the name of his infant daughter. I had no time to inquire why Manilal Shivchand was paying into this savings bank account a crossed cheque drawn in favour of the Corporation of Rangoon.

" *Q* : The reason that you did not inquire why this crossed cheque drawn in favour of the Corporation was being paid into the savings bank account of this infant was that you had no time ?

" *A* : I knew that the cheque had been drawn by Mr. R. S. Dantra, who was the agent of Dawson Bank, and I thought that he would be in the best position to know whether the cheque was properly endorsed. I knew his signature very well. Those are the reasons why I did not inquire. I did not communicate with Mr. Dantra when the cheque had been presented to me for signature. I passed them on to the cashier for collection. I do not know who was the cashier of Dawsons Bank at that time. The money was collected by my bank from Dawsons Bank and credited to the savings bank account."

The cheque without the guarantee of the payee's endorsement having been signed on behalf of the respondent bank, was returned to Dawsons Bank, and cleared the same day through Lloyd's Bank, and the proceeds of the cheque were immediately credited to the savings bank account of the infant of whom Manilal Shivchand had stated that he was the guardian. On 9th December, when this cheque for Rs. 2,361-12-0 was credited to savings bank account of Savitabai, that account stood in credit to an amount of Rs. 5. On 10th December Manilal Shivchand drew out of the savings bank account Rs. 2,360 leaving a balance of Rs. 6-12-0. This account was not further operated upon. In January 1930 Manilal Shivchand Shah absconded and when the Corporation served upon the plaintiff a further demand for payment of the taxes the fraud was discovered.

The question that falls to be determined is whether in those circumstances the respondent bank in receiving payment of this cheque, and crediting the proceeds to the savings bank account of the infant Savitabai, was guilty of negligence.

Now what is the duty of a collecting bank having regard to the terms of S. 131, Negotiable Instruments Act (26 of 1881). In *Commissioners of Taxation* v. *English, Scottish and Australian Bank*

Ltd. (1), Lord Dunedin, delivering the judgment of the Privy Council observed:

"In the case of *Commissioners of State Savings Bank* v. *Permewan Wright & Co.* (2), in the High Court of Australia, Isaacs, J., says: 'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison* v. *London County and Westminister Bank* (3) and relevant to the present case are (i) that the question should in strictness be determined separately with regard to each cheque; (ii) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the banker's mind, and caused them to make inquiry.' If there be inserted after the words "given cheque" the words "coupled with the circumstances antecedent and present," their Lordships think this is an accurate statement of the law."

Applying the law thus laid down to the facts of the present case the question is whether in the circumstances disclosed in the evidence the respondent bank was guilty of negligence in receiving payment of the cheque in suit.

On behalf of the respondent bank it is contended that however suspicious might be the circumstances in connexion with the presentation of a crossed cheque for collection, the collecting bank is under no obligation to make any inquiry for the purpose of ascertaining whether the cheque is a genuine cheque, or whether the endorsements upon the cheque are genuine or forged endorsements. It is urged that the sole obligation of a collecting bank, if it suspects, or is put on inquiry as to, the genuineness of a crossed cheque or the endorsements thereon is to refrain from signing the guarantee of the collecting bank that the endorsements are genuine, and that if it forwards the cheque to the paying bank in that condition it is absolved from further responsibility in the matter. It is contended that in such circumstances, according to the usage of bankers obtaining in Rangoon, the paying bank must elect to pay or not to pay the cheque on its own responsibility and if it pays the cheque the collecting bank is at liberty, however extravagant the endorsements on the cheque might be, to credit the proceeds to the account of the customer who had tendered it for collection. In the first place I am not satisfied that any such usage has been proved in the present case. Whether the usage exists or not is a question of fact, and the usage upon which the respondent bank relies is that in the case of every crossed cheque the collecting bank signs a form guaranteeing the genuineness of the endorsement on the cheque. The only evidence in support of such a usage is to be found in the testimony of Mr. Thakur, the agent of the respondent bank. In corroboration of the usage as stated by Mr. Thakur reliance was placed on the evidence of Mr. Wing, the accountant of Dawsons Bank. The evidence of Mr. Wing however is not to the same effect. He stated that :

"If there is any irregularity in the cheque it is usual for the collecting bank to guarantee the endorsements. If there is no such guarantee it is the usual practice to return the cheque unpaid. If there is no such guarantee the paying bank pays the amount of the cheque on its own responsibility."

I am not satisfied upon the evidence adduced in the present case that a usage in the form stated by Mr. Thakur has been proved, but in my opinion, assuming that a usage of this nature obtains amongst bankers in Rangoon, whatever rights or obligations may arise thereunder as between the collecting and the paying bank, conformity to such a usage would not ipso facto as held by the learned trial Judge, absolve the collecting bank from all further responsibility in connexion with the receipt of a crossed cheque. In every case the test to be applied in order to ascertain whether the collecting bank was guilty of negligence within S. 131, Negotiable Instruments Act, is that laid down by Lord Dunedin in the *Commissioners of Taxation* v. *English, Scottish and Australian Bank Ltd.* (1).

Now, did the collecting bank in the present case, having regard to the facts disclosed in the evidence, take such reasonable care in connexion with the payment of this cheque as a member of the mercantile community conversant with banking business would be expected to take? What information had the respondent bank in its possession when Manilal Shivchand tendered this cheque for collection? Manilal Shivchand was known to the accountant Tracy, whose duty it was to exercise reasonable care in this matter on behalf of the respon-

(1) [1920] A. C. 683=89 L. J. P. C. 181=123 L. T. 34=36 T. L. R. 305.
(2) 19 C. L. R. 457.
(3) [1914] 3 K. B. 356=83 L. J. K. B. 1202=111 L. T. 114=30 T. L. R. 481=19 Com. Cas. 273=58 S. J. 453.

dent bank. Tracy knew that Manilal Shivchand was merely a clerk, and in his evidence Tracy admitted that Manilal Shivchand was not a person upon whose statement the bank would guarantee the endorsement on a cheque. The respondent bank knew that this crossed cheque had been drawn in favour of a public body, the Corporation of Rangoon, for Rs. 2,361-12-0. It knew that the cheque was being tendered for collection by Manilal Shivchand, a man of no substance. It knew that the cheque was presented for collection with instructions that the proceeds should be credited to the savings bank account of an infant, of whom Manilal Shivchand claimed to be the guardian. And the bank also knew that the cheque was endorsed with a rubber stamp "Chief Superintendent, Corporation of Rangoon," and an illegible scribble purporting to be the name of that official written in ink under the rubber stamp. I should have expected that a gentleman entrusted with the duties of the Chief Accountant of the respondent bank would have been acquainted with the names and designations of the senior officials of the Corporation. As a matter of fact, there is no such official as the Chief Superintendent of the Corporation of Rangoon. But for the purpose of this case I will assume that the Chief Accountant of the respondent bank was not to be deemed to have notice that there is not such an official as the Chief Superintendent of the Corporation of Rangoon. Tracy in his evidence stated that he did not know whether there was such an official or not, and there is no reason why his statement should not be believed. At any rate, the endorsement of the cheque would not have enlightened him, because what purported to be the signature of that official was a mere scribble that was wholly illegible.

In my opinion however the most casual perusal of the cheque ought to have aroused suspicion, and put the bank on inquiry as to the genuineness of this endorsement, for it was a crossed cheque drawn in favour of a public body for Rs. 2,361-12-0, and tendered by a mere clerk for collection and payment into a small savings bank account opened by the clerk in favour of an infant of whom he was the guardian. In *Commissioners of Taxation* v. *English, Scottish and Australian Bank, Ltd.* (1) where the question was whether the bank was negligent in crediting a customer's account with the proceeds of a stolen bearer cheque drawn in payment of taxes, Lord Dunedin observed :

"If the cheque had been in a different form things might well have been otherwise. Their Lordships cannot help remarking that to a certain extent the appellants have themselves to thank for what has happened, owing to the terms of their instructions. If they had insisted that in the case of payments made at the office, as they did insist in the case of drafts sent by post, the cheques should be made payable to the Commissioners of Taxation, then there would have been something on the face of the cheque to arouse inquiry. The fact that the cheque was to bearer distinguishes this case from *Commissioners of State Savings Bank* v. *Permewan Wright & Co.* (2). In that case in the case of 36 cheques, the cheques were drawn in favour of the Commissioners, or had such markings on them as showed that they were drawn for the purpose of paying duties. This was held, their Lordships think rightly, to be a circumstance which ought to have put the bank on inquiry when such cheques were presented by a private individual."

Again in *Ross* v. *London County Westminster and Parr's Bank, Ltd.* (4), Bailhache, J., stated that

"the question is whether the employees of a bank authorized to receive its customer's cheques, to whom a private customer presents for collection a crossed cheque payable to and endorsed by a public official, ought before treating the customer as the person entitled to the cheque and receiving payment of it for him, to make inquiry as to the customer's title to the cheque, and in the event of their failing to do so are guilty of negligence..... It is therefore necessary to consider whether a bank-cashier of ordinary intelligence and care on having these cheques presented to him by a private customer of the bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them. Each of the cheques in question was drawn payable to—"The officer in charge, Estates Officer, Canadian Overseas Military Forces," and was endorsed by that officer under the same description. Each cheque bore upon its face the fact that it was payable to the officer of a public department and not to a private person, and the endorsement on each cheque showed that it was being negotiated by that officer. It is not in accordance with the ordinary course of business that a cheque so drawn and endorsed should be used for the purpose of paying the debt of a private individual. It was highly improbable that the officer in charge of the Estates Office would hand to de Volpi cheques in this form with the intention that the latter should pay them into his private account. It therefore seems to me that when de Volpi presented these cheques with a view to having them credited to his private account a

(4) [1919] 1 K. B. 678=88 L. J. K. B. 927=120 L. T. 636=63 S. J. 411=35 T. L. R. 315.

cashier of ordinary intelligence and experience should have been put on inquiry whether or not the credit ought to be made. I have come to the conclusion that the employees of the defendants in treating de Volpi as the person entitled to the cheques and in receiving or assisting in receiving payment of the cheques for him without making any inquiry whether he was entitled to the cheques, failed to exercise due care and were guilty of negligence, and therefore that the defendants are not within the protection of S. 82."

In that case the statute that was applicable was S. 82, English Bill of Exchange Act, 1882, which is to the same effect as S. 131, Negotiable Instruments Act. I respectfully agree with the observations of Bailhache, J., in *Ross'* case (4) confirmed as they were by the Court of appeal in *A. L. Underwood, Limited* v. *Bank of Liverpool and Martins* (5) at p. 793, and applying the test laid down by Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank, Limited* (1), I am clearly of opinion that the respondent bank on receiving the cheque in suit tendered for collection by Manilal Shivchand in order that the proceeds should be credited to Savitabai's account was under an obligation to make inquiry as to whether the customer was entitled to receive the proceeds of this cheque, having regard to the form of the cheque and its endorsement, and the circumstances in which it was tendered for collection. But the case does not rest there, because at the time when it was tendered for collection there was also a further endorsement on this cheque: "Pay signature guarantee for Savitabai Manilal Shivchand." Now, although these words do not make sense if strictly read, it may be taken, I think, that Manilal Shivchand endorsed the cheque in this way because he thought it well to volunteer his personal guarantee of the genuineness of the endorsement which purported to be that of the Chief Superintendent of the Corporation of Rangoon. Why should Manilal Shivchand have volunteered to give such a guarantee unless he was afraid that the respondent bank, acting with such prudence as a banker is bound to exercise in the course of his business, would suspect the genuineness of what purported to be the endorsement of the Corporation of Rangoon? Tracy, observing this endorsement by Manilal Shivchand on the back of the cheque, at once decided that he could not act upon such an endorsement, or place any reliance on a guarantee by such a person as Manilal Shivchand. In those circumstances, in my opinion, the respondent bank was bound to satisfy itself that Savitabai was entitled to receive payment of this cheque before it credited the proceeds to the savings bank account that had been opened in her name.

Now, with all this information in its possession creating suspicion as to the genuineness of this endorsement, were any inquiries instituted by Tracy or any one else on behalf of the respondent bank to ascertain whether the endorsement was genuine or a forgery or whether Savitabai was entitled to receive payment of the cheque? None whatever. Why not? Because the respondent bank, forsooth, contended that it was absolved from all responsibility in connexion with the collection of this cheque after having sent the cheque to Dawsons Bank without a guarantee by the bank that the endorsement was genuine. Such a contention, in my opinion, is wholly misconceived and unsustainable. Why was it that this cheque was paid? I am satisfied and hold that it was paid because of the negligent conduct of the respondent bank. The simplest inquiry would have disclosed that the endorsement on this cheque, purporting to be that of the Corporation, was a forgery. If the respondent bank had sent the cheque to the officers of the Corporation of Rangoon for perusal and information as to whether the endorsement purporting to be that of the Chief Superintendent of the Corporation of Rangoon was genuine or not, they would have received an answer back in less than ten minutes. The answer would have been that the endorsement was a forgery, and the reasonable suspicion as to its genuineness that the respondent bank had entertained would have been justified. Or, again, if the respondent bank had informend Dawsons Bank of the facts in its possession in connexion with the receipt of this cheque, and the circumstances in which it had been tendered for collection by Manilal Shivchand, no one can doubt that Dawsons Bank would not have paid the cheque. Mr. Tracy in his evidence stated that he made no inquiries because he had "no time," and

(5) [1924] 1 K. B. 775=93 L. J. K. B. 690=131 L. T. 271=26 Com. Cas. 182=68 S. J. 716=40 T. L. R. 302.

it was urged by the learned advocate on behalf of the respondent bank that business could not be carried on if banks were bound to investigate the right of their customers to receive the proceeds of all cheques that were tendered for collection. No doubt that is so, and I do not suggest that banks are under any such obligation, but the answer to the respondent's contention is that

"if banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customer the risk of liability because they do not inquire: per Scrutton, L. J., in *A. L. Underwood, Limited* v. *Bank of Liverpool and Martins* (5)."

Now this case turns solely upon an issue of fact, and no question of law is involved, for whether or not a collecting bank is guilty of negligence within S. 131, Negotiable Instruments Act, must depend upon the particular circumstances obtaining in each case. In the present case, with all due respect to the learned trial Judge, I have no doubt that the respondent bank was guilty of negligence in receiving payment of this cheque for Savitabai, and that the plaintiff is entitled to a decree. The result is that the appeal is allowed, the decree of the trial Court set aside, and a decree passed in favour of the plaintiff for the sum claimed, and interest thereon at 6 per cent. from the date of judgment, and costs in both Courts. The learned advocate on behalf of the appellant is entitled to special costs as awarded to the learned advocate for the respondent bank in the trial Court.

Sen, J.—I agree.

B.V./R.K. *Appeal allowed.*

A. I. R. 1932 Rangoon 11

PAGE C. J. AND SEN, J.

Abdulla Abdul Gani—Appellant.

v.

B. K. Chatterjee—Respondent.

Civil Misc. Appeal No. 33 of 1931, Decided on 7th July 1931, against order of Dist. Judge, Myaungmya, in Civil Regular Suit No. 95 of 1930.

Civil P. C. (1908), S. 51—Interim receiver appointed at instance of decree-holder cannot sue for possession of property after sale certificate has been granted to auction-purchaser—In case of suit by receiver Court cannot apply provisions of Civil P. C. (1908), O. 1, R. 10.

An interim receiver appointed at the instance of the decree-holder becomes functus officio after the sale of the property in execution of the decree and grant of sale certificate in favour of the purchaser, and the Court has no power to allow him to file suit for possession on behalf of the auction-purchaser who alone is entitled to sue for possession. When such a suit is instituted by the receiver the Court ought not to exercise the jurisdiction vested in it under O. 1, R. 10.

A obtained a mortgage decree against *B* and applied for execution on 8th April 1927. On 14th May 1927 *B* sold part of the property to *C*. Subsequently an interim receiver of the mortgaged property was appointed at the instance of *A*. In January 1929 the whole property including that sold to *C* was sold in auction in execution of the decree and was purchased by *A*. No objection being raised by *B* or anyone else the sale was confirmed and a sale certificate was granted. The sale proceeds proving insufficient to satisfy the decree a personal decree for the balance was passed against *B*. Subsequently the receiver after obtaining leave to sue *C* for possession of the property sold to him on the ground that he refused to deliver possession thereof, filed a suit against *C*:

Held: that after the sale certificate had been issued the person who was entitled to sue for possession of the property was the auction-purchaser *A* and not the receiver and that it was not a case in which the Court ought to exercise jurisdiction under O. 1, R. 10. [P 12 C 2]

Leach and *Ganguli*—for Appellant.

P. S. Chari—for Respondent.

Judgment.—This appeal must be allowed. On 15th March 1927, a Chettyar firm obtained a mortgage decree against one Po Sin. On 8th April 1927 an application was made for execution of the mortgage decree. On 14th May 1927, the judgment-debtor sold part of the property subject to the mortgage to the appellant. On 19th July 1928 an interim receiver of the mortgaged property was appointed at the instance of the decree-holder, and the interim appointment of the receiver was confirmed on 26th November 1928. The receiver was appointed because the wife of the judgment-debtor had filed a declaratory suit claiming an interest in the mortgaged property, and also had applied for a stay of the sale in execution of the decree, and the learned District Judge was of opinion that the best way of "frustrating the design of the judgment-debtor and his wife" to defeat and obstruct the sale in execution of the decree was to appoint a receiver.

The receiver who was appointed was the present respondent. On 14th January 1929 the whole of the property subject to the mortgage was sold in execution of the decree, including the property sold on 14th May 1927, to the appellant,

and the property was purchased by the decree-holder. No objection was raised by the judgment-debtor or anyone else to the sale. On 11th June 1929 the sale was confirmed, and on 29th September 1929 a sale certificate was granted. On 14th December 1929, as the proceeds of the sale were not sufficient to satisfy the decree, a personal decree for the balance was passed against the judgment-debtor. On 18th November 1930, the receiver, as receiver, applied for leave to sue the appellant for possession of the property sold to him, upon the ground that he had refused to deliver up possession of the property to the receiver, and on 3rd December leave in the behalf having been granted, the present suit was filed. A preliminary issue as to whether the suit was maintainable was tried and determined by the learned District Judge, who passed a decree in favour of the respondent. The appellant thereupon filed the present appeal.

There is only one point that falls for determination in the appeal, namely, whether in the circumstances obtaining in the present case, the respondent, receiver, was entitled to sue for possession of the property. On behalf of the respondent it is urged that inasmuch as the receiver was granted all the powers that a receiver could be given under O. 40, he was entitled as receiver to sue for possession of the property. On the other hand it is urged on behalf of the appellant that as a sale certificate was granted by the Court to the Chettyar who had bought the property at the auction sale, the only person entitled to recover possession of the property was the auction-purchaser. Now, it is common ground that the effect of the sale certificate was that an absolute title to property in suit passed to the auction-purchaser, and it is also conceded on behalf of the respondent that the right of the receiver to sue did not depend upon the receiver possessing any title to the property but upon the authority in that behalf that he had been given under the order of the Court. In my opinion, in so far as the Court granted him authority to sue for possession of this property the authority granted in that behalf must be taken to have been withdrawn when the Court by the certificate of sale granted an absolute title in the property to the auction-purchaser, thereby authorizing him to sue for possession thereof. It became obvious that that was the position after the following question had been put to the learned advocate for the respondent :

"Assume that the receiver brought a suit for possession, and that the auction-purchaser also brought a suit for possession, (it being common ground that they are not entitled to possession in the same right) which suit would succeed, and which suit would fail ?"

To that question there can be but one answer. I am clearly of opinion that the suit of the auction-purchaser would succeed. In my opinion after the sale certificate had been issued the person who was entitled to sue for possession of the property was the auction-purchaser, and not the receiver. The result is that the suit fails.

It was however further urged on behalf of the receiver that this is a case in which the Court ought to exercise the jurisdiction with which it is invested under O. 1, R. 10. In my opinion, in the circumstances obtaining in this case, the Court ought not to accede to that contention. Why the Chettyar elected to allow the suit to be filed for possession by the receiver is a matter of conjecture. It may be as suggested by the learned advocate for the respondent, that he took that course because he thought that a suit brought by an officer of the Court would be more likely to succeed, than a suit brought by a Chettyar ; or again, it may be that his advisers took the view that if the Chettyar himself brought a suit for possession he might find his claim countered by the provisions of S. 47, Civil P. C. Be that as it may, it is quite clear that whatever the amount of mesne profits the receiver might be able to claim all that the auction-purchaser would be entitled to recover would be mesne profits from the date upon which the sale took place. In these circumstances, in our opinion, the Court ought not to apply the provisions of O. 1, R. 10.

The result is that the appeal is allowed, the decree of the District Court set aside, and the suit dismissed. We make no order as to costs.

Sen, J.—I agree.

R.M./R.K. *Appeal allowed.*

A. I. R. 1932 Rangoon 13

PAGE, C. J. AND SEN, J.

Ah Foon—Appellant.

v.

Hoe Lai Pat and *others*—Respondents.

First Appeal No. 54 of 1931, Decided on 27th July 1931, against decision of High Court on Original Side in Civil Regular No. 410 of 1930.

(a) Transfer of Property Act (1882), S. 53—Principles underlying S. 53 should be applied to transfer of moveable property.

The principles underlying 13 Eliz., Ch. 5, and S. 53, T. P. Act, ought to be applied in India to transactions relating to the transfer of moveable property, upon the ground that those principles are in accordance with justice, equity and good conscience : 10 *Cal.* 616, *Foll.* [P 13 C 2]

(b) Transfer of Property Act (1882), S. 53—Innocent transferee for value is protected—Mere knowledge of impending execution against transferor does not make transfer mala-fide.

The object of the last paragraph in S. 53 is to protect an innocent transferee for value notwithstanding that the transferor may be actuated by a desire to defeat or delay his creditors. The mere knowledge of an impending execution against the transferor is not sufficient to make the transferee a transferee otherwise than in good faith when he does not share the intention of the transferor to defeat or delay his creditors. But a transferee for value who accepts the transfer for the purpose of helping the transferor to convert his immovable property in money which can be easily concealed and kept out of reach of his creditors and thus defeat the creditors cannot be said to be a transferee in good faith : 24 *Cal.* 825 and 22 *W. R.* 473, *Fcll.* ; (*English cases referred*). [P 14 C 1,2]

(c) Transfer of Property Act (1882), S. 53—Fair value—Presumption is that transaction is bona fide.

Where it is proved that the transferee paid what was the fair value of the property the Court will lean towards holding that the transferee acted bona fide in the transaction : 5 *Bom. L. R.* 142, *Foll.* [P 15 C 1]

Clifton and *Sein Tun Aung*—for Appellant.

Hay—for Respondents 2, 3 and 4.

Page, C. J.—At one time the plaintiff and defendant 1 were in partnership. The partnership was dissolved in 1927. In February 1930 the plaintiff obtained a decree for over Rs. 40,000 against defendant 1 and forthwith applied for execution of the decree. On 21st March 1930 execution issued by way of personal arrest of defendant 1, but it was not possible to effect his arrest, and on 28th March the plaintiff in execution of the decree attached certain timber which was lying in the godown of defendant 1 within the Rangoon foundry.

When the attachment was made, defendant 2 informed the bailiff that on 24th March 1930 he and defendants 3 and 4 jointly had purchased all the timber lying in defendant 1's godown, exclusive of some timber that was newly cut, and timber of European quality. As the plaintiff refused to withdraw his attachment an objection to the attachment was filed in the execution proceedings by defendants 2 to 4, and their objection was upheld. Thereupon the plaintiff instituted the present suit for a declaration that at the time of the attachment the property in the timber remained in defendant 1, and that the sale by defendant 1 to defendants 2 to 4 was voidable as being a transaction made with intent to defeat and delay the creditors of defendant 1.

Now at Common law and apart from insolvency, a person may dispose of his property as he chooses. He is at liberty to pay his creditors in any order, preferring one or more of them to the others; and although he is in embarrassed circumstances he may transfer his property or any part thereof by way of sale, gift or otherwise, provided the transaction does not infringe the provisions of S. 53, T. P. Act, which relates to immovable property, or the rules set out in 13 Eliz., ch. 5.

Now, 13 Eliz., ch. 5 was repealed by the Transfer of Property Act (1882), but it has been held that the principles underlying 13 Eliz., ch. 5, and I take it also S. 53, T. P. Act, ought to be applied in India to transactions relating to the transfer of moveable property upon the ground that those principles are in accordance with justice, equity and good conscience : *Abdul Hye* v. *Mir Mahomed Mozaffar Hossein* (1).

It follows therefore in the present case that if the transfer by defendant 1 to defendants 2 to 4 was a transfer made with intent to defeat or delay the creditors of defendant 1 it was voidable at the option of any creditor so defrauded provided that the rights of defendants 2 to 4 would be preserved if they were bona fide transferees of the property for consideration.

In *Twyne's* case (2), it was held that : "notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said Act of 13 Eliz., by which it was provided that the said

(1) [1884] 10 Cal. 616=11 I.A. 10.

(2) 3 Coke 80.

Act shall not extend to any estate or interest in lands, etc., goods or chattels, made on a good consideration and bona fide ; for, although it is on a true and good consideration, yet it is not bona fide, for no gift shall be deemed to be bona fide within the said proviso which is accompanied with any trust."

And in *Alton* v. *Harrison* (3) Giffard, L. J., observed :

"I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is bona fide that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the Statute of Elizabeth ; see also *Ex parte Games* (4), *Maskelyne* v. *Smith* (5), *Glegg* v. *Bromley* (6) and *Re Fasey* (7)."

In my opinion however the rule laid down in *Twyne's* case (2) and in *Alton* v. *Harrison* (3) does not necessarily determine the matter, and I agree with the observations of Mukerjee and Holmwood, JJ., in *Hakim Lal* v. *Mooshahar Sahu* (8), at p. 1012 :

"that if the intent of the transferor is not only to sell the property, but forthwith to abscond with the proceeds so as in effect to withdraw the property from the fund available for the creditors without providing an equivalent, in such cases, there would be an intention to defraud creditors which, if the purchaser had notice of it, would avoid the sale. To put the matter in another way, although a transfer, which is a mere cloak for the retention in the grantor of a benefit in the property transferred, is not a transfer in good faith, the test is by no means exhaustive; there may be cases in which the transferee is intended to take an absolute title in the property, but the object of the transfer is to convert land into money, and thus place it beyond the reach of the creditors of the grantor; a transfer of this description cannot legitimately be regarded as a transfer made in good faith."

In my opinion, the true rule was laid down in *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (9) in which Maclean, C.J., and Banerjee, J., observed:

"A consideration of the section taken as a whole, leads us to the view we have taken, that the object of the last paragraph of S. 53 is to protect an innocent transferee for value, notwithstanding that the transferor may be actuated by a desire to defeat or delay his creditors. But there arises a further question, whether where a transferee for value has knowledge of an impending execution against the transferor, such knowledge itself is sufficient to vitiate the transfer and make it one not in good faith, notwithstanding that the transferee may not be aware of any intention on the part of the transferor to defeat or delay his creditors, and notwithstanding that he may honestly believe that the sale is resorted to for the purpose of paying the creditors. We are of opinion that mere knowledge of an impending execution against a transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when he does not share the intention of the transferor to defeat or delay his creditors.

This view is fully supported not only by reason, but also by authority ; see the case of *Ramburan Singh* v. *Jankee Sahoo* (10). We are not prepared however to accept as correct the extreme contention urged on behalf of the appellant, that all that was necessary to constitute a transferee in good faith within the meaning of S. 53 was that the transfer should be real, and that, although the transferee might share the intention of the transferor to defeat or delay creditors, he would still be a transferee in good faith. It cannot be said that a transferee for value who accepts the transfer for the purpose of helping the transferor to convert his immovable property into money which can easily be concealed and kept out of the reach of his creditors, and thus defeat or delay the creditors, is a transferee in good faith within the meaning of S. 53. Indeed, it would almost be a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immovable property into money which can easily be concealed, and thus to defeat or delay his creditors, should nevertheless be treated as a transferee in good faith, and the transfer to him should be upheld, though S. 53 says that a transfer made with such intention is voidable at the opinion of the creditors: see also *Palamalai Mudaliar* v. *The South Indian Export Company, Limited* (11), *Aftabuddin Chowdhury* v. *Basanta Kumar Mukhapadahyaya* (12) and *Kamini Kumar Roy* v. *Hira Lal Pal Chowdhury* (13)."

Now, such being the law, it is necessary to consider whether the facts disclosed in the evidence bring the present case within the ambit of the principles that I have enunciated. As regards defendant 1, I have no doubt that by selling this timber to defendants 2 to 4 defendant 1 intended to convert into cash 110 tons of timber, which could not easily be removed, in order that he might be in a position to make away with the proceeds of the sale thereby defeating and delaying his creditors. Defendant 1 succeeded in attaining the object that he had in view, because after the sale had been completed he abscon-

(3) [1869] 4 Ch. A. 622=38 L. J. Ch. 669=21 L. T. 282=17 W. R. 1034.
(4) [1879] 12 Ch. D. 314=40 L. T. 789=27 W. R. 744.
(5) [1902] 2 K. B. 158=71 L. J. K. B. 476=86 L. T. 832=9 Manson 139.
(6) [1912] 3 K. B. 474 = 81 L. J. K. B. 1081= 106 L. T 825.
(7) [1923] 2 Ch. 1=92 L. J. Ch. 400 = (1923) B. & C. R. 8=129 L. T. 132.
(8) [1907] 34 Cal. 999=11 C. W. N. 889=6 C. L. J. 410.
(9) [1897] 24 Cal. 825=1 C. W. N. 665.
(10) [1874] 22 W. R. 473.
(11) [1910] 33 Mad. 334=5 I. C. 33.
(12) [1918] 45 I. C. 441.
(13) [1919] 51 I. C. 736.

ded with Rs. 13,000 which had been paid to him by defendants 2 to 4 as the purchase price of the timber. It follows therefore that unless defendants 2 to 4 as transferees of the timber are able to satisfy the Court that they took the timber as bona fide transferees for valuable consideration, the plaintiff must succeed.

As regards consideration it was, and could not have been, contended upon the evidence that the finding of the learned trial Judge could be challenged that a sale was effected of this timber to defendants 2 to 4 under which the transferees paid a fair price for the goods that they purchased. In my opinion, it is clear that the price that was paid was not less than the market value of the timber. 110 tons of timber was bought, and the purchase price that was paid by defendants 2 to 4 to defendant 1 was Rupees 13,000. That sum was paid as follows:

		Rs.
On the 24th of March	...	100
On the 26th of March	...	12,500
On the 27th of March	...	400

Between the date of the sale and 28th March when the attachment was effected defendants 2 to 4 removed from the godown of defendant 1, 70 tons of the timber, the quantity remaining in the godown being about 40 tons. In his statement of claim the plaintiff valued the 40 tons of timber that was attached at Rs. 4,000, that is to say, at Rs. 100 a ton. It follows therefore that if the value put upon this timber by the plaintiff was fair and reasonable, and I think it was the price that defendants 2 to 4 paid for the 110 tons which they purchased was not less than the fair market value of the timber.

Now, where it is proved that the transferee paid what was the fair value of the property transferred to him, the Court will lean towards holding that the transferee acted bona fide in the transaction: *Amarchand Jethabhai* v. *Gokul Bapu* (14), and it is necessary to consider whether in these circumstances the Court would be justified upon the evidence in coming to the conclusion that defendants 2 to 4 were not acting bona fide in the transaction, because at the time when they purchased the timber they knew that the intention of defendant 1 by transferring the timber to them was to defeat and delay his creditors. In the statement of claim no such allegation was made, for in para. 4 the plaintiff avers

"that the alleged purchase of the said converted timber was a bogus one, without consideration, or without adequate consideration, not bona fide and made with knowledge on the part of the defendant of the impending attachment."

Nor in the memorandum of appeal filed by the plaintiff was it made a ground of appeal that defendants 2 to 4 knew of the intention of defendant 1 to defeat and delay his creditors. In para. 1 of the memorandum of appeal the plaintiff set out the contention

"that, having found that respondent 1 sold and the rest of the respondents purchased the timber with knowledge of the impending attachment, the learned Judge should have avoided the transaction by applying and extending the principles underlying S. 53, T. P. Act, to moveables."

Further, no witness was called on behalf of the plaintiff to prove that defendants 2 to 4, when they purchased the timber, were aware of the intention of defendant 1 by means of the transaction to defeat and delay his creditors. Ah Moon, a witness called on behalf of the plaintiff, stated that at the time when the sale was effected defendant 1 told defendants 2 to 4 that his object in selling the timber was to effect a quick sale, because he was afraid that the timber would be attached by the plaintiff. Ah Moon did not suggest that any information was given to defendants 2 to 4 other than that defendant 1 was anxious to sell the property before it was attached in execution of the plaintiff's decree. If that was all that defendants 2 to 4 knew, the Court ought not for that reason alone to treat them as not being bona fide transferees of the timber: *Wood* v. *Dixie* (15), *Darvill* v. *Terry* (16), *Hale* v. *Saloon Omnibus Co.* (17) and *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (9).

Moreover, why should defendant 1 have been anxious or willing to confide to defendants 2 to 4 the object that he had in view in selling the timber to them?

No reason was suggested to justify the Court in assuming that defendant 1 would be likely to do so, and the probabilities of the case are against it, for the plaintiff and defendant 1 being Chinamen and defendant 2 to 5 Indians, one would not expect defendant 1 to give any more information to defendants 2 to 4 than was

(14) [1903] 5 Bom. L. R. 142.

(15) [1881] 7 Q. B. D. 892=9 Jur. 796.
(16) [1861] 6 H. & N. 807=30 L. J. Ex. 355.
(17) [1857] 4 Drew. 492.

necessary for the purpose of effecting a quick sale of the timber.

The learned advocate for the appellant however urged the Court to infer from the form of Ex. 1, which embodied the terms of the agreement of sale, that the transaction was a mere sham, and was carried through by the parties thereto with the intention thereby to defeat and delay the creditors of defendant 1.

In *Twyne's* case (2) reliance was placed upon the maxim *clausuloe inconsuetoe semper inducunt suspicionem*; and the learned advocate for the appellant contended that the form of Ex. 1 was so strange that the Court ought to hold that it was not a genuine agreement for sale, but had been created to bolster up what was in truth a colourable and bogus transaction. By Ex. 1, which was dated 24th March, it was agreed between the parties inter alia that defendant 1 should be paid the purchase price by 12 noon on 26th March; that the timber should be cleared within a week from 24th March; and that if the purchasers failed to remove the material within ten days they should pay Rs. 100 a day as compensation for damage to the godown. The terms of the agreement to which the learned advocate for the appellant takes exception however are equally consistent with knowledge on the part of the transferees that defendant 1 desired that the sale should be completed with all possible despatch in order to prevent an effective attachment of the timber by the plaintiff. It was further urged on behalf of the appellant that, inasmuch as the timber was sold without measurement it cannot be treated as a genuine transaction. It so happens however that the guess which was made by defendants 2 to 4 as to the value of the timber was a sound one; for it is not now disputed that the amount of the timber lying in the godown was about 110 tons, and that the purchase price was rather more than what the plaintiff himself estimated to be the fair market value of the timber. This sale was an out and out sale, at a fair market price, openly carried through by the defendants, and it is not pretended that in this transaction the parties agreed that there should be any trust created in favour of defendant 1, or that defendant 1 obtained any benefit under the transfer except the purchase price of the timber that was paid to him by defendants 2 to 4.

I am of opinion that the conclusion at which the learned trial Judge arrived was correct. It is not now contended that the transfer was not for good consideration, and, in my opinion, the evidence fails to establish that defendants 2 to 4 were not bona fide transferees of the property that they bought.

For these reasons the appeal fails, and must be dismissed with costs, advocate's fees 10 gold mohurs. The cross-objection was not pressed and is dismissed without costs.

Sen, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Rangoon 16

PAGE, C. J. AND MYA BU, J.

Ma Thaw May—Appellant.

v.

Mahomed Eusoof—Respondent.

Civil First Appeal No. 15 of 1931, Decided on 6th August 1931, against decree of District Judge, Bassein, in Civil Reg. No. 59 of 1928.

Civil P. C. (1908), O. 41, R. 20—Administration suit by nephew of deceased against their heirs, viz., deceased's widow and niece, decreed giving certain share to each—Appeal by widow joining nephew only—At hearing appeal time barred as against niece — She cannot be made respondent—Appeal could not proceed in absence of niece.

Where a suit for the administration of the estate of the deceased by his nephew against the deceased's widow and niece is decreed giving certain share to each of the heirs on report of the Commissioner and the widow appeals joining the nephew only as respondent the appellant cannot be allowed to join the niece as respondent where at the hearing the appeal as against the niece is time barred as under the decree she had obtained a valuable right to have the estate distributed upon the basis of the decree. The appeal also cannot be allowed to proceed in the absence of the niece if in case the appeal as against the respondent proved to be successful the effect would be that there would be in existence two inconsistent decrees one of the High Court and the other of the lower Court with respect to the subject-matter of the suit: *A. I. R.* 1927 *P. C.* 252; *A. I. R.* 1926 *Cal.* 893 and *A. I. R.* 1927 *Pat.* 23, *Rel. on.* [P 17 C 1, 2]

M. A. Rauf—for Appellant.

P. B. Sen—for Respondent.

Judgment.—Although the pleadings in this suit are not artistically drawn, there can be no doubt that in substance it is a suit by one of the heirs of U Po Aing against the other heirs for administration of his estate. It was agreed between the parties that the plaintiff and defendants 1 and 2 were the sole heirs of U Po Aing, the plaintiff being

his nephew, defendant 1, his wife and defendant 2, his niece.

At the trial it was common ground that defendant 2 was entitled to a fourth share in the estate the dispute being whether the plaintiff was entitled to a half-share and defendant 2 to a quarter-share.

The learned Judge decided that the plaintiff was entitled to a share twice as great as the share of defendant 2, that is to say, at the trial it was proved or admitted that the plaintiff was entitled to a half-share, defendant 1 to a fourth share and defendant 2 to a fourth share and a preliminary decree was passed for accounts to be taken upon that footing. In due course the commissioner presented his report and this report was considered by the learned District Judge who passed a final decree setting out the details of the estate of which administration had been decreed.

Defendant 1 appealed to the High Court against the final decree of the District Court making the plaintiff a respondent but failing to implead defendant 2 as a respondent. In these circumstances a preliminary objection has been raised on behalf of the respondent that in the absence of defendant 2 the appeal cannot proceed. It was further contended that the Court in the circumstances of the case ought not to allow defendant 2 to be impleaded as a respondent. In my opinion the preliminary objection must prevail. Under the decree of the District Court defendant 2 acquired a valuable right namely to have the estate distributed upon the basis of that decree and if she were to be impleaded now she would be made a respondent after an appeal as against her had been barred by limitation. In my opinion in such circumstances the Court ought not to allow the appellant to implead defendant 2 as a party respondent to the appeal.

Now in the absence of defendant 2 ought the appeal to be allowed to proceed? The test to be applied is this. Assume that the appeal against the respondent proved to be successful would the effect be that there would be in existence two inconsistent decrees one of the High Court and the order of the District Court with respect to the subject-matter of the suit? In my opinion there would. In the memorandum of appeal the appellant alleges that the items representing the estate under administration were not correctly found in the report of the commissioner or set out in the decree of the District Court. In respect of certain items the appellant contends that increased deductions ought to be allowed to her in respect of disbursements that she had made and that in respect of certain properties she should receive a larger share than under the decree was allotted to her. If the appeal were to succeed in respect of all or any of the items set out in the memorandum of appeal the decree of this Court as against the respondent would both in form and in substance vary from the decree passed by the District Court which as between the parties to the appeal and defendant has become conclusive. In these circumstances the appeal cannot be allowed to proceed (*V. P. R. V. Chokaligum Chetty* v. *Seeihai Acha* (1) *Midnapur Zamindari Co. Ltd.* v. *Amulya Nath Roy Chowdhury* (2) and *Badri Narayan* v. *E. I. R. Company* (3).

The appeal accordingly is dismissed. There will be no order as to costs.

Mya Bu, J.—I agree.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1927 P. C. 252 = 107 I. C. 237 = 6 Rang. 29 (P. C.).
(2) A. I. R. 1926 Cal. 893 = 95 I. C. 649 = 53 Cal. 752.
(3) A. I. R. 1927 Pat. 23 = 93 I. C. 1003 = 5 Pat. 755.

A. I. R. 1932 Rangoon 17

PAGE, C. J. AND SEN, J.

Mahomed Yacoob—Appellant.

v.

P. L. R. M. Firm and *others* — Respondents.

First Appeal No. 42 of 1931, Decided on 15th July 1931, against decision of Dist. Judge, Toungoo, in Civil Regular No. 1 of 1930.

(a) Civil P. C. (1908), O. 21, Rr. 65, 69, 84 and 90—Sale is complete when bid is accepted by receiver and deposit of 25 per cent is made.

A sale by a receiver appointed under O. 21, R. 65, is complete when the bid is accepted by the receiver and deposit of 25 per cent of the purchase price is paid by the auction-purchaser : 27 *I. C.* 805 and *A. I. R.* 1929 *Rang.* 311, *Foll.*; *A. I. R.* 1929 *Rang.* 12 ; *A. I. R* 1923 *Pat.* 325 and *A. I. R.* 1931 *Cal.* 583, *Diss. from.*

[P 18 C 1]

(b) Civil P. C. (1908), Appendix E, Form 29, Condition 3 — Condition 3 gives Court quasi revisional discretion.

The effect of condition in the form of proclamation in Appendix E form 29, is to give the Court a quasi revisional discretion in the matter and not to require the Court itself to knock down the property : 27 *I. C.* 805 and 19 *C. W. N.* 633, *Foll.* [P 19 C 1]

Mootham—for Appellant.

Hay—for Respondents.

Page, C. J.—This appeal must be dismissed.

The appellant purchased certain property at an auction-sale held by a receiver authorized by the Court on that behalf. The appellant was the highest bidder ; the property was 'knocked down' to him, and he paid 25 per cent of the purchase price to the receiver. Subsequently, on the same day, he wrote to the receiver informing him that he had purchased the property under a misapprehension as he understood that there were no incumbrances upon the property, but that after the sale he had been informed that there were incumbrances thereon, and he therefore requested the receiver to resell the property, by so doing in effect withdrawing his bid. He has brought this present suit inter alia for a declaration that the property had not been sold to him. His suit has been dismissed. On appeal the learned advocate on behalf of the appellant contended that the appellant was entitled to withdraw his bid until such time as the District Court had formally accepted his bid, and that in the circumstances no sale had taken place. In my opinion, this contention on behalf of the appellant is misconceived, and cannot be accepted.

Under O. 21, R. 65, the receiver was duly authorized by the District Court to conduct the sale, and under O. 21, R. 84, the appellant was declared by the receiver to be the purchaser, and immediately afterwards paid the deposit of 25 per cent of the purchase price. In my opinion, when his bid was accepted by the receiver and the deposit of 25 per cent of the purchase price had been paid the sale was effected : vide *Rajendra Prosad Jha* v. *Upendra Nath Jha* (1) and *Maung Ohn Tin* v. *P. R. M. P. S. R. M. Chettyar Firm* (2). I am of opinion that the ruling of Chari, J., in *Afauzuddin* v. *Howell* (3) that when property is 'knocked down' to the highest bidder there is a conditional offer to purchase the property by the bidder, which he is at liberty to withdraw unless and until his bid is accepted by the Court, was wrongly decided, and must be regarded as overruled. Of course, if there is a rule of practice in the Court that the officer conducting the sale shall not be entitled to accept a bid or conclude the sale, and that such officer is given authority merely to record the bids and forward the bid sheet to the Court in order that the Court may accept or reject the bids or any of them, it follows that no sale takes place until the Court has accepted the bid. Such a practice appears to obtain in Bihar and Orissa, but there is no such practice in Burma. In the circumstances of any particular case it may be found as a matter of fact that the officer conducting the sale did not accept the offer made by the highest bidder, but had referred the offer to the Court in order that the Court should accept or reject it. In a case of that description, no doubt, there would be no completed sale until the offer of the highest bidder was accepted, but that is a question of fact to be determined according to the circumstances of each case.

In *Jaibahadar Jha* v. *Matukdhari Jha* (4), it appears that a number of bids were made, and as stated by Macpherson, J. :

"The nazir sent the bid-sheet, in accordance with practice, to the Munsif who wrote "Close" against the last offer, and signed the order."

It was held, and I respectfully think rightly held, that in the circumstances of that case there was no completed sale by the nazir.

But if, and in so far as, that case decided as a matter of law that until the Court accepts a bid at a Court sale there can be no completed sale I am unable to agree with that decision, and I am of opinion that the law thus stated is not correct.

Condition 3 of the form of proclamation of sale (see Appendix E, Form 29, Civil P. C.), runs as follows :

"*Condition* 3.—The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the

(1) [1915] 27 I C. 805.
(2) A.I.R. 1929 Rang. 311=120 I.C. 142=7 Rang. 425.
(3) A.I.R. 1929 Rang. 12=114 I.C. 522=6 Rang. 609.
(4) A.I.R. 1928 Pat. 525=76 I.C. 113=2 Pat. 548.

Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so."

But as pointed out in *Rajendra Prosad Jha* v. *Upendra Nath Jha* (1), the effect of condition 3 is to give the Court a quasi revisional discretion in the matter, and not to require the Court itself to 'knock down' the property.

In *Surendramohan Sarkar* v. *Manmathanath Banerji* (2), a Bench of the Calcutta High Court appears to have accepted the view of the law as enunciated by the Patna High Court in *Jaibahadar Jha* v. *Matukdhari Jha* (3). In *Surendramohan Sarkar's* case (2) however it appears that the sale was conducted by the nazir, who did not purport himself to accept the plaintiff's bid, although it was the highest bid that was made, but sent the bid-sheet to the Subordinate Judge for the learned Judge for him to consider whether he would accept any of the bids. Upon the facts of that case therefore in my opinion, it was rightly held that there was no completed sale when the nazir recorded the bid, but in so far as the learned Judges in *Surendramohan Sarkar* v. *Manmathanath Baneri* (5), followed the view of the law laid down by the Patna High Court in *Jaibahadar Jha* v. *Matukdhari Jha* (4), I respectfully dissent from that ruling. In my opinion, the law was correctly stated in *Rajendra Prosad Jha* v. *Upendra Nath Jha* (1) and *Maung Ohn Tin* v. *P. R. M. P. S. R. M. Chettyar Firm* (2). For these reasons, in my opinion, the appeal fails, and must be dismissed with costs 10 gold mohurs.

Sen, J.—I agree.

R.M./R.K. *Appeal dismissed.*

(5) A.I.R. 1931 Cal. 583=134 I.C. 447=58 Cal. 788.

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* A. I. R. 1932 Rangoon 19

Special Bench

PAGE, C. J., BAGULEY AND DAS, JJ.

Commissioner of Income-tax, Burma—Applicant.

v.

Hajee Cassim Tayoob Surty—Respondent.

Civil Reference No. 11 of 1931, Decided on 25th November 1931, from reference made by Commissioner of Income-tax.

*** Income-tax Act (1922), S. 2 (1) (a)—Sabape loan income is not agricultural income.**

Income derived from 'sabape' loans (loans made in cash at the beginning of the cultivating season and repayable in paddy at harvest time) is not agricultural income not being rent or revenue derived from land within S. 2 (1) (a). The fact that the lender is the landlord of the borrower is immaterial : *A. I. R.* 1925 *Cal.* 929, *Dist.* [P 19 C 2]

E. A. Eggar—for Commissioner of Income-tax, Burma.

Foucar—for Assessee.

Page, C. J.—The question propounded is :

"Whether such portion of assessee's income as was derived from Sabape loans was 'agricultural income' within the meaning of the Income-tax Act."

Under S. 2 (1) (a) of the Act "agricultural income" means :

"any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such"

and the question that falls for determination is whether the assessee's income derived from sabape loans was "rent or revenue derived from land" within S. 2 (1) (a).

It has been found as a fact that

"loans made on the sabape system are loans made in cash at the beginning of the cultivating season, and repayable in paddy at the harvest time. The excess in value of the paddy received by the assessee over the cash lent by him to the cultivators was taken as his taxable income from this source. This income is entirely separate from his rents."

Now, it so happened that these sabape loans were made by the assessee to his tenants, but for the purpose in hand, in my opinion, it makes no difference whether the lender was the landlord of the borrower or not. The solution of the problem depends upon whether the income that accrued from these loans to the assessee was

"rent or revenue derived from land which is used for agricultural purposes."

It could not have been intended that any and every person who lent money to a cultivator to be repaid in kind, and made a profit from the transaction, should be treated as thereby receiving "rent or revenue derived from land which is used for agricultural purposes." As the sabape loans under consideration were transactions between a lender and a borrower the mere fact that the lender happened to be the landlord of the borrower is nihil ad rem. These transactions being loan transactions the income accruing to the assessees therefrom in

my opinion, was not "agricultural income" within the meaning of that term in S. 2 (1) (a).

The learned advocate for the assessee relied upon a passage in the judgment of Greaves, J., in the Full Bench case of *Meher Banc Khanum* v. *Secy. of State* (1) (at p. 41 of 53 *Cal.*). His Lordship stated that

"the income then under consideration being nazar or salami paid by a tenant to his landlord for recognizing the transfer of a nontransferable holding was money which comes to the landlord by virtue of the fact that he is the owner of the land"

and as such was

"rent or revenue derived from land which is used for agricultural purposes."

In my opinion this authority tells against the contention urged on behalf of the assessee for the money which the landlord received as profit from these sabape loans did not come to the landlord by virtue of the fact that he was the owner of the land, but was profit accruing to the lender from a loan transaction. Rent or revenue derived from land differs toto coalo from profit derived from such loan transactions as those now under consideration.

In my opinion the answer to the question propounded is in the negative. Costs 5 gold mohurs.

Das, J.—I agree.

Baguley, J.—I agree.

R.K. *Reference answered.*

(1) A. I. R. 1925 Cal. 929 = 89 I. C. 997 = 53 Cal. 34 (F. B.).

* A. I. R. 1932 Rangoon 20

BAGULEY, J.

Daw Dut—Appellant.

v.

Daw Kwi and *others*—Respondents.

Second Appeal No. 115 of 1931, Decided on 30th November 1931, against decree of Dist. Judge, Thaton, in Civil Appeal No. 54 of 1930.

*** Civil P. C. (1908), O 21, R. 63—Claim for removal of attachment dismissed — Claimant suing both attaching creditor and judgment-debtors for declaration that he is owner—Value of property more than value of decree—Value governing jurisdiction is value of property.**

Where a person, whose claim for removal of attachment of the property is dismissed, files a suit against the attaching creditor as well as against the judgment-debtors for a declaration that he is the owner of the property with respect to which his claim is dismissed then if the value of the property attached is more than the value of the decree obtained by the attaching decree-holder, the value which governs the jurisdiction of the Court to deal with the suit is the value of the property itself and not merely the value of the decree. Since if the claimant is unsuccessful in his suit for declaration not only will the attaching decree-holder realize the value of decree but as regards any surplus remaining that will go to the judgment-debtors and the claimant will lose the whole value of the property sought to be attached : 17 *All.* 69 and 39 *Mad.* 602, *Foll.*; 1 *L. B. R.* 1 and 15 *Cal.* 104, *Dist.* [P 21 C 1]

S. Tin Taik—for Appellant.

Joseph—for Respondents.

Judgment.—The appellant Daw Dut claimed to be the owner of a certain mill which had been attached by the respondent Daw Kwi in execution of a decree obtained by her against the remaining respondents. The amount of the decree was less than Rs. 1,000. The value of the mill attached was considerably above Rs. 1,000. Daw Dut applied to the Township Judge for removal of the attachment, but her claim was dismissed. She therefore filed a suit against the attaching creditor and the latter's judgment-debtors for a declaration that she was the owner of the mill in question, and that it was not attachable by Daw Kwi, the attaching creditor.

The point was raised before the Township Judge that he had no jurisdiction to decide the matter, but he overruled the objection and dismissed the plaintiff's suit on its merits.

On appeal to the District Court, the learned Judge came to the conclusion that the Township Judge had no power to try the case and therefore all his proceedings were ultra vires. He directed the Township Judge to return the plaint for presentation to a Court having jurisdiction. It is against this decision that the present appeal has been filed, and I am asked to return the file to the District Judge for him to pass orders on the merits of the case. The appellant relies upon *Sevaraman Chetty* v. *Maung Po Yin* (1), the head-note of which runs as follows:

"The valuation of a suit under S. 283, Civil P. C., for the declaration of a right to attach certain property the attachment on which had been removed, is for the purposes of jurisdiction the value of the decree which it is desired to execute, if that be less than the value of the property, or the value of the property if that be less than the amount of the decree."

The ruling follows *Modhusudun Koer* v. *Rakhal* (2). It must be noted however

(1) [1900-02] 1 L. B. R. 1.

(2) [1888] 15 Cal. 104.

that in this case the suit was filed by the attaching creditor whose attachment had been dismissed against the claimant at whose instigation the attachment had been removed, and the judgment-debtors themselves were not made parties to the suit. The Calcutta case which was followed was one in which the facts were similar; the decree sought was one declaring the rights of the decree-holder to attach certain property. In the present case the decree is one sought for by an unsuccessful claimant for removal of attachment whose property had been attached, and it is filed against both the attaching creditor and the judgment-debtors. The facts in the case are parallel to those dealt with in the cases of *Dwarka Das* v. *Kameshar Prasad* (3) and *Narayanan Singh* v. *Aiyasami Reddi* (4). In both these cases it was held that where an unsuccessful claimant desires not only that the attachment should be removed, but also that his title as against the judgment-debtors should be declared, in cases in which the value of the property attached is more than the value of the decree, the value of the suit which governs the jurisdiction of the Court to deal with it is the value of the property itself, and not merely the value of the decree. The reason for the distinction appears to be clear. When the attaching creditors seeks for a declaration of his right to attach certain property he has really no interest as regards the claim of the defendants among themselves. If he wins his declaration suit, he will benefit by the amount of his decree, and no more. Therefore the value of the suit to him is equal to the amount which he will realize by executing his decree, if the value of the property is greater than the value of the decree. On the other hand, if the unsuccessful claimant files a suit for a declaration, if he is unsuccessful, not only will the attaching decree-holder realize the value of his decree, but as regards any surplus remaining that will go to the judgment-debtors, and the claimant loses the whole value of the property sought to be attached. The value of the suit for him is therefore clearly the value of the property attached.

For these reasons I consider that the learned District Judge was correct in directing the Township Judge to return the plaint to the plaintiff for presentation to the Court having jurisdiction.

I cannot however conclude this judgment without commenting on the errors that appear on the record. The Township Judge after hearing the suit for a declaration signed a decree in a simple money decree form, ordering the plaintiff to pay defendant 1 the sum of Rs. 139 which is apparently the amount of the decree. His decree is entirely silent as regards the declaration whether it is to be granted or whether it is to be disallowed. The District Judge whose judgment shows clearly that he considered the judgment and decree of the Township Judge to be incorrect, at the end of the judgment dismissed the appeal with costs, and then without setting aside the judgment and decree of the Township Judge, he ordered the Township Judge to return the plaint for presentation to some other Court. Both these decrees are obviously incorrect and not in accordance with the judgments on which they are supposed to be based and they must therefore be set aside by this Court.

As a result I set aside the decrees of both the lower Courts and I direct that the plaint be returned by the Township Judge for presentation to the Court having jurisdiction, in this instance the Subdivisional Court. The appellant must bear the costs of the respondents in this Court. All other costs incurred up to the present to be costs in the cause as ultimately decided.

P.N/R.K. *Decree set aside.*

(3) [1895] 17 All. 69=(1895) A. W. N. 3.
(4) [1916] 39 Mad. 602=27 I. C. 265.

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* A. I. R. 1932 Rangoon 21

BAGULEY, J.

Ah Choung—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 620 of 1931, Decided on 13th July 1931, from order of Third Addl. Magistrate, Rangoon, in Summary Trial No. 296 of 1931.

*** Penal Code (1860), S. 186—Protest unless strongly worded and verging on threat with likelihood of its being carried out immediately is not obstruction.**

To constitute an offence under S. 186 there must be some actual resistance or obstacle put in the way of the public servant. A protest is not an obstruction, but a strongly worded protest verging on threats would be an obstruction within the meaning of S. 186 if there appears to be the least likelihood of the threat being immediately carried out. Consequently where

a person stands by a staircase and without any threat or obstruction of the passage verbally objects the police search party from proceeding upstairs, he cannot be convicted of obstruction under S. 186: 38 *All.* 506; 8 *I. C.* 823; 37 *I. C.* 46; 2 *Bom. L. R.* 541; 15 *Mad.* 221, *Ref.* and 1 *Bur. L. T.* 23, *Disc.* [P 24 C 1, 2]

Campagnac—for Appellant.

Maung Lat—for the Crown.

Judgment.—The appellant Ah Choung has been convicted under S. 186, I. P. C., and fined Rs. 201 and has also been directed to pay Rs. 14-8-0 costs under S. 546-A, Criminal P. C. Hence the present appeal.

The facts of the case are that the Superintendent of the Scott Market accompanied by a bazar-gaung, two outsiders and four police constables visited a certain house to search for pigs, having heard that the same had been brought down to be slaughtered illegally. On the ground floor he found the accused and some other Chinamen. He explained the purpose of his visit and searched the ground floor but found no pigs nor pork. He then wanted to go upstairs to search but, he says, he was prevented from doing so by the accused, and this is the obstruction complained of for which the appellant has been convicted.

The Magistrate who tried the case appears to have come to the conclusion that the appellant went and stood on the stairs and blocked the way and objected to the party going up but a perusal of the evidence of the witnesses seems to me to show that this finding is hardly justified. U Tun We, the Superintendent of the Scott Market, says:

"Accused intercepted the way by standing on the staircase and preventing himself and the party from going upstairs."

In cross-examination he says:

"Accused did not put out his hands though he stood on the staircase."

Tait Singh, one of the constables who accompanied him, says that the complainant spoke to the accused and then the complainant told him that he was not allowed to search upstairs. He says the accused was sitting on a chair near the staircase. The witness did not understand exactly what was said. Ba Chit, the bazaar-gaung, says that the accused spoke in Burmese and said: "The upstairs has nothing to do with me" and the accused objected to his going up and went and stood by the staircase. Later on he says:

"Accused did not actually obstruct with his hand and block the way. He only said: 'I cannot allow people to go up. It has nothing to do with me'."

The remaining witness for the prosecution, Ah Eu Wa is the licensee of a stall in the Scott Market for the sale of pork. He no doubt is somewhat biassed against persons who are or are alleged to be illicit slaughterers of pigs. In his deposition he says that the accused stated: "No permission can be given to make a search upstairs." He also says:

"Accused stood at the doorway leading upstairs. The doorway was about three feet wide and accused blocked and prevented Maung Ba Chit to go up and also stretched out his arms."

It will thus be seen that the four witnesses give different versions of what happened ranging from the police constable who says that the accused merely sat in a chair by the side of the stairs and talked to the pork-seller who says that the accused stood on the staircase and held out his arms to prevent anybody going up.

The accused himself was examined very shortly. His examination as recorded is simply a denial of the charge, but his counsel states that his version is that he did no more than what the constable said he did, namely, that he sat on a chair and that the upstairs was not his and consequently he could not give permission for a search to be made by the party. He called witnesses who prove that the accused is the lessee of the ground floor and other persons rent the upstairs portion of the house.

On the evidence I hold that the accused did no more than object verbally to the party going upstairs from a position close to the foot of the stairs either standing or sitting down, it makes no difference which. There is no allegation of any threat. The question to be decided now is whether this amounts to a voluntary obstruction to a public servant in the discharge of his public functions.

It is not disputed that the Superintendent of the Scott Market is a public servant and in searching for pigs illicitly slaughtered or about to be illicitly slaughtered he was acting in the discharge of a public function.

Mr. Campagnac has succeeded in finding a good many cases on the question "what is an obstruction" but unfortunately most of them are in unauthorized reports and they do not seem to cast very much light on the subject. The only

authorized report is *Queen-Empress* v. *Sommanna* (1). In this case a District Judge had issued a commission to a certain person to search the house of the accused and to remove certain property from it to the District Court. On the facts of the case as found by the Subdivisional Magistrate it is said that the commissioner went to the village of the accused, read out the order and asked him to allow it to be executed. The accused remained inside his house, and closing the doors against the commissioner, obstructed the execution of the commission in spite of repeated requests.

On these facts it would certainly appear that the accused openly shut the doors to the commissioner. In the judgment of the Bench which dealt with the case however it is stated:

"All that is found is that the commissioner .... read out the order and asked the petitioner to be allowed to carry it out, and that petitioner, without giving any answer, remained inside his house with closed doors."

This finding of fact does not suggest any active slamming of the doors in the face of the commissioner but a resistance which was purely passive and in fact the accused simply did nothing and continued to do nothing. It was held that the conviction could not be sustained because the use of the word "voluntarily" in the section contemplated the commission of some overt act of obstruction, and did not intend to render penal mere passive conduct. Turning to the unofficial reports we have the case of *Queen-Empress* v. *Gavgappa* (2). The head-note which accurately sets out the judgment is as follows:

"A person objecting to the search of his house without using force or threatening language, cannot be convicted of an offence .... under S. 186, I. P. C."

The idea contained in this head-note is practically the same as that to be found in the Madras case already cited. In *Emperor* v. *Gajadhar* (3), it was held that a man who merely ran away when a chaprasi came to arrest him on a civil warrant could not be convicted under S. 225-B, I. P. C., and it was held that to justify a conviction under that section or under S. 186 there must be an overt act of resistance or obstruction. In *Aijaz Husain* v. *Emperor* (4) no evidence was recorded and the Magistrate did not say what particular fact he found proved. The conviction under S. 225-B was set aside because the Court was satisfied that the accused against whom a civil warrant of arrest had been issued merely objected to being arrested and the chaprasi made no attempt to do so and came away and complained that the accused declined to be arrested. Here again the idea is that the accused merely objected verbally and committed no overt act of obstruction. The next case cited is *Mt. Darkan* v. *Emperor* (5). This is of little help because the order of the High Court is simply one setting aside the conviction and sentence for the reasons recorded by the learned Sessions Judge and as the first reason given by the learned Sessions Judge was that the Court took cognizance of the case without jurisdiction it was really unnecessary to go any further. The next case is *Nishi Kanta Pal* v. *Emperor* (6). This case which is one quoted by Ratanlal in his Law of Crimes and which is apparently relied upon by the learned Magistrate is of somewhat different application. A rule was issued by the Calcutta High Court on three grounds to show cause why a conviction under S. 186, I. P. C., should not be set aside and the judgment merely states that after reading the explanation of the Magistrate the Court is of opinion that the conviction cannot stand. It goes on to say:

"No offence under S. 186, I. P. C., appears to have been committed,"

but whether because there was no obstruction or whether because the Munsif obstructed was not acting in a way justifiable in law is not clear. In the statement of the facts of the case given in the quotation from the reference by the Sessions Judge in appeal I gather that the Munsif wanted to go along a certain waterway and the appellant put a fence across the waterway and completely obstructed the Munsif. If the judgment is intended to lay down the proposition that putting a fence completely across a waterway is no causing of obstruction I can only say that, with respect, I am unable to follow it. The last case men-

(1) [1892] 15 Mad. 221=1 Weir 133=2 M.L.J. 120.
(2) [1900] 2 Bom. L. R. 541.
(3) [1910] 11 Cr. L.J. 721=8 I.C. 823.
(4) [1916] 38 All. 506=17 Cr. L. J. 413=35 I.C. 973.
(5) A. I. R. 1928 Lah. 827=110 I. C. 101=29 Cr. L. J. 645.
(6) [1916] 18 Cr. L. J. 62=37 I.C. 46.

tioned is *Y. C. Ariff and Musoor* v. *King-Emperor* (7). This is a case of the late Chief Court of Lower Burma. The bailiff went to a certain house to attach some property. The second accused fetched the first accused, and when he arrived he used strong language, and both accused pushed the party out of the house. It was held that in a case of this kind S. 95, I. P. C., would apply. If there had been any justification whatsoever for the bailiff and his peon being in the house at all I am unable to agree that S. 95 could possibly apply to a public servant treated in this way who was acting in the execution of his duties. It is also stated in the head-note of this case that a possibly strongly worded protest and order or request to leave the premises does not amount to obstruction. I think this also goes rather too far. A protest I agree would not be an obstruction but a strongly worded protest verging on threats I consider would be an obstruction if there appeared to be the least likelihood of those threats being immediately carried out. A public servant has not got to continue until he actually suffers an assault. If he is actually assaulted then S. 353, I. P. C., would apply and it seems clear that S. 186 would apply where S. 353 would not apply.

The word "obstruction" has a certain connotation of passiveness. Its derivation from the Latin "to build against or to block up" shows that it is a passive act and in the present case had the accused done some passive act which would have rendered it necessary for the search party to use force to him or to any instrument with which he was obstructing in order to carry out the search I would hold that there had been an obstruction within the meaning of the section, as for example if he had stood on the stairway blocking it up so that the party would have had to use force to remove him from the stairway in order to go up. On the evidence however I am unable to hold that the accused did obstruct to this extent. He may well have said that as the upstairs was no concern of his he was not in a position to give permission for a search to be made by the party and in view of the fact that the constable says that he merely sat on a chair by the side of the stairway and the bazaar-gaung definitely says that the accused did not actually obstruct with his hand and block the way but stood by the staircase I must hold that he did no physical act which could be regarded as obstruction while his verbal protest, not containing anything that could be interpreted as a threat which was likely to be immediately put into force, could not amount to obstruction either.

I therefore set aside the conviction and sentence and acquit the accused. The fine will be refunded and also the money paid in for stamp costs.

V.B./R.K *Conviction set aside.*

(7) [1907] 1 Bur. L.T. 23.

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* A. I. R. 1932 Rangoon 24

BAGULEY, J.

U Aung Ya—Appellant.

v.

Ma E Mai—Respondent.

Second Appeal No. 161 of 1931, Decided on 9th December 1931, against decree of Dist. Court, Henzada, in First Appeal No. 19 of 1931, D/- 14th March 1931.

*** (a) Contract Act (1872), S. 12—Suit on mortgage—Mortgagor pleading unsoundness of mind at execution—Mortgagor found to be of unsound mind but having lucid intervals—No general rule could be laid down as to where burden of proof lay.**

In a suit on a mortgage the mortgagor pleaded that he was of unsound mind at the time the mortgage-deed was executed. It was found that he was of unsound mind and also that he had lucid intervals. Mortgagee contended that it was for the mortgagor to prove that he was of unsound mind at the time of execution of the deed while the mortgagor contended that it was for the mortgagee to prove that he was temporarily of sound mind at the time the document was executed. The evidence showed that the chief characteristic of his madness was his unreasonable hatred of strangers. It was also shown that he executed the registered deed and behaved quite normally when he was taken to the Sub Registrar.

Held: that no general rule could be laid down as to where burden of proof lay and that the mortgagor was of sound mind at the time of execution: *Banks* v. *Goodfellow*, 5 *Q. B.* 549 and *Cartwright* v. *Cartwright*, 1 *Philom* 90, *Ref.* [P 25 C 1]

*** (b) Contract Act (1872), S. 12—Unsoundness of mind proved by definite expert evidence—Allegation of lucid interval has to be strictly proved.**

Where the unsoundness of mind has been proved by definite expert evidence the allegation of a lucid interval must be as strong and as demonstrative of such fact as where the object of the proof is to establish derangement of the mind: *Attorney-General* v. *Parnthu*, 29 *E. R.* 632, *Rel. on.* [P 25 C 1]

Zeya and *Tha Kin*—for Appellant.

Messrs. Bose, Venkatram, De and *Basu*—for Respondent.

his nephew, defendant 1, his wife and defendant 2, his niece.

At the trial it was common ground that defendant 2 was entitled to a fourth share in the estate the dispute being whether the plaintiff was entitled to a half-share and defendant 2 to a quarter-share.

The learned Judge decided that the plaintiff was entitled to a share twice as great as the share of defendant 2, that is to say, at the trial it was proved or admitted that the plaintiff was entitled to a half-share, defendant 1.to a fourth share and defendant 2 to a fourth share and a preliminary decree was passed for accounts to be taken upon that footing. In due course the commissioner presented his report and this report was considered by the learned District Judge who passed a final decree setting out the details of the estate of which administration had been decreed.

Defendant 1 appealed to the High Court against the final decree of the District Court making the plaintiff a respondent but falling to implead defendant 2 as a respondent. In these circumstances a preliminary objection has been raised on behalf of the respondent that in the absence of defendant 2 the appeal cannot proceed. It was further contended that the Court in the circumstances of the case ought not to allow defendant 2 to be impleaded as a respondent. In my opinion the preliminary objection must prevail. Under the decree of the District Court defendant 2 acquired a valuable right namely to have the estate distributed upon the basis of that decree and if she were to be impleaded now she would be made a respondent after an appeal as against her had been barred by limitation. In my opinion in such circumstances the Court ought not to allow the appellant to implead defendant 2 as a party respondent to the appeal.

Now in the absence of defendant 2 ought the appeal to be allowed to proceed? The test to be applied is this. Assume that the appeal against the respondent proved to be successful would the effect be that there would be in existence two inconsistent decrees one of the High Court and the order of the District Court with respect to the subject-matter of the suit? In my opinion there would. In the memorandum of appeal the appellant alleges that the items representing the estate under administration were not correctly found in the report of the commissioner or set out in the decree of the District Court. In respect of certain items the appellant contends that increased deductions ought to be allowed to her in respect of disbursements that she had made and that in respect of certain properties she should receive a larger share than under the decree was allotted to her. If the appeal were to succeed in respect of all or any of the items set out in the memorandum of appeal the decree of this Court as against the respondent would both in form and in substance vary from the decree passed by the District Court which as between the parties to the appeal and defendant has become conclusive. In these circumstances the appeal cannot be allowed to proceed (*V. P. R. V. Chokaligum Chetty* v. *Seeihai Acha* (1) *Midnapur Zamindari Co. Ltd.* v. *Amulya Nath Roy Chowdhury* (2) and *Badri Narayan* v. *E. I. R. Company* (3).

The appeal accordingly is dismissed. There will be no order as to costs.

Mya Bu, J.—I agree.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1927 P. C. 252=107 I. C. 237=6 Rang. 29 (P. C.).
(2) A. I. R. 1926 Cal. 893=95 I. C. 649=53 Cal. 752.
(3) A. I. R. 1927 Pat. 23=93 I. C. 1003=5 Pat. 755.

A. I. R. 1932 Rangoon 17

PAGE, C. J. AND SEN, J.

Mahomed Yacoob—Appellant.

v.

P. L. R. M. Firm and *others* — Respondents.

First Appeal No. 42 of 1931, Decided on 15th July 1931, against decision of Dist. Judge, Toungoo, in Civil Regular No. 1 of 1930.

(a) Civil P. C. (1908), O. 21, Rr. 65, 69, 84 and 90—Sale is complete when bid is accepted by receiver and deposit of 25 per cent is made.

A sale by a receiver appointed under O. 21, R. 65, is complete when the bid is accepted by the receiver and deposit of 25 per cent of the purchase price is paid by the auction-purchaser: 27 *I. C.* 805 and *A. I. R.* 1929 *Rang.* 311, *Foll.*; *A. I. R.* 1929 *Rang.* 12; *A. I. R* 1923 *Pat.* 325 and *A. I. R.* 1931 *Cal.* 583, *Diss. from.*

[P 18 C 1]

(b) Civil P. C. (1908), Appendix E, Form 29, Condition 3 — Condition 3 gives Court quasi revisional discretion.

The effect of condition in the form of proclamation in Appendix E form 29, is to give the Court a quasi revisional discretion in the matter and not to require the Court itself to knock down the property : 27 *I. C.* 805 and 19 *C. W. N.* 633, *Foll.* [P 19 C 1]

Mootham—for Appellant.

Hay—for Respondents.

Page, C. J.—This appeal must be dismissed.

The appellant purchased certain property at an auction-sale held by a receiver authorized by the Court on that behalf. The appellant was the highest bidder ; the property was 'knocked down' to him, and he paid 25 per cent of the purchase price to the receiver. Subsequently, on the same day, he wrote to the receiver informing him that he had purchased the property under a misapprehension as he understood that there were no incumbrances upon the property, but that after the sale he had been informed that there were incumbrances thereon, and he therefore requested the receiver to resell the property, by so doing in effect withdrawing his bid. He has brought this present suit inter alia for a declaration that the property had not been sold to him. His suit has been dismissed. On appeal the learned advocate on behalf of the appellant contended that the appellant was entitled to withdraw his bid until such time as the District Court had formally accepted his bid, and that in the circumstances no sale had taken place. In my opinion, this contention on behalf of the appellant is misconceived, and cannot be accepted.

Under O. 21, R. 65, the receiver was duly authorized by the District Court to conduct the sale, and under O. 21, R. 84, the appellant was declared by the receiver to be the purchaser, and immediately afterwards paid the deposit of 25 per cent of the purchase price. In my opinion, when his bid was accepted by the receiver and the deposit of 25 per cent of the purchase price had been paid the sale was effected : vide *Rajendra Prosad Jha* v. *Upendra Nath Jha* (1) and *Maung Ohn Tin* v. *P. R. M. P. S. R. M. Chettyar Firm* (2). I am of opinion that the ruling of Chari, J., in *Afauzuddin* v. *Howell* (3) that when property is 'knocked down' to the highest bidder there is a conditional offer to purchase the property by the bidder, which he is at liberty to withdraw unless and until his bid is accepted by the Court, was wrongly decided, and must be regarded as overruled. Of course, if there is a rule of practice in the Court that the officer conducting the sale shall not be entitled to accept a bid or conclude the sale, and that such officer is given authority merely to record the bids and forward the bid sheet to the Court in order that the Court may accept or reject the bids or any of them, it follows that no sale takes place until the Court has accepted the bid. Such a practice appears to obtain in Bihar and Orissa, but there is no such practice in Burma. In the circumstances of any particular case it may be found as a matter of fact that the officer conducting the sale did not accept the offer made by the highest bidder, but had referred the offer to the Court in order that the Court should accept or reject it. In a case of that description, no doubt, there would be no completed sale until the offer of the highest bidder was accepted, but that is a question of fact to be determined according to the circumstances of each case.

In *Jaibahadar Jha* v. *Matukdhari Jha* (4), it appears that a number of bids were made, and as stated by Macpherson, J. :

"The nazir sent the bid-sheet, in accordance with practice, to the Munsif who wrote "Close" against the last offer, and signed the order."

It was held, and I respectfully think rightly held, that in the circumstances of that case there was no completed sale by the nazir.

But if, and in so far as, that case decided as a matter of law that until the Court accepts a bid at a Court sale there can be no completed sale I am unable to agree with that decision, and I am of opinion that the law thus stated is not correct.

Condition 3 of the form of proclamation of sale (see Appendix E, Form 29, Civil P. C.), runs as follows :

"*Condition* 3.—The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the

(1) [1915] 27 I C. 805.
(2) A.I.R. 1929 Rang. 311=120 I.C. 142=7 Rang. 425.
(3) A.I.R. 1929 Rang. 12=114 I.C. 522=6 Rang. 609.
(4) A.I.R. 1923 Pat. 525=76 I.C. 113=2 Pat. 548.

Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so."

But as pointed out in *Rajendra Prosad Jha* v. *Upendra Nath Jha* (1), the effect of condition 3 is to give the Court a quasi revisional discretion in the matter, and not to require the Court itself to 'knock down' the property.

In *Surendramohan Sarkar* v. *Manmathanath Banerji* (2), a Bench of the Calcutta High Court appears to have accepted the view of the law as enunciated by the Patna High Court in *Jaibahadar Jha* v. *Matukdhari Jha* (3). In *Surendramohan Sarkar's* case (2) however it appears that the sale was conducted by the nazir, who did not purport himself to accept the plaintiff's bid, although it was the highest bid that was made, but sent the bid-sheet to the Subordinate Judge for the learned Judge for him to consider whether he would accept any of the bids. Upon the facts of that case therefore in my opinion, it was rightly held that there was no completed sale when the nazir recorded the bid, but in so far as the learned Judges in *Surendramohan Sarkar* v. *Manmathanath Baneri* (5), followed the view of the law laid down by the Patna High Court in *Jaibahadar Jha* v. *Matukdhari Jha* (4), I respectfully dissent from that ruling. In my opinion, the law was correctly stated in *Rajendra Prosad Jha* v. *Upendra Nath Jha* (1) and *Maung Ohn Tin* v. *P. R. M. P. S. R. M. Chettyar Firm* (2). For these reasons, in my opinion, the appeal fails, and must be dismissed with costs 10 gold mohurs.

Sen, J.—I agree.

R.M./R.K. *Appeal dismissed.*

(5) A.I.R. 1931 Cal. 583=134 I.C. 447=58 Cal. 788.

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* A. I. R. 1932 Rangoon 19

Special Bench

PAGE, C. J., BAGULEY AND DAS, JJ.

Commissioner of Income-tax, Burma—Applicant.

v.

Hajee Cassim Tayoob Surty—Respondent.

Civil Reference No. 11 of 1931, Decided on 25th November 1931, from reference made by Commissioner of Income-tax.

*** Income-tax Act (1922), S. 2 (1) (a)—Sabape loan income is not agricultural income.**

Income derived from 'sabape' loans (loans made in cash at the beginning of the cultivating season and repayable in paddy at harvest time) is not agricultural income not being rent or revenue derived from land within S. 2 (1) (a). The fact that the lender is the landlord of the borrower is immaterial : *A. I. R.* 1925 *Cal.* 929, *Dist.* [P 19 C 2]

E. A. Eggar—for Commissioner of Income-tax, Burma.

Foucar—for Assessee.

Page, C. J.—The question propounded is :

"Whether such portion of assessee's income as was derived from Sabape loans was 'agricultural income' within the meaning of the Income-tax Act."

Under S. 2 (1) (a) of the Act "agricultural income" means :

"any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such"

and the question that falls for determination is whether the assessee's income derived from sabape loans was "rent or revenue derived from land" within S. 2 (1) (a).

It has been found as a fact that

"loans made on the sabape system are loans made in cash at the beginning of the cultivating season, and repayable in paddy at the harvest time. The excess in value of the paddy received by the assessee over the cash lent by him to the cultivators was taken as his taxable income from this source. This income is entirely separate from his rents."

Now, it so happened that these sabape loans were made by the assessee to his tenants, but for the purpose in hand, in my opinion, it makes no difference whether the lender was the landlord of the borrower or not. The solution of the problem depends upon whether the income that accrued from these loans to the assessee was

"rent or revenue derived from land which is used for agricultural purposes."

It could not have been intended that any and every person who lent money to a cultivator to be repaid in kind, and made a profit from the transaction, should be treated as thereby receiving "rent or revenue derived from land which is used for agricultural purposes." As the sabape loans under consideration were transactions between a lender and a borrower the mere fact that the lender happened to be the landlord of the borrower is nihil ad rem. These transactions being loan transactions the income accruing to the assessees therefrom in

my opinion, was not "agricultural income" within the meaning of that term in S. 2 (1) (a).

The learned advocate for the assessee relied upon a passage in the judgment of Greaves, J., in the Full Bench case of *Meher Bane Khanum* v. *Secy. of State* (1) (at p 41 of 53 *Cal.*). His Lordship stated that

"the income then under consideration being nazar or salami paid by a tenant to his landlord for recognizing the transfer of a nontransferable holding was money which comes to the landlord by virtue of the fact that he is the owner of the land"

and as such was

"rent or revenue derived from land which is used for agricultural purposes."

In my opinion this authority tells against the contention urged on behalf of the assessee for the money which the landlord received as profit from these sabape loans did not come to the landlord by virtue of the fact that he was the owner of the land, but was profit accruing to the lender from a loan transaction. Rent or revenue derived from land differs toto coalo from profit derived from such loan transactions as those now under consideration.

In my opinion the answer to the question propounded is in the negative. Costs 5 gold mohurs.

Das, J.—I agree.

Baguley, J.—I agree.

R.K. *Reference answered.*

(1) A. I. R. 1925 Cal. 929 = 89 I. C. 997 = 53 Cal. 34 (F. B.).

* A. I. R. 1932 Rangoon 20

BAGULEY, J.

Daw Dut—Appellant.

v.

Daw Kwi and *others*—Respondents.

Second Appeal No. 115 of 1931, Decided on 30th November 1931, against decree of Dist. Judge, Thaton, in Civil Appeal No. 54 of 1930.

*** Civil P. C. (1908), O 21, R. 63—Claim for removal of attachment dismissed — Claimant suing both attaching creditor and judgment-debtors for declaration that he is owner—Value of property more than value of decree—Value governing jurisdiction is value of property.**

Where a person, whose claim for removal of attachment of the property is dismissed, files a suit against the attaching creditor as well as against the judgment-debtors for a declaration that he is the owner of the property with respect to which his claim is dismissed then if the value of the property attached is more than the value of the decree obtained by the attaching decree-holder, the value which governs the jurisdiction of the Court to deal with the suit is the value of the property itself and not merely the value of the decree. Since if the claimant is unsuccessful in his suit for declaration not only will the attaching decree-holder realize the value of decree but as regards any surplus remaining that will go to the judgment-debtors and the claimant will lose the whole value of the property sought to be attached : 17 *All.* 69 and 39 *Mad.* 603, *Foll.*; 1 *L. B. R.* 1 and 15 *Cal.* 104, *Dist.* [P 21 C 1]

S. Tin Taik—for Appellant.

Joseph—for Respondents.

Judgment.—The appellant Daw Dut claimed to be the owner of a certain mill which had been attached by the respondent Daw Kwi in execution of a decree obtained by her against the remaining respondents. The amount of the decree was less than Rs. 1,000. The value of the mill attached was considerably above Rs. 1,000. Daw Dut applied to the Township Judge for removal of the attachment, but her claim was dismissed. She therefore filed a suit against the attaching creditor and the latter's judgment-debtors for a declaration that she was the owner of the mill in question, and that it was not attachable by Daw Kwi, the attaching creditor.

The point was raised before the Township Judge that he had no jurisdiction to decide the matter, but he overruled the objection and dismissed the plaintiff's suit on its merits.

On appeal to the District Court, the learned Judge came to the conclusion that the Township Judge had no power to try the case and therefore all his proceedings were ultra vires. He directed the Township Judge to return the plaint for presentation to a Court having jurisdiction. It is against this decision that the present appeal has been filed, and I am asked to return the file to the District Judge for him to pass orders on the merits of the case. The appellant relies upon *Sevaraman Chetty* v. *Maung Po Yin* (1), the head-note of which runs as follows:

"The valuation of a suit under S. 283, Civil P. C., for the declaration of a right to attach certain property the attachment on which had been removed, is for the purposes of jurisdiction the value of the decree which it is desired to execute, if that be less than the value of the property, or the value of the property if that be less than the amount of the decree."

The ruling follows *Modhusudun Koer* v. *Rakhal* (2). It must be noted however

(1) [1900-02] 1 L. B. R. 1.
(2) [1888] 15 Cal. 104.

that in this case the suit was filed by the attaching creditor whose attachment had been dismissed against the claimant at whose instigation the attachment had been removed, and the judgment-debtors themselves were not made parties to the suit. The Calcutta case which was followed was one in which the facts were similar; the decree sought was one declaring the rights of the decree-holder to attach certain property. In the present case the decree is one sought for by an unsuccessful claimant for removal of attachment whose property had been attached, and it is filed against both the attaching creditor and the judgment-debtors. The facts in the case are parallel to those dealt with in the cases of *Dwarka Das* v. *Kameshar Prasad* (3) and *Narayanan Singh* v. *Aiyasami Reddi* (4). In both these cases it was held that where an unsuccessful claimant desires not only that the attachment should be removed, but also that his title as against the judgment-debtors should be declared, in cases in which the value of the property attached is more than the value of the decree, the value of the suit which governs the jurisdiction of the Court to deal with it is the value of the property itself, and not merely the value of the decree. The reason for the distinction appears to be clear. When the attaching creditors seeks for a declaration of his right to attach certain property he has really no interest as regards the claim of the defendants among themselves. If he wins his declaration suit, he will benefit by the amount of his decree, and no more. Therefore the value of the suit to him is equal to the amount which he will realize by executing his decree, if the value of the property is greater than the value of the decree. On the other hand, if the unsuccessful claimant files a suit for a declaration, if he is unsuccessful, not only will the attaching decree-holder realize the value of his decree, but as regards any surplus remaining that will go to the judgment debtors, and the claimant loses the whole value of the property sought to be attached. The value of the suit for him is therefore clearly the value of the property attached.

For these reasons I consider that the learned District Judge was correct in directing the Township Judge to return the plaint to the plaintiff for presentation to the Court having jurisdiction.

I cannot however conclude this judgment without commenting on the errors that appear on the record. The Township Judge after hearing the suit for a declaration signed a decree in a simple money decree form, ordering the plaintiff to pay defendant 1 the sum of Rs. 139 which is apparently the amount of the decree. His decree is entirely silent as regards the declaration whether it is to be granted or whether it is to be disallowed. The District Judge whose judgment shows clearly that he considered the judgment and decree of the Township Judge to be incorrect, at the end of the judgment dismissed the appeal with costs, and then without setting aside the judgment and decree of the Township Judge, he ordered the Township Judge to return the plaint for presentation to some other Court. Both these decrees are obviously incorrect and not in accordance with the judgments on which they are supposed to be based and they must therefore be set aside by this Court.

As a result I set aside the decrees of both the lower Courts and I direct that the plaint be returned by the Township Judge for presentation to the Court having jurisdiction, in this instance the Subdivisional Court. The appellant must bear the costs of the respondents in this Court. All other costs incurred up to the present to be costs in the cause as ultimately decided.

P.N./R.K. *Decree set aside.*

(3) [1895] 17 All. 69=(1895) A. W. N. 3.
(4) [1916] 39 Mad. 602=27 I. C. 265.

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* A. I. R. 1932 Rangoon 21

BAGULEY, J.

Ah Choung—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 620 of 1931, Decided on 13th July 1931, from order of Third Addl. Magistrate, Rangoon, in Summary Trial No. 296 of 1931.

*** Penal Code (1860), S. 186—Protest unless strongly worded and verging on threat with likelihood of its being carried out immediately is not obstruction.**

To constitute an offence under S. 186 there must be some actual resistance or obstacle put in the way of the public servant. A protest is not an obstruction, but a strongly worded protest verging on threats would be an obstruction within the meaning of S. 186 if there appears to be the least likelihood of the threat being immediately carried out. Consequently where

a person stands by a staircase and without any threat or obstruction of the passage verbally objects the police search party from proceeding upstairs, he cannot be convicted of obstruction under S. 186: 38 *All.* 506; 8 *I. C.* 823; 37 *I. C.* 46; 2 *Bom. L. R.* 541; 15 *Mad.* 221, *Ref.* and 1 *Bur. L. T.* 23, *Disc.* [P 24 C 1, 2]

Campagnac—for Appellant.

Maung Lat—for the Crown.

Judgment.—The appellant Ah Choung has been convicted under S. 186, I. P. C., and fined Rs. 201 and has also been directed to pay Rs. 14-8-0 costs under S. 546-A, Criminal P. C. Hence the present appeal.

The facts of the case are that the Superintendent of the Scott Market accompanied by a bazar-gaung, two outsiders and four police constables visited a certain house to search for pigs, having heard that the same had been brought down to be slaughtered illegally. On the ground floor he found the accused and some other Chinamen. He explained the purpose of his visit and searched the ground floor but found no pigs nor pork. He then wanted to go upstairs to search but, he says, he was prevented from doing so by the accused, and this is the obstruction complained of for which the appellant has been convicted.

The Magistrate who tried the case appears to have come to the conclusion that the appellant went and stood on the stairs and blocked the way and objected to the party going up but a perusal of the evidence of the witnesses seems to me to show that this finding is hardly justified. U Tun We, the Superintendent of the Scott Market, says:

"Accused intercepted the way by standing on the staircase and preventing himself and the party from going upstairs."

In cross-examination he says:

"Accused did not put out his hands though he stood on the staircase."

Tait Singh, one of the constables who accompanied him, says that the complainant spoke to the accused and then the complainant told him that he was not allowed to search upstairs. He says the accused was sitting on a chair near the staircase. The witness did not understand exactly what was said. Ba Chit, the bazaar-gaung, says that the accused spoke in Burmese and said: "The upstairs has nothing to do with me" and the accused objected to his going up and went and stood by the staircase. Later on he says:

"Accused did not actually obstruct with his hand and block the way. He only said: 'I cannot allow people to go up. It has nothing to do with me'."

The remaining witness for the prosecution, Ah Eu Wa is the licensee of a stall in the Scott Market for the sale of pork. He no doubt is somewhat biassed against persons who are or are alleged to be illicit slaughterers of pigs. In his deposition he says that the accused stated: "No permission can be given to make a search upstairs." He also says:

"Accused stood at the doorway leading upstairs. The doorway was about three feet wide and accused blocked and prevented Maung Ba Chit to go up and also stretched out his arms."

It will thus be seen that the four witnesses give different versions of what happened ranging from the police constable who says that the accused merely sat in a chair by the side of the stairs and talked to the pork-seller who says that the accused stood on the staircase and held out his arms to prevent anybody going up.

The accused himself was examined very shortly. His examination as recorded is simply a denial of the charge, but his counsel states that his version is that he did no more than what the constable said he did, namely, that he sat on a chair and that the upstairs was not his and consequently he could not give permission for a search to be made by the party. He called witnesses who prove that the accused is the lessee of the ground floor and other persons rent the upstairs portion of the house.

On the evidence I hold that the accused did no more than object verbally to the party going upstairs from a position close to the foot of the stairs either standing or sitting down, it makes no difference which. There is no allegation of any threat. The question to be decided now is whether this amounts to a voluntary obstruction to a public servant in the discharge of his public functions.

It is not disputed that the Superintendent of the Scott Market is a public servant and in searching for pigs illicitly slaughtered or about to be illicitly slaughtered he was acting in the discharge of a public function.

Mr. Campagnac has succeeded in finding a good many cases on the question "what is an obstruction" but unfortunately most of them are in unauthorized reports and they do not seem to cast very much light on the subject. The only

authorized report is *Queen-Empress* v. *Sommanna* (1). In this case a District Judge had issued a commission to a certain person to search the house of the accused and to remove certain property from it to the District Court. On the facts of the case as found by the Subdivisional Magistrate it is said that the commissioner went to the village of the accused, read out the order and asked him to allow it to be executed. The accused remained inside his house, and closing the doors against the commissioner, obstructed the execution of the commission in spite of repeated requests.

On these facts it would certainly appear that the accused openly shut the doors to the commissioner. In the judgment of the Bench which dealt with the case however it is stated:

"All that is found is that the commissioner . . . . read out the order and asked the petitioner to be allowed to carry it out, and that petitioner, without giving any answer, remained inside his house with closed doors."

This finding of fact does not suggest any active slamming of the doors in the face of the commissioner but a resistance which was purely passive and in fact the accused simply did nothing and continued to do nothing. It was held that the conviction could not be sustained because the use of the word "voluntarily" in the section contemplated the commission of some overt act of obstruction, and did not intend to render penal mere passive conduct. Turning to the unofficial reports we have the case of *Queen-Empress* v. *Gavgappa* (2). The head-note which accurately sets out the judgment is as follows:

"A person objecting to the search of his house without using force or threatening language, cannot be convicted of an offence . . . . under S. 186, I. P. C."

The idea contained in this head-note is practically the same as that to be found in the Madras case already cited. In *Emperor* v. *Gajadhar* (3), it was held that a man who merely ran away when a chaprasi came to arrest him on a civil warrant could not be convicted under S. 225-B, I. P. C., and it was held that to justify a conviction under that section or under S. 186 there must be an overt act of resistance or obstruction. In *Aijaz Husain* v. *Emperor* (4) no evidence was recorded and the Magistrate did not say what particular fact he found proved. The conviction under S. 225-B was set aside because the Court was satisfied that the accused against whom a civil warrant of arrest had been issued merely objected to being arrested and the chaprasi made no attempt to do so and came away and complained that the accused declined to be arrested. Here again the idea is that the accused merely objected verbally and committed no overt act of obstruction. The next case cited is *Mt. Darkan* v. *Emperor* (5). This is of little help because the order of the High Court is simply one setting aside the conviction and sentence for the reasons recorded by the learned Sessions Judge and as the first reason given by the learned Sessions Judge was that the Court took cognizance of the case without jurisdiction it was really unnecessary to go any further. The next case is *Nishi Kanta Pal* v. *Emperor* (6). This case which is one quoted by Ratanlal in his Law of Crimes and which is apparently relied upon by the learned Magistrate is of somewhat different application. A rule was issued by the Calcutta High Court on three grounds to show cause why a conviction under S. 186, I. P. C., should not be set aside and the judgment merely states that after reading the explanation of the Magistrate the Court is of opinion that the conviction cannot stand. It goes on to say:

"No offence under S. 186, I. P. C., appears to have been committed,"

but whether because there was no obstruction or whether because the Munsif obstructed was not acting in a way justifiable in law is not clear. In the statement of the facts of the case given in the quotation from the reference by the Sessions Judge in appeal I gather that the Munsif wanted to go along a certain waterway and the appellant put a fence across the waterway and completely obstructed the Munsif. If the judgment is intended to lay down the proposition that putting a fence completely across a waterway is no causing of obstruction I can only say that, with respect, I am unable to follow it. The last case men-

(1) [1892] 15 Mad. 221=1 Weir 133=2 M.L.J. 120.
(2) [1900] 2 Bom. L. R. 541.
(3) [1910] 11 Cr. L.J. 721=8 I.C. 823.
(4) [1916] 38 All. 506=17 Cr. L. J. 413=35 I.C. 973.
(5) A. I. R. 1928 Lah. 827=110 I. C. 101=29 Cr. L. J. 645.
(6) [1916] 18 Cr. L. J. 62=37 I.C. 46.

tioned is *Y. C. Ariff and Musoor* v. *King-Emperor* (7) This is a case of the late Chief Court of Lower Burma. The bailiff went to a certain house to attach some property. The second accused fetched the first accused, and when he arrived he used strong language, and both accused pushed the party out of the house. It was held that in a case of this kind S. 95, I. P. C., would apply. If there had been any justification whatsoever for the bailiff and his peon being in the house at all I am unable to agree that S. 95 could possibly apply to a public servant treated in this way who was acting in the execution of his duties. It is also stated in the head-note of this case that a possibly strongly worded protest and order or request to leave the premises does not amount to obstruction. I think this also goes rather too far. A protest I agree would not be an obstruction but a strongly worded protest verging on threats I consider would be an obstruction if there appeared to be the least likelihood of those threats being immediately carried out. A public servant has not got to continue until he actually suffers an assault. If he is actually assaulted then S. 353, I. P. C., would apply and it seems clear that S. 186 would apply where S. 353 would not apply.

The word "obstruction" has a certain connctation of passiveness. Its derivation from the Latin "to build against or to block up" shows that it is a passive act and in the present case had the accused done some passive act which would have rendered it necessary for the search party to use force to him or to any instrument with which he was obstructing in order to carry out the search I would hold that there had been an obstruction within the meaning of the section, as for example if he had stood on the stairway blocking it up so that the party would have had to use force to remove him from the stairway in order to go up. On the evidence however I am unable to hold that the accused did obstruct to this extent. He may well have said that as the upstairs was no concern of his he was not in a position to give permission for a search to be made by the party and in view of the fact that the constable says that he merely sat on a chair by the side of the stairway and the bazaar-gaung definitely says that the accused did not actually obstruct with his hand and block the way but stood by the staircase I must hold that he did no physical act which could be regarded as obstruction while his verbal protest, not containing anything that could be interpreted as a threat which was likely to be immediately put into force, could not amount to obstruction either.

I therefore set aside the conviction and sentence and acquit the accused. The fine will be refunded and also the money paid in for stamp costs.

V.B./R.K *Conviction set aside.*

(7) [1907] 1 Bur. L.T. 23.

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* A. I. R. 1932 Rangoon 24

BAGULEY, J.

U Aung Ya—Appellant.

v.

Ma E Mai—Respondent.

Second Appeal No. 161 of 1931, Decided on 9th December 1931, against decree of Dist. Court, Henzada, in First Appeal No. 19 of 1931, D/- 14th March 1931.

*** (a) Contract Act (1872), S. 12—Suit on mortgage—Mortgagor pleading unsoundness of mind at execution—Mortgagor found to be of unsound mind but having lucid intervals—No general rule could be laid down as to where burden of proof lay.**

In a suit on a mortgage the mortgagor pleaded that he was of unsound mind at the time the mortgage-deed was executed. It was found that he was of unsound mind and also that he had lucid intervals. Mortgagee contended that it was for the mortgagor to prove that he was of unsound mind at the time of execution of the deed while the mortgagor contended that it was for the mortgagee to prove that he was temporarily of sound mind at the time the document was executed. The evidence showed that the chief characteristic of his madness was his unreasonable hatred of strangers. It was also shown that he executed the registered deed and behaved quite normally when he was taken to the Sub Registrar.

Held: that no general rule could be laid down as to where burden of proof lay and that the mortgagor was of sound mind at the time of execution: *Banks* v. *Goodfellow*, 5 *Q. B.* 549 and *Cartwright* v. *Cartwright*, 1 *Philom* 90, *Ref.*

[P 25 C 1]

*** (b) Contract Act (1872), S. 12—Unsoundness of mind proved by definite expert evidence—Allegation of lucid interval has to be strictly proved.**

Where the unsoundness of mind has been proved by definite expert evidence the allegation of a lucid interval must be as strong and as demonstrative of such fact as where the object of the proof is to establish derangement of the mind: *Attorney-General* v. *Parnthu*, 59 *E. R.* 632, *Rel. on.* [P 25 C 1]

Zeya and *Tha Kin*—for Appellant.

Messrs. Bose, Venkatram, De and *Basu*—for Respondent.

Judgment.—The appellant sued the respondent and her son on a mortgage. Execution and receipt of consideration are not now disputed. He obtained a decree against both of them, the decree against the son being ex parte. Ma E Mai filed an appeal through her guardian ad litem on the ground that she was of unsound mind at the time that the mortgage deed was executed, and the learned District Judge set aside the decree against her only. Against this order of the District Judge, the present appeal has been filed.

It should be mentioned that the land covered by the mortgage belongs to the respondent only, her son having no interest in it.

The point for consideration is very simple. It has been proved that the respondent, for some years, has not been of sound mind. It has been found correctly, I consider, that she has lucid intervals, and the plaintiff says that since the fact that she has lucid intervals has been proved, it is for the respondent to prove that she was definitely of unsound mind at the time of the execution of the mortgage deed, but the respondent contends that it is for the appellant to prove that she was temporarily of sound mind at the time the document was executed.

In my opinion no general rule can be laid down. S. 12, Contract Act—which deals with the question: What is a sound mind for the purpose of contracting—distinctly recognizes the fact that a person may be usually of unsound mind, but occasionally of sound mind; while on the other hand a person may be usually of sound mind, but occasionally of unsound mind; and in my opinion, no general rule can be laid down as to where the burden of proof lies. My attention has been drawn to *The Attorney-General* v. *Parnthu* (1) in which it is apparently laid down that when a person has once been proved to be of unsound mind, the allegation of a lucid interval must be as strong and as demonstrative of such fact as where the object of the proof is to establish derangement of the mind.

This, no doubt, would be a satisfactory method where the unsoundness of mind has been proved by definite expert evidence, but in the present case there is no evidence of that kind. There is only the evidence of the respondent's guardian ad item and two or three other villagers who say generally that she has been mad. The guardian Ma Hmi says that her mother has been mad for about saven years, and in that time has never recovered her sanity. She tries to make out that her mother is almost in the raving stage of lunacy that she throws off her clothes and things of that kind and that she has never had a lucid interval; but her witnesser do not support her. Yan Shin says that the respondent sometimes talked like a sane person that sometimes her madness becomes better. He has never seen her with her clothes off. U Kho admits that she had lucid intervals at times. Sometimes she understood what was said to her, sometimes she did not. He also says that she used to be left by Ma Hmi alone in her house with a young son when Ma Hmi and her husband were out at work. He has never seen her confined in any way.

The main sign of insanity on which all the witnesses concentrated is that the old lady is blind and apparently is intensely suspicious of strangers and when she hears stranger's voice, she at once bursts out into abuse. There is regularly recognized form of madness called xenophobia. U Kho, one of the witnesses called for the defendant, says definitely that the old lady would burst into abuse when taken to a crowded place like a Court.

In any case, there is evidence which is beyond controversy that the old lady executed this registered deed. She was taken before the Sub-Registrar, identified there by Po Kyaw, a Thugyi who knew her, and behaved in every way normally and in such a way that she never attracted the attention of the Sub-Registrar or any body else. The Sub-Registrar admits that he has no particular recollection of the transaction, but as might be expected, he says that had there been any reason to suppose that she was mad, he would have refused to register the deed, and her actions conveyed nothing special to his mind to draw his attention to her madness. In view of the peculiar type of madness from which the respondent suffers, it seems to me that this is very strong evidence to show that at the time she was not of unsound mind. To use a term quoted in *Banks* v. *Goodfellow* (2) she was at the time engaged in performing a rational act in a rational manner. In

(1) 29 E. R. Ch. 632.

(2) [1870] 5 Q. B. 549=39 L. J. Q. B. 237=22 L. T. 813.

the passage quoted, which was from another case, *Cartwright* v. *Cartwright* (3) at p. 100 the learned Judge who decided the case said:

"If it can be proved and established that it is a rational act rationally done, the whole case is proved."

The Court would not go to the extent of adopting this dictum in full, but it agrees that the rationality of the disposition is evidence of the sanity of the person making an agreement, and this seems to me, if I may say so, to be very pertinent to the present case.

Ma E Mai clearly was a woman who at times acted in a rational way, and was of sound mind. The chief characteristic of her unsoundness of mind was her unreasonable hatred of strangers. On the occasion in question she was in a public Court, surrounded by strangers and must have heard their voices. She showed no sign of any unreasonable hatred or of unsoundness of mind, and from that fact I think it is legitimate to deduce that at the moment her mind was not unbalanced. The act which she performed, viz., mortgaging her land for the benefit of her son with whom she was at the time living, was a natural one; and even if the son has since then shown himself a scoundrel and gone off with all the money, it is impossible to penalize the plaintiff on that account, and the guardian ad litem who is obviously fighting this case on her behalf, has shown herself not much better than her brother. Her own witness, Yan Shin says "that when she heard of the mortgage at first she did not dispute it, but merely asked the plaintiff to give her another thousand rupees and take the land" and the evidence shows that there is another sister who has equal expectations with her, whom she was apparently quite prepared to deprive of her expectations.

For these reasons, I consider that the decree of the lower appellate Court is not correct. I set aside the decree of the lower appellate Court and restore that of the trial Court. The costs of this appeal and in the lower appellate Court to be added to the amount due under the mortgage.

P.N./R.K. *Decree set aside.*

(3) [1793] 1 Phillim. 90.

A. I. R. 1932 Rangoon 26

CUNLIFFE, J.

Byash Chandra Roy—Plaintiff.

v.

Ajodhyanath Deb and *others*—Defendants.

Civil Regular Suit No. 38 of 1931, Decided on 16th November 1931.

Civil P. C. (1908), O 6, R. 17—Application seeking to introduce fresh matter depriving defendant of defence under Limitation Act cannot be allowed.

The application for amendment seeking to introduce fresh matter into the plaint which would deprive the defendant of the benefit of his statutory defence under the Limitation Act cannot be allowed: *Weldon* v. *Neal*, (1887) 19 *Q. B. D.* 394 and 43 *Cal.* 95, *Foll.* [P 26 C 2]

Robertson—for Plaintiff.

K.C. Bose and *J.C. De*—for Defendants.

Judgment—This is an application to amend a plaint in the manner contemplated by S. 153 of the Code. By O. 6, R. 17, the Court is permitted at any stage of the proceedings to allow amendments which may be necessary for the determining of the real question between the parties.

The plaintiff does not actually seek to set up a new cause of action, but he does seek to introduce fresh matter into his plaint which it is admitted on both sides would deprive the defendants of the benefit of their statutory defence set up by virtue of the Limitation Act.

The question at issue was decided many years ago in England by the Court of appeal, notably in the case of *Weldon* v. *Neal* (1). Lord Esher in that case said:

"We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments"

And on the particulas facts of that case Lord Lindley said:

"I do not think it would be just to the defendant to allow these amendments, the effect of which would be to deprive him of his defence under the Statute of Limitations."

That decision has been followed in Calcutta in the case of *Junardan Kishore* v. *Shib Pershad Ram* (2), and there is further support for that view in one of our own cases, although I think that the point was really considered obiter. I therefore decide that the application which it is sought to obtain here must be disallowed as it infringes the practice

(1) [1887] 19 Q. B. D. 394=56 L. J. Q. B. 621=35 W. R 820.

(2) [1916] 43 Cal. 95=36 I. C. 179.

which is a salutary one. The application is dismissed with costs two gold mohurs.

P.N./R.K. *Application dismissed.*

A. I. R. 1932 Rangoon 27

DAS, J.

On difference between

OTTER AND BROWN, JJ.

Foucar & Co., Ltd.—Appellants.

v.

Secretary of State and *others*—Respondents.

First Appeal No. 151 of 1928, Decided on 28th May 1930, against decision of Dist. Court, Insein, in Civil Regular No. 22 of 1927.

Burma Land and Revenue Act (1876), Ss. 56, 18, 8 and 6 — Suits against Government on title based on grants issued under rules framed under S 18 — S. 56 does not bar jurisdiction of civil Court — (Per *Otter and Dis JJ.*) — **English law of accretion would apply as rule of justice, equity and good conscience to Burma provided it is not excluded by natural features** (*Brown J., dissenting*).

Certain company brought a suit against the Secretary of State for India and others with respect to a certain island in the Pegu river known as "O Bok Kyun" The island had been formed by gradual silting up in the river. Various grants of portions which had been silted up were made by Government in about the year 1894 and subsequent years to various persons for the purpose of dhani cultivation. These grants were grants of areas all of which were below high water mark and above low water mark and the boundaries of which were simply described as the Pegu river. This grant subsequently passed by various assignments into the hands of the plaintiff company. Meanwhile, since the original grants were made, erosions had taken place in some parts, fresh land had been added in other parts to the island by the process of silting up and in some places there had been reformations of land which had been previously eroded. The company claimed that they were entitled to claim against Government on the same terms as they held the grant land any land, that since the issue of the grant had been added thereto by the natural process of accretion from the river and that they were also entitled to claim what originally formed portions of the grants but which have since eroded and have subsequently reformed. Revenue was not paid to Government during the period that the land was submerged. The main grounds of defence were : (1) that the civil Courts had no jurisdiction to entertain the suit ; (2) that the company had no rights in the land except to grow dhani thereon and that the grants of the land for that purpose were liable to be resumed and (3) that the English law of accretions was not applicable to the circumstances of the case.

Held : that the title of the company was based on grants issued under rules framed under S. 18 and that the provisions of S. 56 did not bar the jurisdictions of the civil Courts to entertain the claim made by virtue of S. 6 and by the law of accretion. [P 29 C 1]

Held further : that the grantee obtained the status of land-holder within S. 8 which was a permanent, heritable and transferable right of use and occupancy. [P 29 C 2]

Held further : that the mere non-payment of revenue during the period that the land was submerged was not necessarily a sufficient proof of the intention to abandon land. [P 37 C 1]

Held further : (Per *Otter* and *Dis, JJ*).—That the English law of accretion would apply to Burma as a matter of justice, equity and good conscience provided that it was not excluded by the natural features or by the nature of the tenure and that the natural features surrounding the island, the nature of the property, its growth and user and at the same time the general conditions appertaining to rivers in Burma and the nature of the grant and the Act itself did not either directly or indirectly prohibit the company from claiming accretion. (*Brown, J. dissenting*).

[P 49 C 2 ; P 50 C 1]

(Per *Brown, J*).—That whilst rules of English common law were frequently applied as the rules of justice, equity and good conscience, it by no means followed that the whole of the present English law of accretion suitable to the conditions in England should be applied in Burma and that the grant by Government of a small defined area arising above low water mark for the purpose of dhani cultivation did not give the grantee the right to claim complete title to any further land which might rise above low water mark and be adjacent to the land originally granted : *A. I. R.* 1925 *P. C.* 236 ; *A. I. R.* 1930 *P. C.* 142 ; 22 *Mad.* 464 (*P. C.*) ; 40 *Mad.* 1083 ; *A. I. R.* 1922 *P. C.* 105 ; *Rex* v. *Yarborough*, (1824) 3 *B. & C.* 91 ; *Attorney General of Southern Nigeria* v. *John Holt & Co.*, (1915) *A.C.* 599; 13 *M. I. A.* 467 (*P.C.*); *A.I.R.* 1924 *Pat.* 213 ; 41 *Cal.* 683 (*P. C.*) and 18 *All.* 290, *Ref.* (*Other case law referred*). [P 34 C 2 ; P 36 C 1]

McDonnell—for Appellants.

A. Eggar—for Respondents.

Brown, J. — The plaintiff-appellant company brought a suit in the District Court of Insein against the Secretary of State for India and five others with respect to a certain island in the Pegu river known as "O Bok Kyun." The island has been formed by gradual silting up in the river. Various grants of portions which had been silted up were made by Government in about the year 1894 and subsequent years to various persons for the purpose of dhani cultivation. These grants have passed by various assignments into the hands of the appellant company. Meanwhile, since the original grants were made, erosions have taken place in some parts, fresh land has been added in other parts to the island by the process of silting up, and in some places there have been reformations of land which had previously been eroded. The appellant company claims that the whole island now is made up of land which has passed to them by assignment, or which

has been added thereto by the process of gradual accretion, and that they are therefore entitled to the enjoyment of the whole of the island. Respondents 2 to 6 are squatting on portions of the island, and according to the plaint are doing so with the permission of respondent 1. The appellant sued for various declarations of right with regard to these lands and for possession and damages. The suit was contested by defendant 1, the other defendants having taken no part in the proceedings throughout. Very little oral evidence was recorded, the principal facts of the case having been admitted. The main grounds of defence were :

(1) That the civil Courts have no jurisdiction to entertain such a suit ; (2) that the appellant company have no rights in the land except to grow dhani thereon, and that the grants of the land for that purpose are liable to be resumed ; and (3) that the English law of accretions is not applicable to the circumstances of the case.

The District Court has held in favour of the defendants on these points and has dismissed the suit.

The first line of defence as to jurisdiction is founded on the provisions of the (Lower) Burma Land and Revenue Act. S. 56, Cl. (a) of that Act lays down that:

"Except as hereinbefore expressly provided, no civil Court shall exercise jurisdiction as to any of the following matters, namely :

(a) matters, claims and questions mentioned in proviso 1, S. 55."

Proviso 1 to S. 55 of the Actdeals with various matters, claims and questions, but the only relevant portion relating to is Cl. (b) in the proviso

"claims to occupy or resort to lands under Ss. 19, 20 and 21, and disputes as to the use or enjoyment of such lands between persons permitted to occupy or resort to the same."

The leading case on the applicability of these sections is the case of *In re Maung Naw* v. *Ma Shwe* (1). In that case it was held by a Full Bench of the Chief Court of Lower Burma that the word "claims" in Prov. (b) meant claims against Government only. The learned District Judge has held in the present case that so far as the appellant's case against respondents 2 to 6 is concerned, the Court had jurisdiction, but that the Courts have no jurisdiction to decide the company's claim against Government. The rights of the appellant company are based on certain deeds of grant. Documents have not been produced with regard to each portion of the land, but it is admitted that all the grants are couched in terms similar to the terms of Ex. A. The document is headed "Instrument of Grant (R. 46)." It describes the land granted and states that it is granted for the purpose of dhani cultivation. It is signed by the Deputy Commissioner and contains on the reverse certain of the rules under which it was granted. One of these rules is that not less than half of the area granted must be brought under cultivation before the expiry of the five years for which exemption of revenue is allowed. It is admitted that in any case this period of exemption expired many years ago. S. 6 of that Act enacts that :

"No right of any description shall be deemed to have been or shall be acquired by any person over any land to which this part applies, except the following :

(a) rights created by any grant or lease made by or on behalf of the British Government ;

(b) rights acquired under Ss. 27 and 28, Lim. Act, 1871 ;

(c) rights created or originating in any of the modes hereinafter in that behalf specified ;

(d) rights legally derived from any right mentioned in Cls. (a), (b) and (c) of this section."

Section 18 provides that the Local Government may from time to time make rules for the disposal by way of grant or otherwise of any land over which no person has a right of either of the classes specified in Cls. (a) and (c), S. 6. And S. 19 provides that the Local Government may from time to time make rules to regulate the temporary occupation of such land, i.e., of land over which no person has a right of either of the classes specified in Cls. (a) and (c), S. 6.

Quite clearly the appellants are not claiming in this case to occupy or resort to lands under S. 19 of the Act. Their title is based on grants issued under rules which had been framed under S. 18 and they claim that by virtue of the provisions of S. 6 and by the law of accretion, they are entitled to hold the whole land on the same tenure as that of their original grants. They make no claim whatsoever to the right of temporary occupation or resort to the lands. Ss. 20 and 21 clearly have no application to the circumstances of the present case. That being so it is in my opinion impossible to hold that the claims that the appellant company makes against Government are claims of the kind mentioned in Cl.(b

(1) [1915] 8 L.B.R. 227=30 I.C. 772.

Prov. 1, S. 55. The provisions of S. 57 do not therefore bar the jurisdiction of the civil Courts. It has been contended that even if the Act did enact that the civil Courts had no jurisdiction, such an enactment would be ultra vires of the powers of the legislature. But in view of the interpretation I put on Ss. 55 and 56 of the Act it is unnecessary for me to express an opinion on this point. I am of opinion that the civil Courts have jurisdiction to decide the present case.

As regards what actually passed to the grantees under the original grant in this case arguments have been raised as to the exact meaning of the word "pottah." According to the learned Government Advocate the word "pottah" imports a mere temporary right of occupancy of the nature of raiyatwari tenure in certain parts of India. It does not appear to me however that the meaning of the word "pottah" is of much more than academic interest so far as this case is concerned. It is true that the revenue proceedings which led to the making of the grants are headed "pottah cases." And it is true that in the Burmese portion of the form on which the grant is drawn up the word "pottah" is used. The form which is drawn up bilingually is headed in English.

"Instrument of Grant
Lease"

and in Burmese

"Instrument of (pottah) grant
(pottah) lease."

But with regard to the instrument with which we are concerned the word "lease" has been struck out in each case. The grant is declared to be made in accordance with the rules framed under the Burma Land and Revenue Act. S. 18 of the Act empowers the Local Government to make rules for the disposal by way of grant or otherwise. The grants must therefore have been made under the rules in force at the time they were made. R. 2 of these rules reads as follows:

"Except as provided in R. 1, such land may be disposed of by grant of the status of landholder, or by lease, and on the condition and in the mode hereinafter prescribed; grants and leases of such land shall not, without the previous sanction of the Governor-General in Council, be made on any other condition or in any other mode."

It is quite clear therefore that the grants in this case were made under R. 2 and that what the appellants' predecessors in title obtained was a "grant" and not a lease. Further, the rule so far as a grant is concerned provides only for the grant of the status of landholder. What was granted in the various deeds relevant to this case was therefore the status of landholder subject to such conditions as are expressly or impliedly applicable to the grant. A landholder is defined in S. 8 of the Act which lays down:

"A landholder shall have a permanent heritable and transferable right of use and occupancy, subject only: (a) to the payment of all such revenues, taxes, cesses and rates as may from time to time be imposed in respect of such land under any law for the time being in force (b) to the reservation in favour of Government of all mines and mineral products, and of all buried treasure, with full liberty of writ and search for the same, paying to the landholder only compensation of surface damage as estimated by the revenue officer."

It seems to follow from this definition that a grantee of land under the rules obtains a permanent heritable and transferable right of use aud occupancy, and not a mere temporary right as it is suggested is involved in the meaning of the word "pottah." It has been suggested that a landholder's rights are very much the same as freehold rights. It is dangerous to apply technical terms of the English law to tenure of land in Burma, but it is clear that the rights of the plaintiffs in the lands held under grant in this case are very considerable rights, and far greater than those of mere squatters. Nor can I see how respondent 1's claim to have the right to resume these lands has been made out. The learned trial Judge refers to Rr. 4 and 21, Burma Land Revenue Rules at present in force, and remarks that the holders of the grants undertook to use the lands for the purpose of dhani cultivation only and that the grants are liable to resumption if used for other purposes. These particular rules were not in force when the grants were made, and I find it difficult to read S. 60 (2) of the Act as having the effect suggested by the learned Government Advocate of making the rules applicable to grants which were issued under different rules and thereby derogating from already existing rights. But if S. 60 (2) has the effect contended for, I am still unable to see how under either R. 4 or R. 21 the grants could be resumed. R. 4 enacts that a grantee's land shall be liable to be resumed if the grantee fails to comply with any of the conditions of the grant. The grants in this case were made for the purpose of

dhani cultivation, but nowhere do the deeds of grant suggest that the grants would for all time be conditional on the land being used solely for that purpose and for no other. There is an express condition that at least half of the lands granted should be brought under cultivation within five years of the grant, but there is no suggestion that this condition has not been complied with, and in fact there is nothing to show that the greater part of the land granted is still not being used for purposes of dhani cultivation.

Rule 21 I find difficult to understand. It enables the Deputy Commissioner to resume a grant if any grantee or lessee fails to comply with the conditions mentioned in R 20. I do not understand it to be suggested that any of these conditions have been broken. R. 21 then goes on to prescribe that if a grant has been made for cultivation with a period of exemption from assessment to land revenue, and the grantee does not employ the terms of exemption in the bona fide cultivation of the products for the cultivation of which the grant was made, the land may be resumed. So far the meaning is clear enough. It is the following portion of the rule I find obscure. But even if it means to enact that even after the period of exemption the land must not be used " principally for other crops, or for the purpose of obtaining fuel, timber or other spontaneous products," or that it shall be liable to resumption if the grantee at any time remove

" timber otherwise than in accordance with the conditions prescribed in R. 6, or during a period of two years makes no use of the land or abandons it without sufficient cause,"

it still does not seem to me that any of the circumstances making the land liable to resumption have been shown to exist in the present case.

According to the rules under which the grants were issued the bringing of the land under cultivation was a direct condition of the grant. Rights to minerals and to teak trees were also reserved to Government. Otherwise there were no other definite restrictions on the use of the land, and subject to these conditions and to the payment of revenue the grantees must be held to have obtained a permanent heritable and transferable right of use and occupancy.

The remaining and vital issue in this case is a matter on which it is extremely difficult to decide. It is contended on behalf of the appellants that they are entitled to claim against Government on the same terms as they hold the grant lands, any land that since the issue of the grant has been added thereto by the natural process of accretion from the river. It is also contended that they are entitled to claim what originally formed portions of the grants but which have since eroded and have subsequently reformed. A number of authorities on the law of accretion have been cited to us dealing with cases arising in India, England and elsewhere. But no decided case in Burma has been brought to our notice, and so far as we know the applicability of the law of accretion to Burma has never previously been the subject-matter of judicial decision.

Before discussing the various authorities which have been cited to us, it will be convenient to set forth briefly the circumstances connected with the lands concerned in this case. It would appear that the present island began to appear out of the bed of the Pegu river some 40 years ago. The river is a tidal and a navigable one, and admittedly title to the bed of the river vests in Government. There is no oral evidence on record on the subject but admittedly the history of the land is given in the series of maps; Exs. 1 to 22. The present island is situated in two kwins. The western portion is in the Kyagan kwin, and the eastern portion in the Tapathun kwin. The map for the year 1892-93 shows that in that year two small plots of land had been granted out to Maung Aung Myat and Maung Po in Kyagan kwine while a long strip of land was forming to the east of these holdings. The next year's map shows that this strip had been granted to one Po Thet, and another strip of land in the adjoining Tapathun kwin had been granted to Maung On Gaing. Further extensions are shown in the year 1894-95. In the year 1896-97 a further portion was added to the south-west of Kyagan kwin. After this the land remained more or less stationary until 1900-01 when the portion added in 1896-97 was surrendered to Government. After this the changes are slight until the year 1914-15 by which time the portion granted in the two kwins had joined up. From 1914-15 the position remained stationary until 1923-24 when fresh pieces of land are shown to the south-east of the

area, and an extension is shown on the east which is in part a re-formation of land shown in some of the earlier maps. Since 1923-24 there do not appear to have been any great changes.

The grants were all made for the purpose of dhani cultivation, and dhani cultivation can be carried on on land which is covered at ordinary spring tides but uncovered at low water. According to the plaint the whole or nearly the whole of the island is still in this condition. It is still used mostly for the purposes of dhani cultivation, but the appellant company, a timber firm, chiefly require it for the storing of logs, and use parts of it for that purpose. The various original grants had by the year 1895-96 mostly passed into the hands of one Nagiappa Chetty. Since then they have changed hands several times until the whole island was purchased by the appellants in the year 1922 from one M. E. Mulla. At the time of this purchase it does not appear from the maps that the accretions now claimed were in existence. They are first shown in the map of the following year. I have already indicated that in my opinion the appellants hold the status of landholders as to the original grants subject to the conditions implicitly or impliedly attached to these grants, and that that involves a permanent, heritable and transferable right of use and occupancy. But it is also quite clear that the purpose of the original grants in each case was dhani cultivation, that the area in the case of each grant was set forth, and the boundaries were apparently demarcated (vide R. 40 in Ch. 7 of the rules then in force), and that it was set forth in express terms in the deeds of grant that if the grantees wished to erect bunds they must do so within the area granted. The boundaries on one or more sides in each case were set forth as the Pegu River. It is also clear that the idea that the grantees were entitled to accretions never occurred to either the original grantees on the one side or the officers of Government on the other. If the law of accretions as now contended for by the appellants had been rigorously applied from the first, then the first grantee of a small rectangular plot must in process of time have become the owner of the whole island. Authorities have been cited in which the law of accretions has been held applicable to foreshore. Foreshore has been defined as land between high and low water-mark. If this is the correct definition then it appears that the whole of the land owned by the appellants in this case is foreshore, and that they own no solid land behind it. In all the cases cited foreshore has been attached to solid land.

There can be no doubt that the law of accretion has been held applicable in other parts of India. By S. 4, Bombay Land Revenue Code, 1879, alluvial accretions where exceeding one acre in extent are at the disposal of Government, and no Bombay case has been cited before us. In Bengal however the position under the statutory law is different. By the Bengal Regulation 11 of 1825 it was enacted that where there was no local usage to the contrary, land gained by gradual accession whether from the recess of a river or of the sea, shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed. No other statutory enactments on the law of accretion have been cited to us, and admittedly the Bengal Regulation is not in force in Madras. The right of adjacent owners to gradual accretion has however been recognized in several cases in Madras, as in the case of *Secy. of State* v. *Kadirikutti* (2). The general principles on which the rights to soil gained from a river arise were first enunciated in that case, and the judgment then goes on to say:

"There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary."

In the case of *Balusu Ramalakshmamma* v. *Collector of Godavari* (3) the Privy Council dealing with a case of accretion remarked:

"There does not appear to be in Madras as in Bengal an express law embodying the principle that gradual accretion enures to the land which attracts it but the rule though unwritten is equally well established."

It is clear however that their Lordships were not prepared to accept the view that the whole of the English law on the subject of land gained from rivers was applicable, as they also express themselves as

"having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari."

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(2) [1890] 13 Mad. 369.
(3) [1899] 22 Mad. 464=26 I. A. 107 (P.C.).

In the case of *Secy. of State* v. *Rajah of Vizianagram* (4)it was held by a Bench of the High Court of Madras that in the case of large rivers in India like the Godavari it is not necessary to apply the English rule that accretion must be slow and imperceptible. At p. 1099 of his judgment in that case Srinivasa Ayyangar, J., refers to the law of accretion as "now a part of the law of all civilized countries." This case was taken on appeal to the Privy Council whose decision is reported at p. 207 (of 45 *Madras*). Their Lordships upheld the decision of the Madras High Court on the ground that the accretion in that case must be held to have been "gradual, slow and imperceptible." They expressed no opinion as to the general extent to which the law of accretion was applicable in Madras.

In all these reported cases it seems to have been assumed that the general law of accretion was applicable to the circumstances of the cases reported, but the grounds for that assumption were never argued or stated. And their Lordships of the Privy Council have indicated that they might have doubts as to the wholesale application of the English law on the subject. In each of the cases cited the lands were claimed as accretions to solid land to full title to which there was no serious dispute. In none of the cases is there any real analogy with the circumstances of the present case; where it is in effect claimed that the grant by the Government of a small defined area arising above low water-mark for the purpose of dhani cultivation gives the grantee the right to claim complete title to any further land which may rise above low water-mark and be adjacent to the land originally granted. And as late at any rate as 1870 the Privy Council indicated doubts as to the extent to which the law of accretions applied even in Bengal where Regn. 11 of 1925 was in force. In the judgment of their Lordships in the case of *Felix Lopez* v. *Muddum Mohun* (5) at pp. 473 and 474 occurs the following passage:

"There is however another principle recognized in the English law, derived from the civil law, which is this: that where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine year by year to whom an inch, or a foot or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land: *Rex* v. *Lord Yarborough* (6). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea: *In re Hull and Selby Railway Company* (7). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property by landmarks, by maps, or by a mine under the sea other means of that kind, has never been judicially determined."

The principles underlying the law of accretions have been variously stated. At one time it was suggested that *de minimis non curat lex* was the basis of the law. But this has been dissented from and cannot now be looked on as correct. In the case of *Brighton and Hove General Gas* v. *Hove Bungalows, Limited* (8), the general law as stated by Blackstone is quoted at p. 381 of the judgment of Romer, J., as follows:

"As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra-firma; or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be that if this gain be little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*: and besides these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration, for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King."

The learned Judge goes on to remark:

"The reason given by Blackstone for this rule of law is not now accepted as being the true one."

And at p. 386 the same learned Judge remarks;

"I am rather disposed to adopt the reason assigned for the rule by Baron Alderson in the case of *Hull and Selby Railway Company* (7) namely, 'That which cannot be perceived in its progress is taken to be as if it had never existed at all.' And as Lord Abinger said in the same case: 'The principle' as to gradual accretion 'is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property'."

And in the case of *Attorney-General of Southern Nigeria* v. *John Holt and Co.* (9) at p. 612 a reference is made to

(4) [1917] 40 Mad. 1083=40 I. C. 896.
(5) [1870] 13 M. I. A. 467=5 B. L. R. 521=14 W. R. 11 (P.C.).
(6) [1824] 2 Bligh (N.S.) 147=1 Dow & Clark 178=5 Bing 163=4 D. & R. 790=3 B. & C. 91=27 R. R. 292.
(7) 5 Mee. & Wel. 327=8 L. J. Ex. 260.
(8) [1924] 1 Ch. 372=93 L. J. Ch. 197=130 L. T. 248=88 J. P. 61=21 L. G. R. 758=68 S. J. 165.
(9) [1915] A. C. 599.

"that general convenience and security which lie at the root of the entire doctrine of accretion."

We have been referred on behalf of the appellant company to a number of English authorities which bear directly or indirectly on the applicability and scope of the law of accretions so far as the circumstances of this particular case are concerned.

In the case of *Micklethwait* v. *Newlay Bridge Co.* (10) the question in issue was whether a grant of land included all the grant of a non-navigable river bounding it *ad medium filum*. The judgment has no direct bearing on the doctrine of accretion, but on p. 145 are contained certain observations on the presumption to be drawn from a grant:

"It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded is intended to pass, but that presumption may be rebutted. In my opinion you may look at the surrounding circumstances, but only to see whether there were facts existing at the time of the conveyance and known to both parties, which showed that it was the intention of the vendor to do something which made it necessary for him to retain the soil in the half of the road or the half of the bed of the river, which would otherwise pass to the purchaser of the piece of land abutting on the road or river."

In the case of *Gann* v. *Free Fishers of Whitstable* (11) the right of the Crown to make a grant of the bed or soil of an estuary or navigable river was recognized, but it was held that the grant was subject to the public right of navigation. The case of the *Duke of Beaufort* v. *Mayor, Aldermen and Burgesses of Swansea* (12) was a case in which the claim was a claim by a subject to certain foreshore. It was held that it was for the jury to decide whether in the circumstances of the case a grant of the foreshore could be held proved. The case of the *Attorney-General* v. *Jones* (13) is an authority to a similar effect. In the case of *Scratton* v. *Brown* (14) it was held that the grant by the Crown of land between high and low water-mark meant the grant of whatever land might from time to time be between high and low water-mark. At p. 1146 of the judgment of Bayley, J., the following passage occurs;

"Then what was the object of the parties to the deed of 1773? To grant the land within limits. Those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low water-marks." I think that these words must be construed with reference to the rule of the Common-law on the subject of accretion, and that as the high and low water-marks shift, the property conveyed by the deed also shifts."

This is rather an authority, as to the construction of the terms of a grant than as to the applicability of the general law of accretion. The grants in the present case were grants of specified areas all of which were under high water-mark, and the boundaries of which are simply described as the Pegu River.

In the matter of the Hull and Selby Ry. (7) the question arose whether land which had become foreshore by the invasion of the river was the property of the original owner or the Crown. It was held to be the property of the Crown. In his judgment in the case Alderson B., observed:

"Suppose the Crown, being the owner of the foreshore—that is, the space between high and low water-mark—grants the adjoining soil to an individual; and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible; in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all."

To two other cases which are important in their bearing on the present case I have already referred in regard to their interpretation of the reason for the law of accretions. The case of the *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (9) is specially relied on as being a case to which the English law has been applied although the land affected was in Lagos. On this point however it is to be noted that at p. 601 of the judgment it is stated that:

"by Ordinance 3 of 1863 of Lagos, English law is there applicable so far as local circumstances permit, and unless inconsistent with any ordinance in force in the Colony."

In that case the respondents had obtained Crown grants, the sea being generally stated to be the boundary, and it was held that the general law of accession would apply notwithstanding the fact that in some parts the area of the

(10) [1886] 33 Ch. D. 133=55 L. T. 336=51 J. P. 132.
(11) [1865] 11 E. R. 1305=11 H. L. C. 192=20 C. B. N. S. 1=35 L. J. C. P. 29=12 L. T. 150=13 W. R. 589.
(12) 154 E. R. 905.
(13) 159 E. R. 144.
(14) [1825] 4 B. & C. 485=6 D. & R. 536=107 E. R. 1140.

land granted had been stated in the grants. In this connexion Lord Shaw observes at p. 612 of this judgment;

"To suppose that lands which, although of specific measurement in the title-deeds, were de facto fronted and bounded by the sea were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a strip of land (it might be yards, feet or inches) between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into inland property would be followed by grotesque and well-nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage."

It is to be observed however that the Crown grants in that case appear to have been in general terms and always intended to have been made use of for purposes of commerce for which a sea-front was indispensable. The original grant in the present case was of a small piece of land, which had recently in part emerged from the river, for the specific purpose of dhani cultivation, and the land has not yet fully emerged. It might with some force be argued that grotesque and well-nigh impossible results would be more likely in the present case if the appellant's claim were pushed to its logical conclusion than if he were kept within the bounds of his original grants.

In the case of *Brighton & Hove General Gas Co.* v. *Hove Bungalows, Ltd.* (8), it was held, following the decision in *Rex* v. *Lord Yarborough* (6), that where the original boundary of land granted was the high water-mark, the grantee was entitled to claim the high water-mark still to be the boundary even though that mark had shifted, and was demonstrably different from its original position.

Most of the decided English authorities deal with accretion to solid land bounded by the high water-mark. In some cases it has been laid down that a grant of the foreshore would mean a grant of the foreshore as it might be from time to time. But in none of the decided cases are the circumstances in any way similar to those of the present case. Here the grant was not of the foreshore, nor was it a grant bounded by the high water-mark. It was a grant of a small portion of land below high water-mark and above low water-mark. It is true that the Pegu river was stated to be the boundary, but the boundary clearly was not the high water-mark of the Pegu River; nor can it well have been the low water-mark. It was clearly intended to be a boundary actually demarcated by posts on the spot; and that this was intended to be a rigid boundary is evidenced by the clause which prohibits the creation of bunds except inside the boundary.

As regards the applicability of English law we have been referred to the case of *Maung Bya* v. *Maung Kyi Nyo* (15), where the general principles of English law were held to be applicable to the flow of and flooding by fresh-water rivers or water-courses in Burma But no general principles as to the applicability of English law were laid down. In a recent case *Mehrban Khan* v. *Makhna* (16), the Privy Council held that in the North-West Frontier Province where regulations in force required Judges to decide according to justice, equity and good conscience, that should generally be held to mean the rules of English law if found applicable to Indian society and circumstances. The matter in issue was as to the law of mortgage It is impossible to hold, and has not in fact been seriously contended, that the whole of the English Common law can be applied to Burma. And the English law of accession though generally held applicable in Bengal and Madras is not of universal application in India. The Bombay Code makes it clear that it does not apply to that province. Whilst rules of English Common law are frequently applied as the rules of justice, equity and good conscience, it by no means follows that the whole of the present English law of accession which has been evolved by slow degrees as being suitable to the conditions in England should be applied in Burma. The general principles underlying that law have been stated to be of universal application and I am certainly not prepared to go so far as is, I understand, suggested on behalf of the Crown that these principles should never be applied in Burma. But before deciding whether the law should be applied to the circumstances of this particular case it does seem to me very necessary to consider very carefully not only the special conditions of Burma, but also the circumstances peculiar to the present case.

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(15) A. I. R. 1925 P. C. 236 = 90 I. C. 198=52 I. A. 285=3 Rang. 494 (P.C.).

(16) A. I. R 1930 P. C. 142 = 128 I. C. 554=57 I. A. 168=11 Lah. 251 (P.C.).

No oral evidence as to local custom has been given. Some reliance has been placed on behalf of the Crown on Direction 40 of the Directions to Land Revenue Officers published at pp. 216 to 218 of the Land Revenue Manual. The directions are in the nature of executive instructions and have no legal force. They do however indicate the manner in which alluvial formations of land are ordinarily dealt with, and they do suggest that the law of accretion is not ordinarily held applicable to such formations. Further, it is reasonably clear that both Government and the grantees have dealt with the present island in the past as though what was granted was a specific area of land only and did not carry with it the right to use and occupy adjacent land which might subsequently be formed by the river. The natural right of a riparian owner to retain a sea or river frontage would seem to be the principle underlying the decision in the case of the *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (9).

But that was a case where the original grant of the land had been apparently for commercial or industrial purposes, and the principle of justice, equity and good conscience clearly justified the application of the rule. The conditions of the present case are entirely different. Burma is still mainly an agricultural country and the Burma Land and Revenue Act is framed principally for the purpose of dealing with agricultural land. The original grants in the present case were quite clearly made for the purposes of cultivation, and the land was not and never has been suitable for the ordinary purposes of commerce or industry. A river frontage was clearly unnecessary for the purposes of dhani cultivation. All that would be required for this purpose would be free access to and egress from the particular holding concerned. In my view of the case the original grantees obtained a permanent heritable and transferable right of use and occupancy of the land originally granted. But there is nothing in the original grants to indicate that the grants were ever intended to cover more than the land then actually granted. S. 22 of the Act lays down that no person shall acquire, by length of possession or otherwise, any right over lands disposed of or allotted under S. 18, S. 20 or S. 21 beyond that which is given by the rules made under the said section respectively. I am not prepared to say that this section operates to exclude the applicability of the law of accretion to all lands which are subject to the Act, but it does indicate that in deciding what are the rights of any particular person to land, the provisions of the Act and the rules thereunder must ordinarily be the sole or at least the chief consideration. The Indian cases cited are all cases in which there was no dispute as to the nature of the tenure of the lands to which the principle of accretion was held to apply, and they were all cases in which what was accreted to was solid land.

The principle of the law of accretion must now be held to be founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property. I am unable to see how such a necessity exists in the present case. The original grants were clear enough, and all the purposes of those grants can be served by limiting the grantees to the portions originally granted. The necessity which exists in the case of solid land used for the purposes of commerce or industry does not arise in the case of a purely agricultural grant on land which is not attached to any solid land at all, but is itself washed by high spring tides. Nor can it be said in the present case that either the high water-mark or the low water mark was the boundary of the original grants. True, the boundary was described as the Pegu River. But it clearly was not the high water-mark, nor can I see any reason for supposing that it was the low water-mark. It was some line in between the two which at the time of the original grant was definitely demarcated, but which bore no definite relationship either to high or low water-mark. I can find no authority for applying the law of accretions to such a case, and in my opinion the original grantee obtained only the land within the fixed boundaries of his original grant, and not the right to any land which might subsequently be added thereto by the process of accretion.

Nor can I see that the present appellants are in any better position than the original grantees. In the case of the *Attorney General of Southern Nigeria* v. *John Holt & Co.* (9), the riparian owners were held to have a perpetual right to place stone on the reclaimed land and to erect buildings thereon on the ground that

they had an irrevocable license from the Crown for that purpose. No such claim can possibly be made here. It is not shown that Government have ever acquiesced in the storage of logs by the appellants on lands not covered by the grants, and no buildings are alleged to have been erected on the lands. So far as is shown by the record it would appear that as new lands have appeared from time to time in the past they have been the subject of fresh grants, or fresh persons have been allowed the temporary use and occupation of them. The principles of estoppel or of irrevocable license cannot possibly be urged in favour of the appellants, nor can it justly be urged in their behalf that in buying lands which were under water at high spring tide and which had expressly been granted for the purposes of dhani cultivation, they had been induced to believe that they thereby acquired all the incidents of ownership which might ordinarily be attached to lands granted or for a long period used for the purposes of commerce or industry. In my opinion the appellant company is not entitled to claim any lands outside the areas of the original grants simply because those lands have been formed by the process of gradual accretion.

The next question for consideration is the appellants' claim to such portions of the island as formed part of the original grants which have since been eroded and have subsequently re-formed on the original sites. It is not clear from the maps and the evidence on record exactly which of the lands in dispute are in this category. According to the last map—that for the year 1925-26—it would appear on a comparison with earlier maps that the only portion which has so re-formed is the northern portion of the holding shown in the 1925-26 map in the name of Maung Ba Shin. And this land would appear to have disappeared somewhere about the year 1914-15. Since then no revenue appears to have been paid to Government by the appellants or their predecessors-in-title for this land, but there is no other evidence to indicate any intention on their part to abandon the land. There is no express provision in the Lower Burma Land and Revenue Act as to the abandonment of land which has been the subject of a grant by Government. But the grant in the present case was in my view a grant of landholders' rights, and the provision contained in S. 11 of the Act would appear to be applicable. That section lays down that:

"any landholder who, except as provided in S. 12, voluntarily relinquishes the possession of any land after the expiry of three years from the date on which this Act comes into force, shall at once forfeit his status of landholder in respect of such land."

The subject of re-formation of "diluviated" land was dealt with by the Privy Council in the case of *Lopez* v. *Muddun Mohun* (5). At p. 472 of his judgment James, L. J., remarks:

"The rule of English law applicable to this case is thus expressed in a work of great authority, Hale, de Jure Maris, p. 15: 'If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land the same can be known, or it be by art or industry regained, the subject doth not lose his property.' 'If the mark remain or continue, or the extent can reasonably be certain, the case is clear.' And in another place, p. 17, he says: 'But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his propriety of the soil, although it for a time becomes part of the sea, and within the Admiral's jurisdiction while it so continues.'

"This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner."

It is not however suggested that this rule is a rigid rule to be enforced in all circumstances, and at p. 478 of their judgment their Lordships remark:

"Their Lordships however desire it to be understood that they do not hold that property absorbed by the sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation."

A number of later cases on the subject of re-formations of land have been cited to us, where the main question has been what is sufficient to constitute such abandonment of land as to merge the land again into the public domain. In the case of *Hemnath Dutt* v. *Ashgar Sindar* (17), it was held that tenants holding under raiyatwari tenure who had ceased to pay

(17) [1879] 4 Cal. 894.

revenue on their submerged holdings must be deemed to have abandoned their holdings. Raiyatwari tenure does not appear to be very different from the tenure of a landholder as defined in S. 8, Lower Burma Land and Revenue Act. In the case of *Maharaja of Vizianagram* v. *Secy. of State* (18) their Lordships of the Privy Council held that raiyatwari tenants who had ceased to pay revenue on submerged lands had forfeited their tenure of rights. There were in that case other indications of abandonment besides a mere failure to pay revenue.

It was however held by the High Court of Allahabad in the case of *Mazhar Rai* v. *Ramgat Singh* (19) that mere failure to pay rent was not a sufficient indication on the part of the tenants of their intention to abandon their tenancy. And the Privy Council held in the case of *Arun Chandra Singh* v. *Kamini Kumar* (20) that the principle applicable to this class of cases was rightly enunciated in *Mazhar Rai's* case (19), and that the Calcutta decision in *Hemnath Dutt's* case (17), was not good law. Their Lordships' later decision in the case of *Maharaja of Vizianagram* (18), might at first sight appear to be in conflict with this decision, but in that case nonpayment of revenue was not the only factor taken into consideration. The High Court had held that for numerous reasons it must be held as a fact that the ryots had relinquished their holdings and their Lordships of the Privy Council merely upheld this decision. On the other hand, in *Arun Chandra Singh's* case (20), their Lordships definitely approved the principle laid down in *Mazhar Rai's* case (19).

As a result of these authorities the general rule would appear to be that, although nonpayment of revenue is a very important factor for consideration in such cases, it is not necessarily by itself sufficient proof of the intention to abandon land. Now in this case it would appear that the land concerned became submerged in about the year 1914 and was after that for several years unfit for dhani cultivation. Revenue was not paid during those years, but there is no evidence of any kind of any action on the part of the appellants or their predecessors-in-interest indicating any desire to abandon that land beyond nonpayment of revenue; and the present claim seems to have been launched not very long after the land re-appeared. There does not seem to me, therefore, in the present case to be sufficient material on the record to justify the view that the appellants had abandoned this land.

Under S. 11, Lower Burma Land and Revenue Act, the status of landholder is lost if the landholder voluntarily relinquishes possession. I am not however satisfied that this section has the effect of making the case against the appellants any stronger. There is nothing to show—and the presumption is to the contrary—that they or their predecessors gave up the cultivation of dhani so long as that cultivation was possible. Presumably they ceased to cultivate, not because they wished to do so but because they were forced by the action of the river. I do not therefore think that it can be said that they voluntarily relinquished possession. In fact there appears to me very little difference between voluntary relinquishment of possession and abandonment of land such as is discussed in the rulings referred to. I hold that the appellants are entitled to possession of so much of their former grants or the former grants of their predecessors-in interest as have re-appeared above the river.

The result is that I would dismiss the appeal so far as the claim to accretion is concerned. But so far as the claim to re-formation is concerned I am of opinion that the appeal should be allowed and I would remand the case to the trial Court for decision as to which of the lands in dispute are re-formations of grants previously made to the appellants or their predecessors-in-interest.

As I am holding on many of the points raised in this case in favour of the appellants I would direct that the parties should bear their own costs in both Courts.

Otter, J.—I have had the advantage of reading the judgment of my learned brother and upon the first two grounds of defence reviewed by him, I need only say that I agree with his reasoning and conclusions. In my view both defences fail.

The last remaining ground raises points of peculiar difficulty, more especially as, so far as I know, this is the first case of its kind in Burma. Moreover, the land legis-

(18) A. I. R. 1926 P. C. 18=94 I. C. 501=53 I. A. 64=49 Mad. 249 (P.C.).
(19) [1896] 18 All. 290=(1896) A. W. N. 56.
(20) [1913] 41 Cal. 683=41 I. A. 32=22 I. C. 317 (P.C.).

lation of this Province is silent upon the matter, and the inherent features of the case differ in some respects from previously decided cases in other Indian High Courts and in England.

As my learned brother states, the last of the three main grounds of defence was that the English law of accretion is not applicable in the circumstances of the case. Both in Bengal and Bombay ordinances have been passed dealing with accretion, and it is unnecessary to consider in any detail the law in force in these Provinces, although it will be necessary to refer to certain cases decided in the Calcutta High Court at a later stage.

It is pehaps sufficient to state that, so long ago as 1825, Bengal Regulation No. 11 of that Province was passed, declaring the rules to be observed in determining claims to lands gained by "alluvion or by dereliction" of a river or the sea. Later legislation also dealt with the matter, and there can be no doubt that speaking generally, the English law of accretion has been made to apply to various forms of land tenure in Bengal.

In Bombay, the position is different, for the law there is that all alluvial lands and newly formed islands vesting in holders of alienated land are liable to revenue, when the area exceeds a certain acreage; and the occupant of a bank or shore upon which alluvial land forms is entitled to the temporary use thereof "unless or until the area of the same exceeds an acre;" when such area is exceeded such land is "at the disposal of the Government;" see Bombay Act 5 of 1879, Ss. 46 and 64, and see also S. 63 (substituted by Bombay Act 5 of 1913), which gave Government power to grant alluvial lands. Thus it would seem that the general law of accretion does not apply in the Province of Bombay, and moreover it seems to have been necessary to pass special legislation to exclude it.

In Madras however, so far as I know there has been no legislation of a general character upon the matter, but there are a number of important decided cases which have arisen in that Province where the principles of English law of accretion (with certain modifications) have been held to apply.

It may be well first of all to endeavour to ascertain what the original grantees of the plots now forming the island obtained. In my view, they obtained landholders' rights within the meaning of S. 8, Burma Land and Revenue Act 1876. I am not sure that Mr. McDonnell, who appeared for the appellant company, put his case quite in this way. He said, as I understood him, that the grants were made by virtue of S. 6 of the Act, and were "out-and-out grants." For my part I doubt whether S. 6 of the Act provides for the making of grants at all. Grants of land over which no person had existing rights were made, I think, by virtue of S. 18 of the Act and R. 2 of the rules. Such grants were, of course, subject to the conditions upon which they were made and conveyed a permanent, heritable, and transferable right of possession and occupancy in the land granted.

My learned brother has dealt in some detail with the terms of the grants, and I need only observe that the purpose for which the grant was made was for dhani cultivation, and, in order that certain exemptions for revenue might be obtained, a certain proportion of the land granted had to be brought under cultivation within a certain time. It is unnecessary to set out these last-mentioned matters in detail, for it was admitted before us that the purpose for which the land was granted has been at all material times carried out, and that there has been no breach of the conditions as to cultivation or payment of revenue.

The purpose however for which the grants were expressed to be made must be kept in mind, for this may have material bearing upon the question whether the law of accretion should be applied or not. In any view of the effect of the grants under examination, it seems to me that the grantees obtained something akin to a grant of freehold in England, subject however to the reservation of minerals and to the incidence of certain covenants, the chief of which I have just referred to. In this connexion one further restrictive covenant should be mentioned, viz., the restriction directing that any protective bunds must be constructed from inside the land.

There is no evidence as to the date when, or the circumstances under which, the land first emerged above the surface of the river. It is however agreed that the river at this point is both tidal and navigable, and that the bed of the river is vested in Government.

Apart from the question of re-formation, the case for the appellant company, quite shortly, is : that, by reason of the conveyance to them in the year 1922, they obtained not only the whole island, as it then stood, but the right to any perceptible increase to it by accretion which either had occurred or may occur in the future.

For the respondent, on the other hand, it is argued that the appellant company obtained no more than rights of occupancy for the purpose of dhani cultivation upon the lands actually conveyed.

It was not, and, so far as I can see, it could not have been, successfully argued that the appellant company would not be entitled to succeed if the English law of accretion (with certain modifications, to which I shall refer, allowable by virtue of the altered conditions obtaining in this Province) is to be applied. The two main grounds, which, as I understand the learned Government Advocate, it is said, prevent such application rest upon :

(i) The nature of the grants and the principles of land tenure in this Province.

(ii) The particular natural features peculiar to the holdings under review.

These two matters involve considerations which are closely allied, and in examining some of the numerous authorities, quoted by the learned advocates on both sides, each must be borne in mind.

I propose first to briefly refer to two cases, viz., *Maung Bya* v. *Maung Kyi Nyo* (15) and *Mehrban Khan* v. *Mukhan* (16). The first of these, though far different from the present case, is the only authority in this Province which, so far as I know, throws any light upon the question whether English law may be said to be applicable upon questions arising in connexion with the water-flow of rivers. Part of the head-note is :

"The law applicable in Burma to the flow of and flooding by fresh-water rivers or water-courses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is the same as that in England."

The short facts in that case were that the respondents, whose paddy lands abutted on a water-course, had stopped up the overflow of the water, and that by reason of this action, the waters flowed back and caused damage upon the appellants' land. The suggestion that English law was not applicable in that particular case was not put forward before their Lordships of the Privy Council, who, after referring to a number of English authorities, held the respondents liable.

In the second case, it was held that a direction in a statute "to decide by justice, equity and good conscience" means a direction to decide by the rules of English law, if such are found to be applicable to Indian society and circumstances. The question in that case related to the right of redemption of a mortgage.

Section 60, T. P. Act, which deals with such rights, was not in force in the place where the case arose. As however that section indicated that the rules of English law relating to such rights are applicable to Indian society and circumstances, and as there was no indication to the contrary, it was held that the matter must be determined by the rules of English law.

I am of opinion therefore that prima facie the English law of accretion may be applied as a rule of justice, equity and good conscience, in the absence of any specific rule of law applicable in this Province, if it is found to be applicable to the particular circumstances of the case.

I am fortified in this conclusion by a reference to the case of *Waghela Rajsanji* v *Masludin* (21). At p. 551 of the report I find this passage in the judgment.

"Now it was most candidly stated by Mr. Mayne . . . . . that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances."

Moreover when I find, as I shall proceed to show, that in Madras (where no appropriate legislation is in force) the English law has been applied, and such application has not been animadverted upon by their Lordships of the Privy Council, I have no doubt that, provided it is not excluded by local or other conditions applicable to the particular case, the Courts of this Province would be right in applying the English law upon matters of the nature now under review.

I will now turn to certain authorities of the High Court of Madras, which seem to me to be of the highest importance upon the matter.

The first case is *Secy. of State* v. *Kadirikutti* (2). It will be seen that this was the first case of its kind in the

(21) [1887] 11 Bom. 551 (P. C.).

Madras Presidency. Part of the head-note runs as follows:

"The rules of English law, according to which the rights of the Crown or of riparian owners to accretions caused by alluvion are determined, with reference to the character of the river and the manner in which the accretion is occasioned are applicable in British India unless excluded by enactment or local usage."

The facts and issues differ from those in the present case, but in the judgment at pp. 373 and 374 of the report, the Court has referred briefly to the Institutes of Justinian and to certain extracts from the classic English Commentaries, inter alia, the well-known passage from Stephen's Commentaries, which may be found mentioned in the modern text-books dealing with this question.

It is also pointed out (and this is of some importance in the present case) that the ownership in the land between the ordinary high and low water marks is vested in the Crown and subject to the user of the public for the purposes of navigation and otherwise.

This principle was laid down in *Gann* v. *Free Fishers of Whitstable* (11).

At p. 375 of the report in the Madras case appears this passage:

"There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary."

It was then pointed out that the rule that the Government is the owner of the soil in the bed of a navigable river up to high water-mark is recognized in Regn. 11 of 1825 (Bengal), and the case of *Felix Lopez* v. *Muddun Mohun* (5) was referred to. It will be necessary to refer to this last case at a later stage, but it may be mentioned here that it was a case of a navigable river. In the Madras case under review it had been argued that the English rule was inconsistent with the law prevailing in Malabar with regard to ownership in land but it was found as a fact, that this was not so.

Later in the judgment at p. 376 it was observed that the character of the river must be considered, and the manner in which the accretion is occasioned, and it became necessary inter alia to refer back certain questions to the District Judge. One of these was whether the variation to the river bank was caused by the acts unlawfully done by the plaintiffs and persons claiming under them, and as the answer to this question was in the affirmative, the claim of the riparian owner was dismissed.

I would observe that there is no suggestion that in the present case the variations were caused by the acts of the appellants. It may be mentioned that one of the passages at p. 374 of the judgment (viz. a quotation from Stephen's Commentaries) is relied upon by the learned Goverment Advocate. It is as follows:

"The principle on which this rule as to gradual accretion rests is founded as well 'on the necessity which exists for some such rule of law for the permanent protection and adjustment of property' as 'on the impossibility of identifying from time to time small addition to or subtraction from land caused by the constant action of running water.'"

It was said of course that in the present case the accretion was rapid, and that it was possible to identify additions to the land in question from time to time. It will be necessary to refer at a later stage to the first of these assertions ; but bearing in mind that we know that the accretions have been going on since the year 1892, at any rate, it would appear doubtful whether the second of the contentions of the learned Government Advocate is justified. No doubt after each rainy season such identification may be possible, but it would be at least difficult to identify the accretions from day to day.

The next case is *Balusu Ramalakshmamma* v. *Collector of Godavari* (3). In this case part of the head-note is as follows :

"Although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures to the land to which the accretion is made following the ownership of that land the rule is equally well established in both those provinces."

In my view this authority is of much importance in relation to the present case, and I consider it useful to set out in full an extract on pp. 465 and 466 from the judgment of the District Judge describing the property under review:

"The Godavari is a broad river. In places it is about four miles wide. In the hot weather the river bed is a waste of sand with some streams of clear water here and there finding their way down to the sea. When the floods come down in June and later months, the river is a turbid torrent, more than twenty or thirty feet deep, very heavily laden with rich silt from the black soil of Central India. When the river reaches the deltaic tract, where the fall is only one foot per mile, the current slackens and the suit is deposited in large islands or accretions in the river-bed, which are called lankas. These are composed of rich black soil, carried down and re-arranged by the river, and they are extremely fertile. As the river falls, these lankas have their edges cu-

off abruptly by the current. When the river is at its lowest in the hot weather, one sees, as I said above, a few streams of clear water, an extensive waste of barren valueless sand, and standing up in the midst of this waste of sand, the black fertile lankas."

So far as I am able to understand the physical features which exist in the present case, it seems to me that they are somewhat similar to those in the Godavari case. The lanka was thrown up originally in the river much as the island here. The accretions were to the island and, so far as I can see, the difficulty pointed out by my learned brother, viz., that, if the contention of the appellant is correct, the owner of a first small plot forming an island would be entitled to every subsequent accretion to it, was there present.

I would point out however that it was found, as a fact, that the river was not tidal or navigable, and I am not sure that the conditions in the dry weather are similar. The question in both Courts was whether the existing lanka belonged to the plaintiff or the defendant. This point having been decided against her, the appellant in the Privy Council endeavoured to base her claim to the lanka upon grounds other than those put forward in the Courts below. It was held that she was not allowed to do so, and it followed therefore that as the accretions were to a lanka belonging to the defendant the latter was entitled to them.

Two passages at p. 469 of the judgment are of importance. The first is:

"There does not appear to be in Madras, as in Bengal, an express law embodying the principle that gradual accretion enures to the land which attracts it; but the rule, though unwritten, is equally well established. It is hard to see why it should not apply to land *which the river washes on both sides, as well as to land which is washed only on one side.*"

I would point out here that it never seems to have been suggested that, if the accretions were gradual and imperceptible, they did not enure to the benefit of the owner of the land to which they adhered.

The second passage is:

"The result is that their Lordships, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari, would require to know much more about the river in question and the mode in which it has been dealt with, before deciding as to the presumption or its rebuttal. The plaintiff must abide in this suit by the case she has presented."

This passage was much relied upon by the learned Government Advocate as showing that the principle that the English law of accretion would be applied in India, is not crystallized. I would point out however that their Lordships of the Privy Council did apply the principle to the Godavari River, and moreover it seems to me that in the passage quoted they are referring only to be the contention on behalf of the appellant sought to be raised before them for the first time, which was based upon ownership of both banks of the river. It is perfectly true that in England in a nontidal river the riparian owner owns the soil ad medium filum, and in my view, it was to the presumption that this was so, and to this alone, that their Lordships referred in the passage relied on by the learned Government Advocate.

One other Madras case remains to be mentioned, viz., *Secy. of State* v. *Rajah of Vizianagram* (4). In that case the material portion of the head-note runs as follows:

"*Held*: that the suit land was an accretion to the plaintiff's land, that in applying the rule of English law as to accretions, local physical conditions must be taken into consideration, and that in the case of large rivers in India like the Godavari which on occasions leave large and sudden deposits, it is not necessary that the accretion should be slow or imperceptible."

The facts of that case may be shortly mentioned. The lanka in dispute had been formed in contiguity with another lanka in midstream. Subsequently it became detached by the formation of a channel and became a separate island. The importance of the case is that it was found to be impossible to say that the accretion was slow or imperceptible ; but nevertheless, the decision in that case, applying the law of accretion was upheld by their Lordships of the Privy Council.

Before referring to the judgment of the Committee however I would point out that the addition amounted to no less than 600 acres in the course of a single flood season, and it was pointed out that in *Lopez's* case (5), and another case, the accretions were 2,500 and 5,000 acres respectively. There can be no doubt of course, that in England accretion must be formed by gradual, slow and imperceptible degrees; indeed, it was at one time said that it was because of the principle *de minimis non curat lex* that accretion was recognized in law. In this connexion Srinivasa Ayyangar, J., (who delivered the principal judgment of the Court)

referred (at p. 1,099) to the two English cases of *Rex* v. *Yarborough* (6) and *Advocate-General* v. *M'Carthy* (22).

One other case referred to by the learned Judge was *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (9). I must refer to this case also at a later stage, but I would point out here that the Court distinguished these decisions upon the question whether the accretion must be gradual, slow and imperceptible. That they must now be so regarded is, I think (at least so far as Madras is concerned), settled, for in the head-note of the report of the appeal in *Secy. of State* v. *Rajah of Vizianagram* (23) appears this passage :

"The actual rate of progress necessary to satisfy the rule when used in connexion with English rivers is not necessarily the same when applied to the rivers of India."

It was admitted, as I have already pointed out, by the learned advocate for the appellants in that case that the English law of accretion was applicable in Madras, but it was said, of course, that the accretion must be gradual, slow and imperceptible. Lord Carson however who delivered the judgment of the Committee, said that he did not propose to discuss the exact meaning of the word " imperceptible " in the English rule,

" for, assuming the applicability of the English rule, " slow " and " imperceptible " are only qualifications of the word " gradual,"

and he went on to say :

" and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words, the actual rate of progress necessary to satisfy the rule when used in connexion with English rivers is not necessarily the same when applied to the rivers of India."

Later he referred with approval to the following passage in the judgment of Ayling, J., (as he then was in the Madras Court) (pp. 213 and 214) :

" It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces, and the different conditions of Indian and English rivers is such that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (24)."

It seems clear therefore that no objection that the accretions in the present case were slow or imperceptible can be entertained and that the question whether they were gradual or not must depend upon the conditions found in the Pegu River. Thus it is at least arguable that the objection of the learned Government Advocate that there is no reported case where the law of accretion has been held to apply to land practically covered at high water may be of little force, for such a state of things may well be described as one of the abnormal conditions referred to in the judgment of the Judicial Committee. It is well known, of course, that such conditions are common in the rivers of this Province.

I have now referred to all the cases decided in the High Court of Madras material to the issues under review. Certain cases decided in the High Court of Calcutta were cited to us, but I do not propose to deal with them upon the question of accretion pure and simple for the law in that Province is laid down by the ordinance to which I have already referred. It will be necessary however to deal with certain of these cases when I come to the question of re-formation.

It will be convenient now to turn to certain English authorities which are of importance upon the particular features of the present case.

The English law of accretion upon most points is so well settled that no useful purpose would be served by stating it at any length; moreover after examination of a number of authorities upon the subject and a perusal of such text-books as Coulson and Forbes' Law of Waters, it seems clear that the same principles must prima facie be applied in the case of islands in rivers as have been applied in the case of the banks of rivers or sea foreshore. In the nature of things, there is no English case which approximates to the present case, but certain authorities are useful upon such matters as the alteration of the high and low water-marks.

The case of *Hull and Selby Ry. Co.* (7) may be very briefly referred to as throwing light upon the reasoning which underlies the principle of the law of accretion.

At p. 332 of the report, Lord Abinger said that the necessity for some such rule of law (is)

"for the permanent protection and adjustment of property; for it must be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of the rule; for if the water gradually steals upon the land, he loses so much of his property."

(22) [1911] 2 Ir. R. 260.
(23) A. I. R. 1922 P. C. 105=67 I. C. 1=49 I. A. 67=45 Mad. 207 (P.C.).
(24) A. I. R. 1914 P. C. 48=25 I. C. 467=41 I. A. 221=42 Cal. 489 (P.C.).

I need hardly say there is no English case where the facts are those of the present case; and it is not easy to ascertain what the actual facts were. I would suggest however that, though posts may have been used to mark the boundaries of each successive holding, it appears that, starting from the earliest grant and map, the boundary may well have been the "river." For example, in the grant of April 1894, I find the "south and east boundaries" described in the body of the grant as "Pegu Main River," and "Pegu Main River Channel," and on the map on three sides at any rate (enclosing almost the whole area) a boundary line is shown dividing the subject of the grant from the Pegu River or Pegu Main Channel.

At the same time, as I understand the evidence, that river boundary was not the high or low water-mark. It was something between the two, and nearly all the subject of the grant was covered with water at high tide. But that which was cultivable could be demarcated from time to time, and was, in fact, described and shown as bounded by the river.

Now, I doubt very much whether the boundaries at material times were well defined, but, if they were, the case of *Rex* v. *Yarborough* (6) is, I think, an authority that in England the law of accretion might apply in such a case.

Upon this I would say here that the mere fact that the land was nearly all covered with water, to my mind, makes no difference, for it was just as much land for cultivation purposes, at any rate, as dry land. Moreover the facts in *Rex* v. *Yarborough* (6) (a salt marsh case) were not dissimlar to the present case. Assuming therefore the boundaries of each grant to have been well defined, does this make any difference? Mr. McDonnell says no, and cites, inter alia *Scratton* v. *Brown* (14). The point is one of difficulty. There is no doubt that in that case, where the boundaries of the grant were to be ascertained by the high and low water-mark, it was held that by the deed the right of soil in that portion of land which from time to time lay between high and low water-mark passed to the grantee; and Bayley, J., at p. 499 of the report, said:

"I think that those words must be construed with reference to the rule of the Common law upon the subject of accretion, and that as the high and low water-marks shift, the property conveyed by the deed also shifts."

Littledale, J., at p. 1148 puts the principle on which the decision rests clearly. He says;

"The distinction is well established, that where there are words sufficient to pass property in the first instance, and there are in a subsequent part of the deed words of affirmation, these latter words, though they may be wrong in point of description, do not affect the previous part of the grant. The words are, 'which said sea-grounds.'etc.,(after description),of their boundaries on the north and south by high and low water-mark, ... 'do contain, on the, whole 800 acres of land covered with water.' Now these words of suggestion or affirmation may be true or false. Instead of 800 acres there might have been 5,000 acres, and it is quite immaterial whether they were bounded on the east and west by the lands of the persons mentioned in the deed, because, in the operative part of the grant, the sea-grounds are the thing granted, ..."

Now, it is perfectly true that the case of *Scratton* v. *Brown* (14) turned on the construction of a grant, and the principles of conveyancing. In the present case we have a form devised to comply with a Revenue Act passed in the earlier days of the occupation. But may it not be argued (from this case) that, if what was granted was what was bounded by the river on two sides at least that, the facts that 800 acres (in one grant) only are mentioned, and that certain posts marked out the corners only, the boundaries of what was granted should remain the Pegu River where the cultivable land abutted upon it?

It may be said, of course, that in the present case there is no well-defined line (as high water-mark) which moves from time to time. But that the limit of cultivable land moved and was defined and granted from time to time is also plain. It will be seen, I think, that until *Scrattan* v. *Brown* (14) (1826) (when *Rex* v. *Yarborough* (6) was considered), it was not clear whether the law of accretion would apply to land, the boundaries of which were clearly defined. The position was most carefully reviewed in the important fishery case of *Hindson* v. *Ashby* (25). There the main question was whether a strip along a river bank left dry by the water level sinking had ceased to be part of the river bank. Romer, J., said this was a question to be determined regarding all the circumstances of the case . . . . . nature of the land and its growth and uses, and found that it had ceased to be part of the bed and belonged to the plaintiff by accretion.

(25) [1896] 2 Ch. 1=65 L. J. Ch. 515=74 L. T. 327=45 W. R. 252=60 J. P. 484.

These principles were approved by a strong Court of appeal, but that Court found that as a fact the land in dispute had not ceased to form part of the river bed. In distinguishing *Foster* v. *Wright* (26), a fishery right case, where it was held that the fishery right owner by virtue of his rights of the bed of the river could follow the river when it changed its course, Lindley, L. J., pointed out (at p. 88) that

"the old six feet bank has been ever standing where it is. There stands the old line of demarcation of the plaintiff's land, and there it has stood clearly defined whenever the deposit of alluvium by reason of the silting up of the sand became such as to be in itself apparent, and then and at that very moment when the first and indeed every subsequent accretion became apparent, so also at the same time it became perceptible to the ordinary observer, that the accretion so formed was no part of plaintiff's land."

It is clear therefore that this case might be said to support the case for Government, but great stress was laid on the gradual and imperceptible nature of the accretion. This element, as I have endeavoured to show, might well be held to make no difference since the Godavari River cases. Moreover, in the present case there is no such thing as the six feet wall, and I have the gravest doubts where the existence of posts (if proved), at the time the grants were made, so defined the boundaries as to take the case out of the ordinary law. Furthermore, the boundaries, in fact, seem to me to have been the river where the land abutted upon it.

A further passage in the judgment of Lindley, L. J., may be usefully quoted (p. 87, Stuart Moore) :

"Passages were cited from Bracton, Britton, Fleta, and Hale de Jure Maris, c. i and vi, and the Year Book, 22 Ass. fo. 106, pl. 93, to show that the doctrine of accretion does not apply where boundaries are well defined and known. This may be if the boundary on the waterside is a wall or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself. The cases of *Rex* v. *Lord Yarborough* (6), affirmed by the House of Lords in *Rex* v. *Lord Yarborough* (6) and In re *Hull & Selby Railway Company* (7), seem opposed to these authorities if applied to fluctuating water boundaries. The judgments in *Scratton* v. *Brown* (14) point in the same direction. On the other hand, *Attorney-General* v. *Chambers* seems the other way. But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise."

I regard this passage as significant. It is plain that Lindley, L. J., was of opinion that to exclude the doctrine it must be easy to see whether the accretions, as they became perceptible, are on one side of the boundary or the other. Now, in any view of the case, the existence of the posts would scarcely make the ascertainment of the exact limits of the accretions an easy matter.

Surely, from the nature of the grants, the boundaries on the water fronts must be held to have been the line between the cultivable land and the water.

That being so, there can be little doubt as to the application of the doctrine in England. I would put the matter in this way ; if the boundaries of the grants can be described as well defined at any time, they were not so well defined as to exclude the doctrine. If, on the other hand, they were not defined at all (and there is no real evidence as to the construction or maintenance of the posts), and the boundary on the water fronts was the river, then the doctrine would apply.

Upon this I would refer to what was said in *Lopez's* case (5). There doubt was expressed whether the rule would be applied if there were existing certain means of identifying the original bounds by "landmarks, by maps, etc., etc." There do not appear to be landmarks today, and, to my mind, the maps only afford indication sufficient to show quite roughly what it was possible to grant out for cultivation.

Before leaving this aspect of the case, I would refer to a case relied upon by Mr. McDonnell, viz., *Lyon* v. *Fishmonger's Co.* (27). Part of the head-note is:

"The right of navigating a tidal river is common to the subject of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river, and the latter is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages, or for an injunction. . . . .

"The right of a riparian owner to the use of the stream does not depend on the ownership of the soil of the stream."

It has been suggested in that case that a riparian proprietor, where the tide flows and re-flows, had rights different to those existing in respect of the banks of a stream above the flow of the tide. At p. 672 of the report the Lord Chancellor said :

" . . . I should have thought that some authority should be produced to show that the

(26) [1878] 4 C. P. D. 438=49 L. J. C. P. 97=44 J. P. 7.

(27) [1876] 1 A. C. 662=46 L. J. Ch. 68=35 L. T. 569=25 W. R. 165.

natural rights possessed by a riparian proprietor, as such, on a non-navigable river are not possessed by a riparian proprietor on a navigable river."

He later rejected the suggestion that such a riparian owner must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation.

The suggestion, of course, is that the appellant company in the present case have special rights of access to the shores of the island greater than those of ordinary members of the public.

There are a large number of authorities dealing with the rights of riparian owners in inland waters, and a number of them may be found collected in chapters of Coulson and Forbes' work to which I have already referred.

That being so, it is said, additional force is lent to the suggestion that accretion may be claimed in respect of land which, before the foreshore receded, was part of it. Were it otherwise the appellant company would be denied access to their land for any purposes, for there would be a strip of land (not foreshore but above it) which would enure to Government.

So far then I have endeavoured to show that the natural features of the present case may well not prevent the application of the doctrine of accretion. The Madras cases strongly support this view in my judgment. Further, I think that when once it is established that the English law may apply, the case of *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (9) throws further light on the position.

It must be borne in mind that the Lagos Ordinance gives rise to a position closely allied to that which I believe to obtain in the present case. The English law is to apply in Lagos "as far as local circumstances permit." That I think (apart from the question of tenure, peculiar to the present case), is the position here.

There are of course points of fact upon which the Lagos case differs from those under review, e. g., it was a sea foreshore case and the tide did not ebb and flow over a greater part of the area. The headnote may be set out in full :

"The respondents were in occupation of lands on the shore of the island of Lagos and there carried on business as African merchants. The lands had originally been granted by native grants to the respondents' predecessors-in-title, who in 1861 had obtained Crown grants. All the grants described the lands as bounded by the sea. About 1860 a wharf and two piers had been built upon the foreshore. At various dates subsequent to the Crown grants the respondents had carried out works on the foreshore to prevent incursion by the sea and erosion. Owing to these works a strip of land had been reclaimed below that which in 1861 had been high water-mark. The respondents had built stores and sheds upon the reclaimed land and had for a period of from 30 to 50 years used it, together with the land granted and the piers and wharf, for the purposes of their business and had had exclusive possession. The Government of the island had knowledge of the reclamation and of the building upon and use of the reclaimed land :

Held : that the reclaimed land, not being the result of natural accretion, vested in the Crown as owner of the foreshore, but that the respondents continued to have the rights of riparian owners over the foreshore, and that there was to be presumed in the respondents' favour an irrevocable license from the Crown to erect buildings and to store goods upon the reclaimed land and to use it generally for the purposes of their businesses."

It would seem arguable therefore if (as in the present case) the rights are claimed by natural accretion, the plaintiff company may be entitled not only to the rights of riparian owners but also to the soil itself. It is clear from p. 610 of the report that there was no express grant of the foreshore, nor could one be held to be implied. There can be little doubt that, if the accretion had been by natural causes, the company would have acquired the soil.

I would also point out that the grants were old and made when the place was undeveloped, and were described as, inter alia, "facing the beach" and "having a water frontage," and it was found as a fact by their Lordships of the Privy Council that they were all treated in description "as being bounded by the sea."

Moreover, there was no express grant of foreshore. Further, I think the judgment throws much light on the underlying principle relating to the law of accretion in such a case.

At pp. 611 and 612 of the report occurs a passage which may be usefully quoted :

"On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of in-road had de facto been transferred to the Crown, as owners of the sea and its bed within territorial limits, and of foreshore even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles. Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel, and the

like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land; notwithstanding the measurement in square yards or feet which the title contained.'

The last words seem significant. If it be the fact that the grants in the present case were by metes and bounds, this circumstance would seem to make no difference. Moreover, we know the south and east boundaries were described as the Pegu River.

I have shown that in Madras the accretion need not be "gradual" in the sense of the old maxim of de minimis. The passage in *Lord Yarborough's* case (6), referred in the Lagos case at p. 614, may perhaps be mentioned :

"The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjudgment of property."

So far as the natural features are concerned therefore I can see no reason why they should prevent the application of the English law of accretion in the present case.

The river, though much smaller (and therefore more like an English river), resembles the Godavari. Its seasonal increases and decreases in volume, the carrying down of silt, the formation of islands and increases to them, are all points of similarity.

The island is, it is true, almost covered at high water, and this raises a point of difficulty. It can be cultivated however and foreshore by the English law can be gained or lost by accretion or erosion.

Moreover, if the Godavari cases are examined closely (see especially the judgment of Iyengar, J., at p. 1097 of the report), it would seem that the lankas were completely covered by water at flood times of the year.

Furthermore, it does not seem to be the law that, although as in the Lagos case, the portion adhering by accretion did not enure to the grantees and their successors yet this fact did not deprive these persons of their ordinary rights of user in connexion with their business.

But the matter is by no means concluded, and my learned brother, in coming to the conclusion that English accretion law should not be applied was influenced I think, by the nature of the tenure conveyed by the grants.

That they are not "pottahs" in the sense this word is used in Bengal, I think is clear from an examination of the documents, and the definition of the status of "landholder" conveyed under them. In *Freeman* v. *Fairlie* (28), pottahs are described as merely documents in the nature of receipts for revenue. The word "pottah" seems to have been much used in connexion with land tenure in India, but it does not occur in the Act of 1876, and though the word may be found in the grants in the present case, the actual terms of these must be looked at.

But the objection is put somewhat in this way:

It is said Burma is an agricultural country, and you must look at the purpose for which these grants were made, viz., dhani cultivation. How can it be suggested, it is argued, that rights such as are permitted to free-holders in England or "owners" in Madras be applied, where the original grants conveyed (at most) something less than "ownership".

On the other hand it may be argued that land-holders' status is highly important; it is the highest form of private land tenure known in Burma; and it cannot be said that so long (at any rate) as the proper quantity of dhani is (or has been) grown, the holder is restricted to that form of user of the island. Surely, he could (as Mr. McDonnell suggested) put up a rice mill on it, if the soil is or becomes sufficiently secure. The only covenants or conditions imposing liability to forefeiture relate to revenue (and perhaps to minerals); and, lastly, may it not be argued that the ancient proprietary rights in land which have been recognized from earliest times in Burma (see Baden-Powell, Vol. 3, Part 4, Chap. 2) are embodied in the status of landholder created by the Act of 1876.

The matter is one of difficulty, and there are no authoritative decisions or pronouncements which assist its determination. The grant is described as being for the purpose of dhani cultivation. The condition however about dhani cultivation only is that three-fifths of the area should be brought into cultivation "within five years"; and this was for the purpose of obtaining exemption from revenue.

Upon this point, I think R. 16 of the rules, which impose penalties where land for other purposes than the cultivation for which the land was leased, during the

(28) [1828] M. I. A. 305.

period of exemption from revenue, lends considerable support to my view.

It cannot, I think, be suggested that, so far as the term of the grants are concerned, nothing can be done except to grow dhani. Turning to the Act itself and rules, the tenure of a land-holder is defined, and as I think I shall show, there are no limitations except those in the definition section and the rules as to revenue.

May it not be said, then, that so long as no forfeiture is incurred, a landholder may use his land in any way he pleases so long as he does not break the law? In other words, may he not enjoy a user which in this Province is highly important and extremely common, viz., that of mooring timber?

But my learned brother goes further. He lays stress on S. 22 of the Act. That section says:

"No person shall acquire, by length of possession or otherwise, any right over land disposed of or allotted under S. 18, S. 20, or S. 21 beyond that which is given by the rules made under the said sections respectively."

Rules under Ss. 20 and 21 do not affect this case, and R. 2 (passed under S. 18) must be a gain referred to.

It provides for the grant of the status of landholder on the conditions hereinafter specified. These are contained in Chap. 2; R. 3 requires applicants to have

"sufficient means to fulfil the purposes for which and the conditions on which the land is to be granted or leased."

The only application of this rule would seem to be that it lays stress on the fulfilment of the conditions, and it might possibly be used in support of the argument that the grant was for dhani cultivation alone.

But cannot a landholder, who has a permanent, heritable and transferable right gain rights by accretion, even it be only more land for dhani cultivation? Moreover, is it not said by Government that he lost such rights by erosion or flooding?

Rule 4 states the conditions applicable to grants for cultivation where a period of exemption from revenue has or has not been given. This rule, and R. 5 which follows cannot affect the question, for all conditions have been complied with. Rs. 6 and 7 prohibit acquisition of minerals and the cutting of teak trees except under license. Rr. 9, 10, 11 and 12 do not affect the matter.

Thus it comes to this that the company cannot acquire any rights over land beyond those giving rise to the status of landholder subject to the conditions attached to the grant.

I am unable to see that Rr. 3 or 4 say that anything is given, they merely impose conditions on what was given by R. 2, and the whole question is therefore: Does the rule, by implication exclude the acquisition of land by accretion?

I cannot see, first of all, that the Courts should lean towards such a construction in view of the fact that accretion might have been directly provided for as in Bengal and Bombay. Moreover in Madras the Privy Council have approved its application. It is true that the persons allowed to benefit were described as owners, and it must be conceded, I suppose, that a landholders' status is something less than a freeholder's status in England. It may also be that it is less than that of an "owner" in Madras or Bengal.

In any view of the case however it seems to me that strong grounds should be shown in order to deprive a "landholder" in Burma from the benefit of rights which have been allowed to "owners" of land in Madras. I am satisfied that the "purpose" for which the grants were made would not of itself be sufficient. The conditions of the grants do not in terms exclude accretion and as I have tried to show, the fact that in the documents the boundaries purport to be delimited may well make no difference.

Upon the whole therefore (and in the absence of direct authority), I am of opinion that the particular tenure which passed by the grants does not exclude rights of accretion.

Upon the question of re-formation, it may be useful to refer to an extract from Doss on Riparian Rights (1891). At p. 211 the learned author says [in connexion with certain passages in the case of *Lopez* v. *Muddun Mohan* (5), to which I am about to refer]:

"They contain at once a complete exposition and a precise definition of the principles upon which the law of accretion as well as the doctrine of re-formation on original sites is based."

James, L. J., in delivering the judgment of the Judicial Committee in that case, said this (at p. 472 of the report):

"The rule of the English law applicable to this case is thus expressed in a work of great autho-

rity : Hale, de Jure Maris, p. 15. If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced yet if by situation and extent of quantity and bounding up on the firm land the same can be known or it be by art or industry regained the subject doth not lose his property."

Later he said:

"This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice; that is, to say, that whoever has land, wherever it is whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property remains in the original owner."

My learned brother referred inter alia to this authority and pointed out that at p. 478 of the report appears a passage showing clearly that property absorbed by a sea or a river is not, under all circumstances and after any lapse of time, to be recovered by the old owner and he went on to say that it may have been so completely abandoned as to merge again into the public domain.

It is clear from the facts in *Lopez's* case (5) that the claimants to the reformed land took most effectual steps to prevent the possibility of the question of abandonment being raised for the description and measurement of the submerged mouzah were recorded and rent continued to be paid.

In the present case the only substantial question for us to decide upon this point is whether there had or had not been abandonment. This I think was substantially admitted by the learned Government Advocate but his case was that upon the facts we should hold that abandonment had taken place.

My learned brother has dealt at some length with what actually happened so far as can be ascertained as regards reformation and I need only say that it seems to me that what is now claimed upon this ground is part of that portion shown in the 1925-26 map in the name of Maung Ba Shin. This land seems to have been submerged for something less than ten years and so far as I know there is no evidence that revenue was paid in respect of it during that period or any other evidence that the appellant company or its predecessors-in-title on the one hand, or Government on the other ever displayed any intention to preserve, or to resume their rights over it.

I do not propose to refer to all the cases on this matter, for my learned brother has dealt with them. One of the most recent cases however is *Ramanandan Sahay* v. *Jaigovind Pandey* (29). In the course of the judgment in that case, all the important Indian cases are reviewed and the conclusion come to by a Bench of that High Court was that the mere fact that a person with whom land was settled by the Government obtained a remission of revenue on account of part of the land having been diluviated by the action of a river does not necessarily prove that he abandoned the land in respect of which the remission was granted. It was further held that the question must depend upon the intention of the parties and that, if the circumstances indicate that in taking the abatement of revenue there was an intention to abandon the land, then when the land has reappeared the person who took the abatement cannot claim the land.

As I have already indicated, in the present case, it does not appear that there was any demand for or refusal to pay, or application for abatement of revenue. It seems to me that it may well be that nonpayment affords at least no more evidence of an intention to abandon than does the obtaining of remission and in any event, I do not think that this decision entirely disposes of the contention put forward on behalf of the appellant company, viz., that mere nonpayment of revenue shows an intention to abandon. That this is so may follow from what was said by their Lordships of the Privy Council in the case of *Arun Chandra Singh* v. *Kamini Kumar* (20). At p. 693 of the report I find that the principle laid down in the case of *Mazhar Rai* v. *Ramgat Singh* (19) was approved. The material portion of the head-note in the Allahabad case is:

"Hence where the lands of certain tenants became submerged by the action of a river, and the tenants though they ceased to pay rent during the period of the submersion, made no overt indication of their intention to relinquish the said lands, but, on the contrary, on the river again shifting its course, laid claim to lands which had emerged. . . . It was held that there had been no relinquishment."

In the present case it may be useful to observe that, so far as I know, no asser-

(29) A. I. R. 1924 Pat. 213=75 I. C. 955=2 Pat. 839.

tion of claim to the re-formed land was made until the correspondence prior to the institution of the present case, although it would seem that at some time before 1925 or 1926, at auy rate, some portion at least of the re-formed land may have appeared. But there were changes in ownership up till 1922, and it is impossible that the re-formed land only appeared after the rains of 1925.

I would further point out that at the conclusion of the judgment in *Arun Chandra Singh's* case (20) appears this passage:

"The diluviated lands formed part of a permanent, heritable, and transferable tenure; until it can be established that the holder of the tenure has abandoned his right to the submerged lands it remains intact."

It will be remembered that the tenure of a landholder is described in identical words in the Act of 1876. So far as I know, there were no overt acts on the part of the predecessors of the appellant company, and, in any event, it seems to me that nonpayment of revenue is far from conclusive in this case. From earliest recorded times in this Province, produce and revenue have gone hand in hand: see upon this question Baden Powell on Land Systems of British India, (1892) Vol. II, Part 6.

There is no evidence that revenue was not paid at a time when dhani was; in fact, being cultivated on any portion of the re-formed land, and it may be assumed I think, that at the time when the land was submerged dhani was not cultivated and revenue was not paid. This seems likely, for R. 5 of the rules specially deals with failure to pay revenue and its consequences, and moreover specifically lays down that Government may resume upon abandonment. Government did not do so. Does not this circumstance lend support to the view that in law there was no abandonment?

So far as the Indian case law is concerned therefore might it not well be held (in the absence of any overt indication) that there was no intention to abandon in the present case? As my learned brother has pointed out however by S. 11 of the Act of 1876, it is provided that any landholder (except where land is made over temporarily to a revenue officer), who voluntarily relinquishes the possession of any land after the expiry of three years from the date on which this Act comes into force, shall at once forfeit his status of landholder in respect of such land.

The question under the Act therefore is whether there is any evidence of "voluntary relinquishment" of possession. Upon this I cannot help thinking that the same principles would apply as were enunciated in the cases that I have mentioned. As I have said, I think the grants created the status of landholder and created a permanent, heritable and transferable right of use and occupancy, and, unless there is some outside evidence of it, I do not think it necessarily follows that when lands are submerged a voluntary relinquishment or abandonment must be presumed from a nonpayment of revenue which may well have been not leviable.

Furthermore, it may well be argued that stronger evidence would be required to establish voluntary relinquishment than abandonment, when it is remembered that it was the action of the river that was the primary cause of the nonpayment of revenue.

I am of opinion therefore that the evidence of abandonment or voluntary relinquishment is insufficient, having regard to the nature of the holding, the purpose for which it was granted, and the fact that no overt indication to abandon or relinquish is to be found.

I have now endeavoured to deal with the last remaining defence referred to by my learned brother. It will have been seen that this defence deals with different portions of the island, and as has been shown the relevant principles of law relating to each portion are separate and distinct.

Upon the question of accretion, I have endeavoured to indicate my views upon the considerations which seem to me to be most relevant to the present case.

Quite shortly, my views are as follows:

(i) The English law of accretion would apply to this Province provided that it is not excluded by the natural features, or by the nature of the tenure regarding the subject-matter of the suit.

I arrive at this conclusion mainly because in Madras, where no special legislation upon the matter exists, the application of this law with certain modifications appropriate to that Province has been recognized and approved by the Privy Council.

(ii) Upon the difficult question whether in view of the natural features attendant

upon the present case this law should be held to apply, I think that the natural features surrounding the island in question do not differ greatly from those under consideration, in the cases arising in Madras.

I think, further, that the question must be considered in the light of all the material circumstances of the case, including the nature of the property, its growth and its user and, at the same time, the general conditions appertaining to rivers in Burma must be borne in mind.

In these circumstances and for reasons which I have endeavoured to indicate, I see no real reason why these matters should take the case outside a law which has been recognized from the earliest times and, so far as the Indian High Courts are concerned, so recently as the year 1926.

(iii) Upon an examination of the grants themselves, and the law contained in the Burma Land and Revenue Act, 1876 and the rules thereunder, I can find nothing which, either directly or indirectly, prohibits a landholder from enjoying benefits which have been permitted to owners of land in England and in India.

Upon this part of the case, I have no doubt at all that the ordinary law regarding re-formation would be held to apply in Burma, and, in view of the facts of the case and the special provisions of the rules passed under the Burma Land and Revenue Act, I see no reason to hold that such rights as the appellant company, or its predecessor-in-title, had, were ever abandoned by them or resumed by Government.

I must express my thanks to the learned advocates on both sides for their very great assistance upon this difficult matter, and I regret very much that the result of my opinion upon what is the main question under review must be that the case upon this question must be reheard in this Province. I agree with the proposed order as to costs. (On difference on the question as to the accretions, the case was, referred for hearing to Das, J.)

Das, J.— In this appeal my learned brothers Brown and Otter differed and the case was referred to me under Cl. 34, Letters Patent.

It is unnecessary for me to deal with the authorities cited in this appeal as both the learned Judges have dealt with them elaborately in their judgments. It is only necessary for me to say that I agree with the judgment of my learned brother, Otter, J., and therefore the appeal must be allowed and a decree passed in favour of the plaintiffs in terms of the prayer of the plaint. As both my learned brothers have agreed to that each party should bear their own costs in both Courts, that order as to costs will stand.

P.N./R.K. *Appeal allowed.*

A. I. R. 1932 Rangoon 50

BAGULEY, J.

Emperor

v.

Nan E —Accused.

Criminal Revn. No. 487-A of 1931, Decided on 21st July 1931, against order of 2nd Addl. Magistrate, Bogale, in Criminal Trial No. 52 of 1930.

Criminal P. C. (1898), Ss. 397 and 123— Sentence under S. 123 – Subsequent sentence of fine or imprisonment in default for offence committed prior to order under S. 123—Imprisonment in default must run after expiry of sentence under S. 123.

Where an offender is sentenced to imprisonment for a certain term in default of furnishing security under S. 123, Criminal P., C. and is subsequently convicted of an offence committed prior to the passing of order under S. 123 for which again he is sentenced to fine or in default imprisonment for a certain term, the sentence of imprisonment in the latter case must run from the expiry of the sentence under S. 123. *A. I. R.* 1931 *Rang.* 127, *Ref.* [P 51 C 1]

Judgment.— The accused Nan E was first sentenced to one year's rigorous imprisonment in default of furnishing security under S. 123, Criminal P. C. Next he was sentenced to two months' rigorous imprisonment for offences under Ss. 323 and 336, I. P. C. committed prior to the passing of the order under S. 123. These sentences had to take effect immediately under Prov. (2), S. 397, Criminal P. C. For two months they would run concurrently with the imprisonment under S. 123, Criminal P. C. and so in effect, he suffered in no way at all from being so convicted. After this in Criminal Reg. No. 52 of 1930 of the 2nd Additional Magistrate, Bogale, he was convicted yet again under S. 379, I. P. C. for an offence committed prior to the passing of the order under S. 123, Criminal P. C., and sentenced to pay a fine of Rs. 75 or in default three months' rigorous imprisonment. The fine has not been paid and the question arises as to the date from which the sentence

of three months' rigorous imprisonment in default is to run.

Section 64, I. P. C. seems to be quite clear. The three months is to be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable in commutation of a sentence. The section of the Criminal Procedure Code which deals with the question of the dates from which sentences are to run is S. 397. It has been laid down by a Bench of this Court in *Emperor* v. *Nga Pye* (1) that the word "sentence" in S. 397, Criminal P. C., and its provisos includes an order of committal or detention in prison under S. 123 of that Code. The three months' imprisonment in default passed in this case therefore must run from the expiry of the order of detention passed under S. 123, Criminal P. C.

V. B./R K. *Order accordingly.*

(1) A. I. R. 1931 Rang. 127 =1931 Cr. C. 522 =131 I. C. 501=32 Cr. L. J. 714=9 Rang. 110 (F.B.).

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* A. I. R. 1932 Rangoon 51

BAGULEY, J.

Mariam Bi Bi—Applicant.

v.

A. E. Motala—Respondent.

Criminal Revn. No. 191-B of 1931, Decided on 20th August 1931, against order of First Addl. Magistrate, Rangoon, in Criminal Misc. Trial No. 438 of 1930.

*** (a) Provincial Insolvency Act (1920), Ss. 23 and 31—Order protecting debtor pending his application for adjudication is pure nullity.**

Protection order can only be issued after an order of adjudication has been passed. Consequently, where the Court orders that the applicant debtor be protected from being arrested in execution of a decree or detained in prison for any debt pending the disposal of the application to be declared insolvent, is a pure nullity: 5 *Cal.* 536, *Dist.* [P 51 C 2]

*** (b) Criminal P. C. (1898), S. 488 (3)—Person under imprisonment under S. 488 (3) —It is doubtful if he is under arrest in execution of decree—Provincial Insolvency Act (1920), S. 23—*Quaere.***

Where a person is under arrest or imprisonment under S. 488 (3), Criminal P. C., in connexion with an order for maintenance it is doubtful whether it would be said that he was under arrest or imprisonment in execution of a decree of any Court. [P 52 C 1]

Auzam—for Applicant.

Guha—for Respondent.

Judgment.—The applicant Mariam Bi Bi had an order for maintenance for herself and her two children against the respondent Motala. She applied to the First Additional Magistrate. Rangoon, for enforcement of the payment of arrears due under that order. The respondent objected to being made to pay, and produced a document signed by the Additional District Judge, Amherst, purporting to be an "interim protection order" passed in an insolvency case in the District Court of Amherst. The order was passed after Motala had applied to be declared an insolvent, and it is worthy of note that this application was made after Mariam Bi Bi applied for enforcement of her arrears of maintenance. The wording of the protection order is as follows:

"Upon reading an application presented by Mr. Roy, advocate for Ahmed Ismail Motala of Fourth Division, Moulmein, applicant praying for an interim protection order to prevent his arrest in execution of decree or being detained in prison for any debt.

"It is ordered that Ahmad Ismail Motala applicant be protected from being arrested in execution of decree or detained in prison for any debt pending the disposal of the said application to be declared an insolvent."

In the course of argument I was informed that interim protection orders of this kind are well known in the districts. The Magistrate, faced with this order, came to the conclusion that it was not for him to question the order passed by the District Court. He says that it appears to be irregular, but he thought that a Criminal Court could not sit in judgment on the Insolvency Court. In the ordinary way I should have agreed with him. The Courts are supposed to recognise each other's orders when they appear, on the face of them, to be good—a principle which has very recently been enforced by a Special Bench of this Court in the case of *Nathan* v. *Samson* (1), which will no doubt shortly be reported.

In the present case however I think the interim protection order must be regarded as not merely an irregular or incorrect order, but as a pure nullity; for I can find no section of the Provincial Insolvency Act under which such an order could have been passed. Protection orders can be issued under the Provincial Insolvency Act under S. 31; but such protection orders can only be issued after an order of adjudication has been passed, and so far as this Court is aware, no order of adjudication has even now been passed. It was certainly not passed on 14th January 1931, when the interim protection order was passed. Before adjudica-

(1) A. I. R. 1931 Rang. 252=135 I. C. 65=9 Rang. 480 (F.B.).

tion the Insolvency Court can help a debtor under S. 23 which runs as follows:

"At the time of making an order admitting the petition, or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary."

This section contemplates a debtor being under arrest or imprisonment. The present respondent has not been under arrest or imprisonment in connexion with this order for maintenance, and even had he been, it seems doubtful whether it could be said that he was under arrest or imprisonment in execution of a decree of any Court. If he were suffering imprisonment in connexion with this order for maintenance he would be imprisoned by an order under S. 488 (3), Criminal P. C.

It was argued before this Court that the order for maintenance could not be enforced as against a respondent who was an insolvent, or who had applied for insolvency, and a very old case, *Tokee Bibee* v. *Abdool Khan* (2) was quoted. This ruling dates from 1879. Insolvency in this country was then governed by the Insolvency Act (11 and 12, Victoria, Cap. 21), and under S. 13 of that Act, which is quoted at p. 541 of the report, it is clear that interim protection under that Act could be granted by an order which could be made to apply to all debts and liabilities mentioned in the schedule including money due under an order for maintenance. There is no corresponding section in the Provincial Insolvency Act now in force, and although under English law a protection order can be given, the English law does not apply in this country despite the fact that insolvency law in general in this country is based on the insolvency law of England, and we have got to keep within the provisions of the Provincial Insolvency Act.

For these reasons I set aside the order of the First Additional Magistrate, Rangoon, dismissing the application and direct that he proceed with the enforcement of the order for maintenance according to law.

P.N./R.K. *Order accordingly.*

(2) [1880] 5 Cal. 536=5 C. L. R. 458.

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* A. I. R. 1932 Rangoon 52
Special Bench

PAGE, C. J., DAS AND BAGULEY, JJ.

The Commissioner of Income-tax, Burma.

v.

S. P. K. A. A. M. Chettyar Firm—Assessee.

Income-tax Reference No. 13 of 1931, Decided on 1st December 1931.

*** Income-tax Act (1922), S. 23 (4)—Mere fact that identity of persons who were parties to deposits and withdrawals is not proved is not sufficient to reject accounts in toto—Duty of Income-tax Officer in such cases stated.**

The only complaint of the Income-tax Officer in connexion with the accounts produced by the assessee in pursuance of the notice issued to him under S. 22 (2) was that he had failed to prove the identity of the persons who were parties to the deposits and withdrawals entered in the suspense account in the names of certain persons and he did not therefore accept the accounts as the basis of assessment though no other fault as to their accuracy or genuineness could be found.

Held: that there were no materials before the Income-tax Officer or the Assistant Commissioner justifying them in disregarding the return in toto, and making an assessment under S. 23 (4). If the Income-tax Officer was of opinion that the transactions appearing in the suspense account were not temporary deposits and withdrawals for which no interest was charged, but were loan transactions which had resulted in a profit to the assessees, in making an assessment under S. 23 (3), he might have included such profit as he found had accrued to the assessees from those transactions in the assessment that he made.

[P 54 C 1]

A. Eggar—for the Crown.

Leach—for the Assessee.

Page, C. J.—For the year 1929-30 the S. P. K. A. A. M. firm of money-lenders were assessed to income-tax by the Income-tax Officer, Toungoo, under S. 23 (4). In the course of the assessment proceedings, a notice under S. 22 (4) was served upon the assessees, and pursuant thereto accounts were produced disclosing a profit of Rs. 43,209-7-0. In the notice under S. 22 (4) the assessees were required to produce

"all accounts, including old agency accounts, for the account year 1928-29."

A number of books disclosing the accounts for that year were produced, and pro tanto the accounts based upon the entries in those books have been accepted as accurate. It appeared however that in a suspense account entries were made purporting to relate to certain sums deposited and withdrawn by Rangoon bro-

kers and others, the entries being in names such as Pweza, Rangoon Pweza and Rangoon Pweza Chinaman. No entries relating to interest in connexion with these deposits and withdrawals were made. The assessees were asked to explain these entries, and on their behalf it was stated that the deposits and withdrawals were temporary deposits and withdrawals effected by Rangoon brokers who came down to Pyu; that the assessees had the benefit of the money while it was deposited, and that therefore no interest was charged by the assessees in respect of these short term withdrawals. The suspicion of the Income-tax Officer was aroused, and a notice was served on the assessees under S. 23 (2) requiring them to produce any evidence on which they might rely in support of these entries.

When the assessees appeared before the Income-tax Officer the managing partner of the firm stated that he could not prove the identity of the five persons mentioned in the notice, that all the transactions in question related to a short period of three months and ten days in the year of account in respect of which the accounts were made, that if he saw these brokers he would be able to identify them, but that he could not remember their names, that they came to Pyu one day with money which they deposited for a short period, that they then withdrew it, that these were not loan transactions, and, therefore that no profit in respect of them had been earned, or disclosed in the return that the assessees made. A further notice was served upon the assessees under S. 22 (4), but nothing turns upon that notice. In these circumstances the income tax officer came to the conclusion that the assessees had failed to comply with the notice that was served upon them under S. 22 (4) requiring them to produce their accounts for the accounting period, and, disregarding all the accounts which had been produced, he refused to accept the return, and made an estimated assessment upon the assessees under S. 23 (4). An application under S. 27 was made by the assessees and was rejected; and an appeal from the refusal of the Income-tax Officer to reopen the assessment under S. 27 was dismissed by the Assistant Commissioner. The question that has been referred by the Commissioner of Income-tax for the opinion of the Court under S. 66 (2) is:

"Were there any materials upon which the income-tax officer or the Assistant Commissioner could find that there was no sufficient cause excusing the assessees from complying with the notice issued under S. 22 (4)?"

It is common ground that the notice therein referred to was the original notice requiring the assessees to produce their accounts for the year 1928-29. Now the complaint of the Income-tax Officer in connexion with the accounts which were produced was that the assessees had failed to prove the identity of the persons who were parties to the deposits and withdrawals entered in the suspense account in the names of Pweza or Rangoon Pweza, etc. No other complaint as to the accuracy or genuineness of the accounts was made by the Income-tax Officer in his order of assessment of 4th October 1929. The Income-tax Officer observed that

"If these names and transactions are ungenuine what can be inferred from that? The accounts produced must be either false or incomplete. It is probable that under these names additional capital was brought into the business and accounts are kept separately for this additional capital which the assessees have withheld to escape payment of income-tax on their true income Therefore the accounts produced cannot be accepted as a basis for assessment."

In my opinion from such premises *conclusio non sequitur*. If the assessees were minded to conceal the accounts in respect of transactions other than those referred to in the accounts that were produced, why did they fabricate the Pweza entries and thus disclose that there were other transactions which had resulted in a profit which they were bound to disclose to the Income-tax authorities? If the assessees are as astute as the Income-tax Officer would have the Court believe, and they wished to conceal the profit that had been made on some other transactions, the simple course would have been to make no reference to such other transactions in the accounts which they produced. In other respects it is not pretended that the return that was made can be challenged as inaccurate, incomplete or fraudulent. The only complaint is that, with respect to the withdrawals and deposits in question, the identity of the persons who were parties to the transactions has not been disclosed. Upon that foundation the Income-tax Officer has built up the following argument; (1) that the Pweza names and transactions in the accounts are not genuine; ergo, (2) that there must be other trans-

actions from which a profit has been made; (3) that there must be accounts of such other transactions ; and (4) that the assessees have deliberately withheld such accounts.

In my opinion the foundation will not bear up the structure. What is the nature of these undisclosed transactions the existence of which is to be presumed because the identity of the persons to whom the Pweza entries relate has not been proved ? The Commissioner of Income-tax states that " it is not of course, possible for this department to say what was concealed." I agree. I am of opinion that there were no materials from which the Income-tax Officer reasonably could infer that there were transactions other than those set out in the books of account for which separate accounts had been made, and which had not been disclosed.

The Income-tax Officer served upon the assessees a notice under S. 23 (2), and if the Income-tax Officer was of opinion that the transactions appearing in the suspense account were not temporary deposits and withdrawals for which no interest was charged, but were loan transactions which had resulted in a profit to the assessees, in making an assessment under S. 23 (3), he might have included such profit as he found had accrued to the assessees from those transactions in the assessment that he made. Whether his finding would have been correct or not is a matter of fact with which the Court is not concerned, but from such an assessment an appeal would lie. In my opinion there were no materials before the Income-tax Officer or the Assistant Commissioner justifying them in disregarding the return in toto, and making an assessment under S. 23 (4). This case turns on its own facts, and is not to be treated as an authority in other cases where the facts are not the same.

The answer to the question propounded is in the negative. Costs, ten gold mohurs.

Das, J.—I agree.

Baguley, J.—I agree.

K.N./R.K. *Answer negatively.*

A. I. R. 1932 Rangoon 54

HEALD AND SEN, JJ.

Abdul Karim—Appellant.

v.

Maung San Kyaw—Respondent.

First Appeal No. 185 of 1930, Decided on 17th March 1931, against order of Dist. Judge, Sandaway, in Civil Execution No. 2 of 1929.

(a) Civil P. C. (1908), O. 20, R. 11—Appeal by judgment-debtor dismissed—Subsequently judgment-debtor applying under O. 20, R. 11, Civil P. C., for payment by instalments—Only decree for purposes of Art. 175, Lim. Act, is decree of appellate Court—Limitation Act (1908), Art. 175.

Where an appeal is taken against a decree, the decree of the lower Court becomes merged in and is superseded by the decree of the appellate Court and for purposes of limitation time runs from the date of the decree which is capable of execution, that is the appellate Court's decree even in cases where the appeal is dismissed. Where therefore the judgment-debtor appellant, whose appeal is dismissed applies for payment by instalments under O. 20, R. 11, Civil P. C., the only decree in respect of which an order for payment by instalments can be made and therefore the only decree to which Art. 175, Lim. Act can refer is the decree of the appellate Court: *A. I. R.* 1926 *P. C.* 93; *A. I. R.* 1914 *P. C.* 66 and *A. I. R.* 1927 *Rang.* 104, *Rel. on.*; 39 *Mad.* 1196, *Ref.*

[P 55 C 1, 2]

(b) Civil P. C. (1908), O. 20, R. 11—Appeal against order of dismissal of application under O. 20, R. 11 as time barred is competent—Civil P. C. (1908), S. 47.

Where a judgment-debtor applies for payment by instalments under O. 20, R. 11, and his application is dismissed as time barred under Art. 175, Lim. Act, an appeal against such order of dismissal is competent as such order of dismissal falls under S. 47: *A. I. R.* 1926 *Rang.* 192, *Foll.*

[P 55 C 1]

P. K. Basu—for Appellant.

P. S. Chari—for Respondent.

Judgment.—The parties referred certain disputes between them to arbitration and an award was made. Respondent applied for that award to be filed and for a decree to be made in accordance with its terms. It was filed and a decree for payment of nearly Rs. 9,000 to respondent was made on 15th June 1929. On 11th February 1929 respondent applied for execution of that decree, but appellant appealed to this Court with the result that execution was stayed until 15th June 1930, on which date this Court dismissed the appeal. On 15th June 1930 appellant applied for an order for payment by instalments under O. 20, R. 11 as amended by this Court. The Court dismissed that application as being time-barred under Art. 175, Sch. 1, Lim. Act.

Appellant appeals on the ground that "the date of the decree mentioned in Art. 175 must, if there has been an appeal mean the date of the appellate decree."

Respondent replies that no appeal lies and that a comparison of the wording of Art. 175 must mean the decree of the trial Court. On the question whether or not an appeal lies I see no reason to differ from the opinion expressed in the case of *Saya Hattie* v. *Ma Pwa Saw* (1) and I would hold that an appeal lies.

On the question of limitation there is a remarkable absence of judicial authority. The only case mentioned in the text-books and cited before us, namely, the case of *Venugopal Mudali* v. *Venkatasubbiah Chetty* (2), seems not to have been officially reported, and dealt with the limitation under Art. 11 and not under Art. 175, but the learned Judges, in support of their finding that "the date of the order" mentioned in Art. 11 must, in cases where there has been an appeal, be the date of the appellate order, referred to Art. 175 which deals with the limitation for applications for an order for payment by instalments under O. 20, R. 11 and said:

"It cannot surely be held that, where the original Court passes a decree for a certain sum of money and the plaintiff appeals on the ground that he ought to have been given a decree for a larger sum but his appeal is dismissed, an application under that order and rule cannot be made by the judgment-debtor after six months of the date of the original decree but within six months of the date of the appellate decree, even though the decree-holder consented to such an order being made."

That dictum was clearly obiter, and the state of facts suggested in it was different from the facts of the present case, and further under O. 21, R. 11 as amended by this Court no question of the decree-holder's consent arises. We therefore cannot rely on that dictum as an authority in the present case.

It seems to me settled law that, when an appeal is taken against a decree, the decree of the lower Court becomes merged in and is superseded by the decree of the appellate Court, and that for purposes of limitation time runs from the date of the decree which is capable of execution, that is the appellate Court's decree even in cases where the appeal is dismissed. In support of this proposition the following cases may be cited, namely, *Jowad Hussain* v. *Gendan Singh* (3); *Abdul Majid* v. *Jawahir Lal* (4) and *S. M. Hashim* v. *J. A. Martin* (5).

(1) A. I. R. 1926 Rang. 192=97 I. C. 1037=4 Rang. 247.
(2) [1916] 39 Mad. 1196=28 I. C. 367.

It follows that that on the passing of the decree of the appellate Court the trial Court's decree ceases to exist as a decree and that the only decree in respect of which an order for payment by instalments can be made, and therefore the only decree to which Art. 175, Sch. 1, Lim. Act, can refer is the decree of the appellate Court.

In view of these considerations I attach no importance to the argument based on a comparison of the wording of Art. 175 with that of Art. 182, and I would set aside the order of the lower Court and would direct that Court to deal with appellant's application under O. 20, R. 11 according to law. Respondent should pay appellant's costs in this Court. Advocate's fees to be two gold mohurs, and the costs in the lower Court should abide the final order on appellant's application.

P.N./R.K. *Order set aside.*

(3) A. I. R. 1926 P. C. 93=98 I. C. 499=53 I. A. 197=6 Pat. 24 (P.C.).
(4) A. I. R. 1914 P. C. 66=23 I. C. 649=36 All. 350 (P.C.).
(5) A. I. R. 1927 Rang. 104=100 I. C. 285=4 Rang. 562.

A. I. R. 1932 Rangoon 55

PAGE, C. J. AND DAS, J.

Mohamed Chootoo and *another*—Appellants.

v.

Abdul Hamid Khan and *others* — Respondents.

First Appeal No. 68 of 1931, Decided on 26th November 1931, against decision of Dist. Judge, Tharrawaddy, in Civil Regular No. 15 of 1930.

Limitation Act (1908), Art. 123 — Suit by sons as heirs of deceased father to recover possession of estate of deceased from alleged trespasser—Art. 123 does not apply.

Where a suit is brought by certain persons as heirs of their deceased father to recover possession of the property of the deceased from a person who it is alleged has no right to represent the estate of the deceased and is a trespasser, Art. 123 does not apply to the claim. [P 56 C 1]

P. B. Sen—for Appellants.

Kyaw Myint and *Rauf* — for Respondents.

Page, C. J.—This appeal must be allowed. The appellants, who were plaintiffs in the suit, are the son and daughter of one Noor Mohamed, who died in 1907. The appellants, under the Mahomedan

law, are two of the three heirs of Noor Mohamed, and claim to be entitled to five-sixths of his estate, one-sixth falling to respondent 4, who is their mother, as the wife of Noor Mohamed. The contesting respondents are not the heirs of Noor Mohamed, and are not entitled in any sense to represent, or to be treated as, the heirs of the estate of Noor Mohamed. The claim against the contesting respondents 1, 2 and 3 is that they are in possession of the estate of Noor Mohamed, consisting of certain immovable property, without any title to be in possession, and the suit is brought against them by the son and daughter of Noor Mohamed for possession.

It is, of course, essential that the appellants, as plaintiffs, should succeed on the strength of their own title, and they allege that they are the heirs of Noor Mohamed, and as such are entitled to five-sixths share of the property in suit. The difficulties that have resulted in this appeal are to some extent due to the inartistic form in which the plaint is drawn. The substance of the claim as set out in the plaint however appears to be what I have stated. In those circumstances, in my opinion, Art. 123, Lim. Act, has no application. It is a suit brought by persons who claim to be entitled to possession of certain property, and no doubt they base their title upon the fact that they are the heirs of their father. But the contesting respondents, it is alleged, have no right or title to, or to represent the estate of Noor Mohamed, and the appellants seek to recover possession of the property from these respondents as trespassers. The learned District Judge has dismissed the plaintiff's suit upon the ground that, as this is a suit brought for a distributive share of the property of an intestate, Art. 123 applies. For the reasons that I have stated, in my opinion, Art. 123 does not apply to the claim in this suit.

In these circumstances the decree from which the present appeal is brought cannot stand, and the proceedings must be remanded to the District Court of Tharrawaddy to be retried according to law. We do not determine in this appeal whether the suit is or is not barred by limitation, or whether the plaintiffs have succeeded in making out their claim or not, and we do not propose to indicate what article of the Limitation Act is applicable to the plaintiffs' claim otherwise than by holding that Art. 123 is not applicable to the suit. The learned advocate for the appellants states that when the proceedings are returned to the District Court he will prefer an application for leave to amend the plaint in order to make clear what the claim is. Whether such an application ought to succeed or not is a matter to be determined by the learned District Judge. A considerable volume of evidence was adduced at the trial, and the learned District Judge, in his discretion, will determine whether further evidence should be allowed.

As regards costs, we think the right order to make is that the costs of this appeal should be the contesting respondents' costs in the cause; which means this: that, if the respondents lose at the rehearing, they will not pay the appellants' costs of this appeal; while if they succeed at the rehearing they will be entitled to the costs of this appeal. We make this order as to costs because, in our opinion, the learned District Judge may have been misled by the faulty manner in which the plaint has been drafted.

A certificate will issue for the refund of court-fees.

Das, J.—I agree.

P.N./R.K. *Case remanded.*

A. I. R. 1932 Rangoon 56

PAGE, C. J. AND DAS, J.

Sallay Mahomed Hajee Sulaiman and *another*—Appellants.

v.

S. B. Neogi & Co.—Respondents.

First Appeal No. 141 of 1931, Decided on 27th November 1931, against decision of High Court on original side in Civil Regular No. 614 of 1930.

Trade mark—Infringement of—Damages—Plaintiff getting injunction—He is either entitled to get damages sustained by him or to claim profit which defendant has made—Question of computation discussed.

In trade mark cases, the plaintiff is entitled, if he succeeds in getting an injunction, either to claim damages suffered by reason of the infringement of the mark or to claim the profit which the defendant has made by his wrongful act. The computation in the two cases is different. It is wrong to base the estimate of damages suffered by the plaintiff upon the amount of profits that the defendant makes. The proper way to approach the question as to how much damages the plaintiff has suffered by reason of

the infringement of the mark is to ascertain what profits the plaintiff would have made if the offending articles had not been put upon the market, and the best evidence in support of such claim is evidence of any loss of trade that the plaintiff has suffered during the period in which the defendant was importing the offending goods: *A. I. R.* 1929 *P. C.* 11, *Rel. on.*; *Lever* v. *Goodwin*, (1882) 36 *Ch. D.* 1, *Ref.* [P 57 C 2, P 58 C 1]

N. N. Burjorjee and *Clifton*—for Appellants.

J. K. Munshi and *Miss Dantra*—for Respondents.

Page, C. J.—The plaintiffs are flour millers, Rangoon, and until a few years ago they put upon the market only whole-meal flour of a superior quality. At the end of 1928 finding that atta was being imported from Calcutta of a quality inferior to that which the plaintiffs were selling the plaintiffs commenced to sell in Rangoon atta of an inferior quality similar to that which was being imported from Calcutta, and they imprinted on the gunny bags in which this atta was sold a "Hans" mark.

In October 1930 the second defendants commenced importing into Rangoon atta of a similar quality to that which was sold by the plaintiffs under the "Hans" mark, with the "Hans" mark on their gunny bags.

On 18th December 1930 the respondents filed the present suit against the first appellants as importers of the second appellants' goods bearing the "Hans" mark. At a later stage of the proceedings the second appellants were impleaded as defendants in the suit. Before the trial commenced the appellants applied that a commission should issue for the examination of certain witnesses in Calcutta, and they further applied on a later occasion that an adjournment of the case should be granted in order that certain witnesses might be called from Calcutta to give evidence in the case. Both these applications were rejected by the learned trial Judge. Thereupon the learned advocates who appeared on behalf of the appellants withdrew from the case, and the suit was heard ex parte.

The learned trial Judge, after hearing such evidence as the plaintiffs elected to adduce, passed a decree in favour of the plaintiffs against both defendants for an injunction, directing the first defendants to deliver up any gunny bags in their possession bearing the "Hans" mark, and for damages amounting to Rs. 4,125 against the first defendants, and Rs. 8,250 against the second defendants.

Both defendants have now appealed. The only contention which has been argued is that the damages awarded as against each of the appellants were excessive. The appellants do not now challenge the decree in so far as an injunction was granted, and an order for delivery up of gunny bags bearing the "Hans" mark was made.

Now

> "it is well-known that, both in trade-mark cases and patent cases, the plaintiff is entitled, if he succeeds in getting an injunction, to take either of two forms of relief; he may either say: 'I claim from you the damage I have sustained from your wrongful act; or, 'I claim from you the profit which you have made by your wrongful act': " per Cotton, L. J., in *Lever* v. *Goodwin* (1).

In the plaint the plaintiffs prayed inter alia for

> "an account of the profits made by the defendants by importing into and selling in Burma atta bearing the 'Hans' trade-mark and for an account of the loss and damage sustained by the plaintiffs by reason of the defendants' wrongful use of the 'Hans' trade-mark on atta imported into and sold in Burma."

Now, when the issues were settled the plaintiffs did not ask that any issue should be raised with respect to an account of the profits made by the defendants, but they did raise an issue as to the amount of damages to which the plaintiffs were entitled.

At the trial the learned trial Judge invited the plaintiffs to state whether they were willing that he should determine the question of damages; and the plaintiffs assented to the damages being assessed by the learned trial Judge, instead of being sent, as normally would be the case, to a referee for determination. Certain witnesses were then recalled by the plaintiffs for the purpose of proving the damages that they had suffered.

In the course of his judgment the learned trial Judge observed:

> "In their plaint the plaintiffs ask that an account of the profits made by the defendants by importing their 'Hans' brand atta into Burma and selling it should be taken, and had this suit been contested throughout I should, in the ordinary course, have referred this matter of taking an account of the profits to the Official Referee. But, as the defendants have withdrawn from the suit, and as the plaintiffs cannot now bring the first defendants who would ordinarily be the accounting parties, to a strict account, I have heard evidence on the question of damages in the course of this hearing, and I propose to decide the matter now."

(1) [1882] 36 Ch. D. 1=57 L. T. 582=36 W. R. 177.

The learned trial Judge then proceeded to consider the evidence adduced for the purpose of proving the profits that the appellants respectively had made by reason of the importation of atta in bags bearing the "Hans" mark, and awarded Rs. 4,125 damages against the first defendants, and Rs. 8,250 against the second defendants upon that footing.

With all respect to the learned trial Judge I am disposed to think that he did not fully appreciate that in the present case it was open to the plaintiffs either to prove the profits which the defendants had made by importing atta with the "Hans" mark, or to prove the damages which the plaintiffs had suffered by reason of such importation. The computation in the two cases is, of course, different. The learned trial Judge, as I understand the issues which he settled and the judgment which he delivered, was under the impression that the measure of damages which the plaintiffs had suffered was the amount of profit which the defendants had made. That, of course, is not the case, and an estimate of damages based upon the amount of profits that the defendants had made would not be in accordance with law. On the other hand, if it is assumed that the learned trial Judge was using the word "damages" not in its strict sense but loosely, it may be that the learned trial Judge intended in his judgment to estimate the amount of profits which the defendants had made out of these transactions, and to award those profits to the plaintiffs. In that case I am of opinion that there was no evidence upon the record which would justify the learned trial Judge in estimating the amount of profits accruing to the defendants by reason of the importation of atta under the "Hans" mark. The only evidence as to the amount of atta that was imported by the defendants was the oral evidence of certain persons connected with the flour trade in Burma, who admittedly had no connexion with the defendants, and did not pretend to do more than guess the amount of atta which the second defendants had imported into Rangoon. No attempt was made to obtain from the official records figures showing how much atta had been imported from Calcutta, or how much had been imported by the second defendants, or had been imported by the second defendants bearing the "Hans" mark. The witnesses could only speak vaguely in giving a bare estimate of what they regarded might probably be the amount of atta which the second defendants would be expected during the material period to import into Rangoon. In the absence of any evidence, except the vague estimates that the plaintiffs adduced, in support of their claim to an account of the profits made by the defendants in importing into Burma atta with the "Hans" mark on it in my opinion, it was neither expedient nor feasible for the learned trial Judge to pass a decree in favour of the plaintiffs upon that footing. Nevertheless, we are prepared, upon the assumption that the learned trial Judge with the assent of the plaintiffs estimated as best he could the damages that the plaintiffs had suffered, to determine this appeal on that basis.

Now, the proper way to approach the question as to how much damage the plaintiffs had suffered by reason of the infringement of their mark by the defendants is to ascertain what profit the plaintiffs would have made if the offending articles had not been put upon the Rangoon market, and the best evidence in support of such a claim is evidence of any loss of trade that the plaintiffs had suffered during the period in which the defendants were importing goods with the "Hans" mark on them: see *Juggi Lal Kamalapat* v. *Swadeshi Mills Co., Ltd.* (2).

In the course of his evidence the managing director of the plaintiff firm produced a statement of the plaintiffs' sales of atta bearing their "Hans" trademark from January 1929 to June 1931, marked Ex. C. From that statement it appears that, so far from there being a diminution in their sales after the period when the defendants had commenced to import atta with the "Hans" mark into Burma, in each year the sales steadily increased. Taking the period from October 1929 to June 1930, the amount of bags sold was 17,118, while the sales in the period from October 1930 to June 1931, the period material for the purpose of this suit, was 25,610 bags. Indeed, in March 1931 the sales reached their high water mark. No doubt there was a diminution in the sales during April, May and June 1931; but there was a corresponding

(2) A. I. R. 1929 P. C. 11=114 I. C. 80=56 I. A. 1=51 All. 182 (P. C.).

diminution in the sales during those months in the two preceding years.

Now, that is the only evidence that the plaintiffs adduced in support of their claim to damages. No damage could be awarded to the plaintiffs upon any other ground. For instance, it was not pretended in this case that by reason of the importation of inferior atta with the "Hans" mark by the defendants the reputation of superior quality atta bearing the same mark belonging to the plaintiffs had in any way suffered, because it is conceded that the atta imported with the "Hans" mark on it by the defendants is of a similar quality to the atta put on the market by the plaintiffs with the same mark. Nevertheless, we are disposed to think that there must have been some loss accruing to the plaintiffs by reason of the importation by the defendants of the atta bearing the "Hans" mark.

The plaintiffs having obtained an injunction are entitled to some damages. The question is, how much? Taking all the circumstances of the case into consideration we are of opinion that a fair sum to award to the plaintiffs for damages would be Rs. 1,250, and for that sum a decree will be passed against both defendants. The result is that the appeal is allowed, and the decree of the trial Court varied. In lieu of the sums awarded at the trial for damages there will be a decree against both the defendants for Rs. 1,250.

Now, as to the costs, I notice that the learned trial Judge awarded special costs, 15 gold mohurs a day, to the plaintiffs. The plaintiffs will have special costs of ten gold mohurs a day during the trial for the senior counsel only; and the appellants will have half the costs of the appeal.

Das, J.—I agree.

P.N./R.K. *Order accordingly.*

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PAGE, C. J. AND CUNLIFFE, J.

Tan Ma Shwe Zin—Appellant.

v.

Tan Ma Ngwe Zin and *others*—Respondents.

First Appeal No. 128 of 1931, Decided on 14th January 1932, against decision of original side of High Court, in Civil Regular No. 536 of 1930.

Burma Laws Act (1898), S. 13 (1) (a) — Buddhist law—Meaning of—Will of Chinese Buddhist is subject to Chinese Customary law.

A Chinese Buddhist is a Buddhist within the meaning of that term both in S. 13, Burma Laws Act, and in the Succession Act. It is a fundamental principle of British imperial policy that, so far as may be consistent with the maintenance of good government and ordered progress, the particular habits and customs of the various communities under British rule should be recognized and respected. Therefore the plain meaning of S. 13 is that in any question regarding succession, inheritance, marriage or caste or any religious usage or institution, where the parties profess the Buddhist or Mahomedan or Hindu religion the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma has by enactment been altered or abolished or is opposed to any custom, having the force of law. The personal law of Chinese Buddhist in Burma is Chinese Customary law and so the will of a Chinese Buddhist is subject to that law. The Burmese Customary law is to be applied in Burma to Burmese Buddhist and the Chinese Customary law to Chinese Buddhists, not because these customary laws are part and parcel of the Buddhist religion, but because they are the personal law by which the Burmans and Chinese in Burma who profess the Buddhist religion respectively are governed: *A. I. R.* 1929 *Rang.* 22 and 2 *L.B.R.* 95, *Appr.*; *A. I. R.* 1927 *Rang.* 265 and *A. I. R.* 1930 *Rang.* 81, *Diss. from.* (*Case law referred*). [P 60 C 2]

Jeejeebhoy—for Appellant.

Eunoose and *Mootham* — for Respondents.

Page, C. J. — The determination of this appeal depends upon the true construction of S. 13, Burma Laws Act 13 of 1898, which runs as follows:

"(1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution: (a) the Buddhist law in cases where the parties are Buddhists, (b) the Mahomedan law in cases where the parties are Mahomedans, and (c) the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-S. (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

(3) In cases not provided for by sub-S. (1) or sub-S. (2), or by any other enactment for the time being in force the decision shall be according to justice, equity, and good conscience.

(4) This section does not extend to the Shan States."

The material facts are not in dispute, and lie within a narrow compass. Tan

Ma Thin died at Rangoon on 14th April 1929. She left a will dated 27th June 1927, of which probate was granted on 7th August 1929 to defendants 3 to 8, of whom defendants 3 to 6 and 8 are the present respondents. The appellant and respondent 1 were half-sisters of Tan Ma Thin, and respondent 2 was her half-brother. It is common ground, as set out in para. 2 of the plaint, that:

"The said Tan Ma Thin was born of a Chinese settler in Burma and a lady of Chinese descent. She married Khoo Boon Tin, a Chinese, who predeceased her without leaving any issue. She was a Buddhist, and during her lifetime she observed the Chinese customs and ceremonies, and attached herself to the Chinese community."

In the plaint the property left by Tan Ma Thin is set out in three schedules—A, B and C. "A" referred to property for which no provision was made in the will; "B" to property which it was conceded by the plaintiff duly passed under the will; "C" to property which under the will was to be appropriated to various religious and charitable uses.

The plaintiff claimed that she and respondents 1 and 2 were the heirs of Tan Ma Thin, and that as such the plaintiff was entitled, inter alia, to one-third of the property set out in "A" as on an intestacy, and to one-third of the property in "C" upon the footing that the bequests in the will of the property therein referred to were null and void under S.118, Succession Act (Act 39 of 1925).

This section provides:

Bequest to religious or charitable uses.

"118. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than 12 months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons."

The first and second pro-forma respondents admitted the allegations in the statement of claim, and prayed that they might be awarded their respective shares in the inheritance.

Defendants 3 to 6 and 8 in substance contended in their written statements that the will was not governed by S. 118, Succession Act, that as executors they were entitled to distribute the estate in accordance with the terms of the will, and in so far as there was an intestacy, in accordance with the principles of justice, equity, and good conscience.

The learned trial Judge held that Tan Ma Thin was a Chinese Buddhist, and that Chinese Buddhists are Buddhists within the meaning of that term as used in S. 13, Burma Laws Act and in the Succession Act. He further held that Chinese Customary law is inapplicable to the testamentary succession to the estate of a Chinese Buddhist, that there is no Buddhist law that can be applied, and that in accordance with the principles of justice, equity, and good conscience, the will of Tan Ma Thin was governed by the rules of English law. Upon that footing he held, inter alia, that the property in Sch. "C" was validly disposed of under the will, and passed a declaration in favour of the appellant and respondents 1 and 2 that each of them was entitled to one-third of the property set out in Sch. "A" as on an intestacy.

Now, the first question that falls for determination is whether Tan Ma Thin was a Buddhist or not. That is a question of fact, and it is the common case of all parties that she was a Buddhist of Chinese descent, who had married a Chinese, and who throughout her life:

"observed the Chinese customs and ceremonies, and attached herself to the Chinese community."

I am further clearly of opinion, indeed I think it is settled law, that a Chinese Buddhist is a Buddhist within the meaning of that term both in S. 13, Burma Laws Act, and in the Indian Succession Act. It follows therefore, inasmuch as the questions which arise for decision in the present case fall within the ambit of S. 13, Burma Laws Act, that the problem to be solved is the meaning of the expression "Buddhist Law" in S. 13 (1) (a) of the Act.

Now, much judicial time has been expended, and divers opinions have been expressed, by the Courts in Burma in connexion with the interpretation of S. 13, but it appears to me that if the intention of the legislature in passing this enactment is steadily borne in mind when the construction of this section is under consideration its meaning and effect is free from difficulty. It is a fundamental principle of British imperial policy that, so far as may be consistent with the maintenance of good government and ordered progress, the particular habits and customs of the various communities under British rule should be recognized and respected. I have no doubt that the legislature intended, to

give effect to this principle when S. 13 was enacted. But the language in which the section is couched is unfortunate, for there is no law by which all Hindus or all Mahomedans are governed, and in the strict sense of the term no Buddhist law at all. The system of law applicable to Sunni Mahomedans differs from that to which Shiah Mahomedans are subject ; Hindus who follow the Benares School are governed by the Mitakshara, those who follow the Bengal School by the Dayabhaga ; while in the religious system known as Buddhism no rules of law concerning secular matters are laid down or prescribed. Bearing in mind the object that the legislature had in view however the meaning and effect of the expressions "Buddhist law," "Mahomedan law" and "Hindu law" in S 13, in my opinion, is plain, and S. 13 (1) must be construed as laying down that in

" any question regarding succession, inheritance, marriage or caste or any religious usage or institution "

where the parties profess the Buddhist or Mahomedan or Hindu religion the rule of decision shall be personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma

" has by enactment been altered or abolished, or is opposed to any custom having the force of law."

In my opinion, it would be neither reasonable nor feasible to construe the section in any other sense. It follows therefore that the questions to be determined in the present case are to be decided by reference to the personal law of the Chinese Buddhists in Burma, which prima facie is Chinese customary law. Whether there is any such law and what is prescribed thereunder, are questions of fact to be determined by the trial Court on a consideration of the evidence adduced in the case, and as there are experts in such matters resident in Rangoon, and we are informed that the Chinese customary law has now been set forth in a series of volumes as a codified system, the Court should find no difficulty in ascertaining what are the provisions of that law relevant to the issues raised in the present case. The view that I hold as to the construction of S. 13 not only appears to me to be in consonance with what was the intention of the legislature when S. 13 was enacted, and to be the plain meaning and effect of the terms therein contained, but is also in conformity with, and is supported by, a series of decisions of the Courts in Burma during a period of nearly fifty years : *Hong Ku* v. *Ma Thin* (1); *Fone Lan* v. *Ma Gyee* (2); *Ma Shein* v. *Kim Sein* (3); *Ma Pwa* v. *Yu Lwai* (4); *Kyin Wet* v. *Ma Gyok* (5); *Gyan Shi* v. *Kim Twe* (6); *Maung Kwai* v. *Yeo Choo Yone* (7); *Maung Po Maung* v. *May Pyit Ya* (8); *Ma Sein* v. *Ma Pan Nyun* (9) and *Chan Pyu* v. *Saw Sin* (10).

In the leading case of *Fone Lan* v. *Ma Gyee* (2), Fox, J., in the course of his judgment observed :

" On consideration of what the Hindu and Mahomedan laws are composed of, I take it that when in S. 13, Burma Laws Act, 1898, the legislature uses the words "Mahomedan law" and "Hindu Law," it means the laws applicable to such Mahomedan and Hindu parties whencesoever such laws may be derived. No doubt, provison has been expressly made in the section for the validity of customs opposed to what is referred to as Hindu and Mahomedan laws, as if customary law formed no part of such laws, but if Customary law is in fact a part of Hindu and Mahomedan Law, tautology or an inexact method of expressing the intention of the legislature cannot make it otherwise. If the terms "Hindu law" and "Mahomedan law" in S. 13 of the Act must be read as above, I think the term "Buddhist Law" in the section must be read in the same way, namely, as meaning the law of succession, inheritance, marriage, etc., applicable to the Buddhist parties in the case. What is the law of succession and inheritance applicable to a Chinese Buddhist ? As far as the evidence in this case goes it is Customary law wholly unconnected with the Buddhist faith."

The learned Judge added that

" the personal law is left to all who are exempted from the operation of the Indian Succession Act."

With these observations I respectfully agree : Ss. 29, 57 and 58, Succession Act. 1925.

I will now consider two Full Bench cases of the Rangoon High Court, *Ma Yin Mya* v *Tan Yauk Pu* (11) decided in

(1) [1872-92] L. B. R. 135.
(2) [1903] 2 L. B. R. 95.
(3) [1915] 8 L. B. R. 225=17 Cr. L. J. 112=32 I. C. 848.
(4) [1915] 8 L. B. R. 404=34 I. C. 99.
(5) [1918] 9 L. B. R. 179=47 I. C. 148.
(6) [1919] 10 L. B. R. 23=51 I. C. 608.
(7) [1919] 10 L. B. R. 159=57 I. C. 900.
(8) A. I. R. 1923 Rang. 180=74 I. C. 933=1 Rang. 226.
(9) A. I. R. 1924 Rang. 219=80 I. C. 749=2 Rang. 94.
(10) A I. R. 1929 Rang. 22=114 I. C. 513=6 Rang. 623.
(11) A. I. R. 1927 Rang. 265=104 I. C. 478=5 Rang. 406 (F.B.).

1927 by Rutledge, C. J., Das, Maung Ba and Brown, JJ., and *Phan Tiyok* v. *Lim Kyin Kauk* (12), decided in 1930 by Heald, Offg. C. J., Chari, Otter, Maung Ba and Brown, JJ., in which S. 13, Burma Laws Act, was discussed and construed.

In *Ma Yin Mya's* case (11) the question propounded for the determination of the Full Bench was

"in the case of Chinese Buddhists is the Burmese Buddhist law regarding marriage applicable to them as the lex loci contractus, or if not, which is the law applicable."

The learned Chief Justice, in the course of his judgment, after tracing the genesis of the rules set out in S. 13, Burma Laws Act, proceeded to construe the section as follows:

"It will be observed that the phrase in S. 13 (1), Burma Laws Act is "the Buddhist law where the parties are Buddhists," and not the Burmese Buddhist law. We know that there are Chinese, Thibetan, Sinhalese and Chittagonian Buddhists. The only Buddhist law however in my opinion, of which the Courts of this Province have ever taken cognizance is Burmese Buddhist law. And for a foreign Buddhist to escape from the application of Burmese Buddhist law he must show that he is subject to a custom having the force of law in this country, and that that custom is opposed to the provision of Burmese Buddhist law applicable to the case."

Das and Brown, JJ., agreed with the view expressed by the learned Chief Justice; and Maung Ba, J., in a concurring judgment observed:

"So far as I know, the lex loci contractus of the Buddhists in Burma is the one to be found in the Dhammathats known as Burmese Buddhist law. Of course, it is but right to allow the Chinese Buddhist to show that that law is opposed to any custom having the force of law, provided that it works no injustice to the Buddhist women, and it should be on him to establish that contention."

It is unnecessary for the purpose of deciding the present appeal to consider whether the actual decision in *Ma Yin Mya's* case (11) was correct or not, but the construction that the learned Judges in that case placed upon the words in S. 13 (1) (a), "the Buddhist law in cases where the parties are Buddhists," with all respect, in my opinion, cannot reasonably be accepted. Notwithstanding the view expressed by Maung Ba, J., (*ibid*, p. 421 of 5 *Rang.*) that

"the term 'Buddhist law' is a misnomer, 'Buddhist' means what appertains to the Buddhist faith, and Buddhism has laid down no law which is to be applied to secular matters,"

their Lordships in that case, as was pointed out by Cunliffe, J., in *Chan Pyu* v. *Saw Sin* (10), held

"that the expression 'the Buddhist law in cases where the parties are Buddhists' means, so far as Burma is concerned, the Burmese Buddhist law in cases concerning any adherents to the Buddhist religion irrespective of whether they are Burman Buddhists or not."

Cunliffe, J., added:

"I am exceedingly doubtful (and I only say so with great respect) whether had I been sitting on the Full Bench I should have been able to agree to this interpretation. It appears to me, firstly, that such a reading introduces by implication into the statute an adjective qualifying the words 'Buddhist law,' and, secondly, having introduced this adjective the qualification is not again applied to the second use of the term 'Buddhists.' I incline to the view that once the term 'Burmese' is introduced, the interpretation should rather read 'the Burmese Buddhist law in cases where the parties are Burmese Buddhists.' The question whether the qualification should have been introduced at all may perhaps be tested by the application of some adjective to the two other provisions in the section dealing with the Mahomedan and the Hindu law. Would it be possible, for example, to qualify the expressions 'Mahomedan law' and 'Hindu law' in some special way, and direct that this special law in some particular province in India should apply to all Mahomedans and to all Hindus?"

I find myself in entire agreement with these observations of Cunliffe, J. In *Hong Ku* v. *Ma Thin* (1), Jardine, J. C., observed:

"I know of no authority for the proposition that the Dhammathat, or even the general body of Buddhist law, is an exclusive lex loci. Under S. 4 of the Courts Act it becomes one of several leges fori. The mofussil Courts apply different religious laws to the various religious classes. This important subject has been discussed at great length in our judgment in Miscellaneous Appeal No. 2 of 1878, printed in the Judicial Commissioner's Memorandum 125 of 19th October 1878. We have been shown no authority for the doctrine set forth in defendant's written answer, and apparently held by the Judge, that a Buddhist coming from a distant country must be held subject to the Burmese Buddhist law of marriage or succession merely because he has a civil domicile here and has married, among other wives, a Burman Buddhist. In India, where the absence of lex loci has caused similar questions, the Courts have applied the special laws of peculiar sects to Jains and Sikhs under the directions of Charters which required the Hindu law to be applied to Hindus. These suitors were treated as Hindus, but with a right to their peculiar laws: *Bhagvandas Tejmal* v. *Rajmal* (13), *Lopes* v. *Lopes* (14) and *Soorendronath Roy* v. *Heeramonee* (15). Westropp C. J's., judgments on these subjects seem to me perfect storehouses of information, and I quote a part of his judgment in the Jain case: 'Those words, the usage of the

(12) A. I. R. 1930 Rang. 81=124 I. C. 849=8 Rang. 57 (F.B.).

(13) [1873] 10 Bom. H. C. 241.
(14) [1868] 5 Bom. H. C. 172.
(15) [1868] 12 M. I. A. 81 = 10 W. R. 35 = 1 B. L. R. 26 (P. C.).

country in which the suit arose, should be liberally interpreted and would comprise the ancient and clearly established usage of a tribe or caste, which, or some members of which, may have migrated from one part of India to another. They have been regarded as carrying their laws of succession and of marriage with them to their new domicile.' The limits within which this doctrine has to be applied are suggested in the judgments. We all know that the Courts apply different systems of both Hindu and Mahomedan law to people belonging to different races, countries or sects. I doubt therefore whether it is obligatory on our Courts here to apply the Burma Buddhist law to Buddhists from Ceylon or China. The subject teems with difficulties;"

and the learned Judicial Commissioner added :

"I will suppose the case of the Emperor of Turkey empowering his Judge to administer 'Christian law when the parties are Christians' at Constantinople or Bagdad. I do not think a Judge would treat such a direction as limiting him to the law of the indigenous Christians, and requiring him to treat English, French, and Italian merchants as subject to the law of the Greek Church or of the Armenians or Nestorians. Neither would it require him to confine himself to books of religious authority such as Levitious or Deuteronomy, which might be useless as guides to the law of the present time. I incline therefore, to think the Judge below was wrong in supposing that he was limited to the Dhamma- that in his application of Buddhist law. In S. 4 of the Courts Act the word Buddhist is not limited by such words as Burmese, religious, or written."

The construction that was given to S. 13 by the learned Judges who decided *Ma Yin Mya* v. *Tan Yak Pu* (11) was not accepted by the Full Bench which subsequently determined *Phan Tyoke* v. *Lim Kyin Kauk* (12). In that case the question referred was :

"Does Burmese Buddhist law govern the succession to the estate of a Chinese Buddhist born in China, but who was domiciled and died in Burma?"

The unanimous answer given by the Full Bench in that case was in the negative. This Court is bound to follow that ruling, but I may perhaps venture respectfully to add that I agree with it. The learned Judges in *Phan Tyoke's* case (12) did not content themselves however with answering the question that was referred to them for determination, but proceeded further to consider and decide what was the law by which the succession to a Chinese Buddhist domiciled in Burma was governed, and laid down (Otter, J., dissentiente) that the law applicable in such circumstances was the Succession Act. The discussion and decision of the Full Bench on this question however admittedly were obiter, and although the observations of their Lordships are, of course, entitled to the greatest respect, this Bench is not bound by the conclusion of the Full Bench on that subject, and as the question directly falls for determination in the present case this Bench is both entitled and bound to express its own opinion upon the matter. With the judgment of Otter, J., who dissented from the conclusion that was arrived at by the other members of the Full Bench in *Phan Tyoke's* case (12), I find myself in complete agreement ; but with all respect I am unable to concur either with the decision of the majority of the Full Bench, or with the various grounds upon which it was based by the learned Judges who decided that case.

Heald, Offg. C. J., based his conclusion upon the simple and sufficient ground (if it is accepted) that Chinese are not Buddhists, and therefore are outside the ambit of S. 13, Burma Laws Act, and are not exempted from the operation of the Indian Succession Act. The view expressed by Heald, Offg. C. J., commended itself also to Chari, J. The majority of the Court however held that the question whether a Chinese was a Buddhist or not was a question of fact, and, although their Lordships found as a fact that the Chinese whose estate was the subject-matter of the suit was a Chinese Buddhist, Maung Ba and Brown, JJ., concurred in the conclusion at which Heald, Offg. C. J., had arrived upon the ground that questions concerning the succession to the estate of a Chinese Buddhist were to be decided "according to justice, equity, and good conscience" as provided by S. 13 (3) of the Act.

I confess that I am unable to persuade myself that there is a *presumptio juris et de jure* that a Chinese is not a Buddhist. Such a view has never been taken by any other Court so far as I am aware, and the answer to it, in my opinion, was tersely given by Maung Ba, J., who, in the course of his judgment in *Phan Tiyck's* case (12) (at p. 136), observed :

"With all respect, in my opinion, the term "Buddhist" used in Cl. (1), S. 13, Burma Laws Act, is wide enough to include a Chinese Buddhist. Buddhism has two main schools—Mahayan and Hinayan—and many sub-sects. China follows the Mahayan school. while Burma follows the Hinayan school. Naturally there must be differences in beliefs, etc., but the same Buddha is revered. A Chinese Buddhist, though he mais not follow the Burmese form of Buddhism, A

still a Buddhist. Whether an individual Chinese is a Buddhist or not appears to me to be a question of fact that is to be determined according to the evidence adduced in any particular case in which the question arises. As was pointed out by the Special Court in *Hong Ku* v. *Ma Thin* (1) it would be as wrong to presuppose of a Chinaman that he is a Buddhist as to presume of an Indian that he is a Hindu and not a Mahomedan, or of an Irishman that he is a Catholic and not a Protestant. Such things require to be proved before a Court can form any opinion."

I agree, and I cannot accept the view expressed by Heald, Offg. C. J , on this matter as being correct.

The following passages in the judgment of the Full Bench sufficiently indicate the ground upon which the opinion expressed by Maung Ba and Brown, JJ., was based :

"Although the ordinary Chinese Buddhist is a "Buddhist" within the meaning of S. 13, Burma Laws Act, there is no law which can be called "Buddhist law" recognized by the Chinese Buddhists residing in Burma, apart from the general Customary law applicable to both Buddhist and non Buddhist Chinamen. They do not recognize the Dhammathats which are recognized by the Burmese Buddhists, and which have come to be known as the Burmese Buddhist law. So it may not be right to force Burmese Buddhist law upon a Chinese Buddhist who has not adopted the Burmese form of Buddhism. In these circumstances the best solution would be to apply to ordinary Chinese Buddhists the law of justice, equity, and good conscience, as provided in Cl 3, S. 13, Burma Laws Act. The Indian Succession Act applies to nonBuddhist Chinamen, and so its principles relating to intestate succession might be applied to Buddhist Chinamen as well, except those who have adopted the Burmese form of Buddhism. To the latter Burmese Buddhist law might justifiably be applied." (per Maung Ba, J.);

and

"the chief difficulty I find in the way of applying the Chinese Customary law is that I am unable to see how such law can in any sense be called Buddhist law. It has been suggested that Buddhist law in the case of a Chinese Buddhist must be interpreted to mean the law that would have been applicable to the particular Buddhist concerned if he had died in his native country. This seems to me to be straining the meaning of the term "Buddhist law" further than is justifiable. It has been pointed out that, so far as Burmese Buddhist law is concerned, the name is a misnomer, and that the law is not Buddhist in origin in any way. That is no doubt correct. But it is quite clearly the law applicable to Burman Buddhists as such. Although not Buddhist in origin, it is now the accepted law that applies to indigenous Buddhists of Burma, and to followers of no other religion. The Chinese Customary law may apply to Chinese Buddhists, but it is in no sense whatsoever connected with Buddhism, and applies in China equally to Buddhists and non Buddhists. I find myself unable to hold that the Chinese Customary law can be called Buddhist law simply because it would be applicable to a Chinaman in China if he happened to be a Buddhist." (per Brown, J.).

His Lordship added :

"In the view I have taken there is no Buddhist law applicable to Chinese Buddhists. The case of the Chinese Buddhist is not therefore provided for by sub-S. (1). Under this section, the law of succession in the case of Chinese Buddhists must therefore be in accordance with justice, equity, and good conscience."

The fallacy, if I may venture to say so, that appears to me to underlie the reasoning of Maung Ba and Brown, JJ., is that it would follow that there is no Buddhist law by which any community is governed, or which can be applied to any community, for neither the Chinese Customary law nor the Burmese Customary law is Buddhistic in its origin, or is in any way connected with the Buddhist religion. As was pointed out by Brown, J., in the same case :

"The Hindu law is laid down in S. 13 as the law to be followed in the case of Hindus, and the Mahomedan law in the case of Mahomedans. But in the cases both of Hindus and Mahomedans, variations of the law are applied in accordance with the particular race or caste to which the persons concerned belong. The Burmese Buddhist law is the law applicable to Burmese Buddhists in Burma, but it does not follow that the same law must be applied without any modification to Buddhists coming from another race and country. It is not really Buddhistic in its origin, and is applied to the Burmese Buddhists because it is the law to which they have been subject from time immemorial. Chinese Buddhists have never been subject to it, and it cannot be called Buddhist law at all when considered in its possible reference to them : See also per Maung Ba, J., in *Ma Yin Mya* v. *Tan Yauk Pu* (11) (at p. 420 *of* 5 *Rang.*)."

It follows therefore that if the Chinese Customary law is not to be regarded as Buddhist law in the sense in which that term is used in S. 13 (1) (a), Burma Laws Act, because it does not emanate from and is not connected with the Buddhist religion, in like manner the Customary law of the Burmans, the source of which is Hindu law, upon which has been superimposed customs peculiar to the Burmese people, and which is unconnected with Buddhism, equally cannot be treated as Buddhist law within S. 13 (1) (a) of the Act. Such reasoning, in my opinion, if it were to be accepted and followed in practice to its logical conclusion, would frustrate the object that the legislature had in mind when S. 13 was enacted, and would render the provisions of S. 13 (1) (a) nugatory, and I respectfully express my dissent from it. As I apprehend the meaning and effect of S. 13, Burma Laws Act, however the Burmese Customary law is to be applied

in Burma to Burmese Buddhists and the Chinese Customary law to Chinese Buddhists, not because these Customary laws are part and parcel of the Buddhist religion, but because they are the personal law by which the Burmans and Chinese in Burma who profess the Buddhist religion respectively are governed. For the reasons that I have stated the issues raised in the present case relating to the succession or inheritance to the estate of Tan Ma Thin are to be determined according to Chinese Customary law. The result is that the appeal is allowed, and the case will be remanded to the trial Court to be heard and determined on the merits in due course of law, and according to the principles that I have enunciated and laid down. The costs of the appeal will be costs in the cause.

Cunliffe, J.—I have had the advantage of reading the judgment of the learned Chief Justice. I agree with his conclusions and the reasons on which they are based. Some time ago, in *Chan Pyu's* case (10), I had occasion to discuss the legal effect of S. 13, Burma Laws Act. I adhere to what I said in that case. I am unable usefully to add anything further.

K.N./R.K. *Appeal allowed.*

* A. I. R. 1932 Rangoon 65

BAGULEY, J.

Abdul Rahman and *another*—Appellants.

v.

Maung Mutu and *another*—Respondents.

Second Appeal No. 182 of 1931, Decided on 12th January 1932, against decision of Dist. Judge, Henzada, D/- 14th March 1931.

*** Mahomedan Law—Gift—Gift of Mushaa for upkeep of mosque—Possession given—Gift is valid though property is divisible—Subsequent change of possession does not affect its validity.**

Where a gift or wakf is made of Mushaa for the upkeep of a mosque, and possession is given with it, the gift is valid to the extent of the donor's share even if the property gifted is divisible. Possession once taken under a gift is not invalidated as regards its effect in supporting the gift, by any subsequent change of possession: 11 *All.* 460 (*P.C.*), *Rel. on.* [P 65 C 2]

M. Auzam—for Appellants.

Ba Han—for Respondents.

Judgment.—It is unnecessary to detail the facts of this case at length because after the argument had been adjourned the parties came practically to a settlement of the appeal. It was agreed that the plaintiffs-respondents were the heirs of Ma Daw Byu, also that when their stepfather Mohomed Rakham went back to India he abandoned all claim that he had in the property in question, and it remained the sole property of Ma Daw Byu. On her death her husband became entitled to a one-quarter share. After her death Mohamed Rakham got possession of the whole land and purported to give it by a deed of gift or wakf for the upkeep of the mosque of which the appellants are the trustees. The lower appellate Court has held that this gift or wakf is invalid because it was for a mosque, and, as the property did not belong outright to Mohamed Rakham, it was what is known as a gift of Mushaa and therefore invalid.

It is quite true that there is authority that a gift of Mushaa is invalid when the property is divisible and in this particular case the property was divisible. There is however a ruling *Mohamed Mumtaz Ahamed* v. *Zubaida Jan* (1) in which it was held that when there is a gift of Mushaa, and possession goes with it the gift is valid and possession once taken under a gift is not invalidated as regards its effect in supporting the gift by any subsequent change of possession. In the present case when Mohamed Rakham made this gift or wakf he gave possession of the land in its entirety and, therefore as a gift although it was Mushaa it was valid to the extent of Mohamed Rakham's interest. The learned Judge of the lower appellate Court however has referred to para. 153 of Mulla's Mahomedan law in which it is stated that although Mushaa may form the subject of a wakf whether the property be capable of division or not, the wakf of a Mushaa for a mosque or for a tomb is not valid.

Prima facie, this paragraph supports the decision of the learned Judge but unfortunately the learned author who was only compiling a handbook of Mahomedan law, made this paragraph somewhat too concise. The words "for a mosque or for a tomb" do not include every wakf in which a Mushaa is made over for the benefit of a mosque, and the more correct view is to be found in Wilson's Anglo-

(1) [1889] 11 All. 460=16 I. A. 195 (P.C.).

Mahomedan law, para. 321, in which it is stated:

"It is agreed that the dedication of undivided property whether naturally divisible or not for use as a mosque or burying ground is invalid."

In commenting on this paragraph the learned author notes

"but if a wakf is valid as in the cases noted above, they are valid for the endowment or construction of mosques or burial grounds."

In the present case the wakf was for the endowment of a mosque, and it was therefore valid because at the time it was made possession of the whole land was made over, and the fact that the plaintiffs have subsequently gained possession does not affect the validity of the wakf.

I therefore alter the decree of the lower appellate Court. The plaintiffs-respondents will be given a declaration that they are entitled to a three-quarter interest in the land which they are now in possession, both parties to bear their own costs throughout.

P.N./R.K. *Decree altered.*

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* A. I. R. 1932 Rangoon 66
Special Bench

HEALD, OFFG. C. J., CHARI AND ORMISTON, JJ.

S. P. K. A. A. M. Chettyar Firm—Assessees.

v.

Commissioner of Income-tax, Burma—Referring Officer.

Civil Ref. Case No. 10 of 1929, Decided on 29th August 1929.

(a) Income-tax Act (1922), S. 66—Findings of fact are not ordinarily open to review.

The Income-tax authorities' findings of fact are not open to review by High Court unless there is no evidence to support them. [P 67 C 1]

*** (b) Income-tax Act (1922), S. 23 (4)—Assessee withholding materials for regular assessment—Still assessment must be reasonable and materials or reasons on which it is founded must be so stated that Commissioner may be in position to ascertain whether or not it is reasonable—Assessment not founded on any materials or reasons beyond Income-tax Officer's private opinion is illegal.**

When S. 23 (4) says that the Income-tax Officer shall make the assessment to the best of his judgment, it means that he must make it according to the rules of reason and justice, not according to private opinion; according to law and not humour, and that the assessment is to be not arbitrary, vague and fanciful but legal and regular. Since there is no appeal against an assessment under S. 23 (4) the only remedy against an arbitrary assessment that is against what is in effect a fine of unlimited amount is the discretion of the Commissioner to review the assessment under S. 23. No doubt where an assessee withholds the materials for a regular assessment, the assessment to the best of the Income-tax Officer's judgment must necessarily be to some extent arbitrary, but it must also be reasonable and the materials or reasons on which it is founded must be so stated that the Commissioner may be in a position to ascertain whether or not it is reasonable. Consequently where the assessment is entirely arbitrary and does not purport to be founded on any materials or reasons beyond the Income-tax Officer's private opinion it is an illegal assessment: *A. I. R.* 1930 *Rang.* 33, *Foll.* [P 67 C 1, 2]

Leach—for Assessees.

Gaunt—for the Crown.

Judgment.—The S. P. K. A. A. M. Chettyar Firm of Rangoon was called on to make a return of its income for the year 1926-27 for the purposes of its assessment to income-tax for the year 1927-28. It returned its income at Rupees 28,818-6-6. On investigation the Income-tax Officer found that certain items of interest shown in the books of the M. M. Firm of Wakema and the K. S. M. Firm of Kayan as paid to the S. P. K. A. A. M. Firm did not appear in that firm's accounts, and that there had been several transactions between those firms and the S. P. K. A. A. M. Firm which did not appear in the latter firm's accounts. The only explanation given for the absence of these transactions from the books of the S. P. K. A. A. M. Firm was that the transactions were dealings not of the firm but of certain of its partners personally. The Income-tax Officer was not satisfied with this explanation because the transactions appeared in the books of the other firms as dealings with the S. P. K. A. A. M. Firm and because there was in those books and in the documents recording the transactions nothing to indicate or suggest that the transactions were not dealings with that firm. He however gave the firm's agent time to get particulars from the partners with whom those dealings were alleged to have taken place and to produce the accounts relating to those transactions. The agent failed to give any further particulars or to produce any further accounts, and as he asserted that the firm had no accounts other than those which he had produced, the Income-tax Officer came to the conclusion that the accounts which were produced, did not contain all the transactions of the firm and that a portion of the accounts was being withheld. He therefore proceeded to make what purported to be an assessment under S. 23(4) of the Act, and assessed the firm on a Rangoon income of Rs. 3,25,000.

No appeal lies against such an assessment, but the assessee is entitled to apply under S. 27 of the Act to have the assessment cancelled on the ground that he was prevented by sufficient cause from making a proper return, and the firm filed an application under that section which was dismissed. The firm then filed an appeal against the order dismissing its application but that appeal was dismissed. There is no question that these two orders were rightly made, because the sole question which arose on the application and the appeal was whether or not the firm was prevented by sufficient cause from making a proper return, and it is clear that the firm failed to prove that there was any sufficient cause for its default. The firm then applied to the Commissioner of Income-tax to refer to this Court certain questions of law under S. 66 (2) of the Act. The Commissioner refused, but he was required by a Bench of this Court to state and refer the case under S. 66 (3) of the Act. He has accordingly stated and referred the case.

The income-tax authorities' findings of fact are not open to review by this Court unless there is no evidence to support them, and in this case there is abundant evidence to support the Income-tax Officer's finding that the firm was in default. It follows that the Income-tax Officer was entitled to make the assessment to the best of his judgment under the provisions of S. 23 (4) of the Act.

The only question which arises in the case is as to the power of this Court to hold that what purports to be an assessment to the best of the Income-tax Officer's judgment was not in fact such an assessment, and was therefore not a legal assessment.

It was said by a Bench of this Court in *P. K. N. P. R. Chettyar Firm* v. *Commissioner of Income-tax, Burma* (1) that:

"When S. 23 (4) says that the Income-tax Officer shall make the assessment to the best of his judgment, it means that he must make it according to the rules of reason and justice, not according to private opinion; according to law and not humour, and that the assessment is to be not arbitrary, vague and fanciful but legal and regular."

It was also said that, since there is no appeal against an assessment under S. 23 (4) the only remedy against an arbitrary assessment, that is, against what is in effect a fine of unlimited amount is the discretion of the Commissioner to review the assessment under S. 33. With these remarks I agree, and it is clear that if the Commissioner is to be in a position to review such an assessment, the Income tax Officer must state in his order the materials or reasons on which his judgment is founded.

In the present case the Income-tax Officer gave no reasons and no indication of the basis of his assessment of the firm's Rangoon income at Rs. 3,25,000. All that he said was that he determined the firm's income for the year at Rs. 3,25,000. So far as appears from his order that determination was entirely arbitrary and was based purely on private opinion. I realize of course that where an assessee withholds the materials for a regular assessment, the assessment to the best of the Income-tax Officer's judgment must necessarily be to some extent arbitrary, but it must also be reasonable and the materials or reasons on which it is founded must be so stated that the Commissioner may be in a position to ascertain whether or not it is reasonable. In this case no reasons or material have been stated and the effect of the order seems to be that the firm has been fined a very large amount.

I would hold that because the assessment in question was entirely arbitrary and did not purport to be founded on any materials or reasons beyond the Income-tax Officer's private opinion, it was an illegal assessment, and I would direct the Commissioner of Income-tax to pay the S. P. K. A. A. M. Firm's costs in these proceedings and in Civil Misc. Application No. 135 of 1928 of this Court, advocate's-fee in each case to be ten gold mohurs.

P.N./R.K. *Order accordingly.*

(1) A. I. R. 1930 Rang. 33=124 I. C. 267=8 Rang. 203.

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* A. I. R. 1932 Rangoon 67

PAGE, C. J. AND MYA BU, J.

Maung Chit and *another*—Appellants.

v.

S. P. Y. S. P. Chettyar Firm — Respondents.

Civil Misc. Appeal No. 159 of 1931, Decided on 26th January 1932.

***Provincial Insolvency Act (1920), Ss 24(2) and 25—Application by creditor — Debtor not examined though present—Such failure to examine does not ipso facto vitiate adjudi-**

cation order unless debtor is thereby prejudiced.

Failure to examine the debtor is not one of the facts upon proof of which the Court is bound to dismiss the petition, and unless the debtor is thereby prejudiced, failure to examine the debtor as provided in S. 24 (2) does not ipso facto vitiate the adjudication order made on the application of a creditor. [P 68 C 1]

Chan Tun Aung—for Appellants.

Kalyanwalla—for Respondent.

Page, C. J.—This appeal must be dismissed. The sole contention on behalf of the appellants is that if a debtor happens to be present at the hearing of an insolvency petition an order of adjudication cannot be made, whatever the circumstances may be, unless the debtor has been examined : [Provincial Insolvency Act 5 of 1920, S. 24 (2) (4).]

The learned advocate for the appellants conceded however as I think he was bound to do, that, if at the hearing of the petition the debtor is present, but refuses to submit to examination, he ought not to escape an order of adjudication merely upon that ground, and that in such circumstances, the Court would have jurisdiction to pass an order adjudging the debtor to be insolvent.

Failure to examine the debtor is not one of the facts upon proof of which the Court is bound to dismiss the petition, (S. 25) and, in my opinion, unless the debtor is thereby prejudiced, failure to examine the debtor as provided in S. 24 (2) does not ipso facto vitiate the adjudication order. In the present case we are informed that at the hearing of the petition the learned advocate for the petitioning creditor and the learned advocate for the debtor in the presence and with the consent of the debtor agreed that there should be no evidence taken on either side, and it is common ground that the debtor desired that he should not be examined. The learned Judge decided—and the correctness of his decision is not challenged — that an adjudication order ought to be made upon the ground that the debtor had committed an act of insolvency under S. 6 (b), Provincial Insolvency Act. It is not suggested that the debtor has in any way been prejudiced by reason of the fact that he was not examined. In such circumstances, in my opinion, this appeal fails and must be dismissed with costs.

Mya Bu, J.—I concur.

P.N./R.K. *Appeal dismissed.*

* A. I. R. 1932 Rangoon 68

BAGULEY, J.

Skeena Bi Bi—Applicant.

v.

Abdul Aziz and *others*—Opposite Party.

Civil Revn. No. 164 of 1931, Decided on 29th February 1932.

*** Civil P. C. (1908), O. 33, R. 5 (e)—Statement by pauper "I have not yet paid any fees to pleader but I have undertaken to pay him his fees when I obtain decree for my share" is not sufficient to dismiss application**

Where the applicant in his examination makes the following statement: "I have not yet paid any fees to him (his pleader) but I have undertaken to pay him his fees when I obtain a decree for my share," the statement is not sufficient to ascertain whether any person has obtained an interest in the subject-matter of the suit within O. 33, R. 5 (e) and is not sufficient to dismiss a pauper application: 9 *Bom.* 371 and 2 *U. B. R.* 272, *Dist.* [P 68 C 2]

Aung Gyaw—for Applicant.

Judgment.—The applicant applied to the Subdivisional Court of Mergui for permission to sue as a pauper. On presenting the application she was examined and made the following statements:

"I own no properties except my clothings worth Rs. 20 to 25. The application is written by pleader U Kyaw Htu. I have not yet paid any fees to him but I have undertaken to pay him his fees when I obtain a decree for my share.

The Judge then noted that the application fell under O. 33, R. 5 (e); Civil P.C., and rejected it.

The rule referred to states that the Court shall reject an application for permission to sue as a pauper:

"where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter."

It seems to me that the statements made by the applicant is not sufficient to ascertain whether any person has obtained an interest in the subject-matter of the suit. There are two rulings which have some bearing on the point. *Manohar Ramchandra* v. *Lakshman Mahadev* (1), was a case in which the two persons who applied to sue as paupers entered into an agreement with their vakil to pay him a definite sum as soon as the case was decided and in default of payment authorized the vakil to recover the money out of the revenues of the village in dispute. It was held that they could not be allowed to sue as paupers. In this case it will be observed that the applicants had given their vakil a right

(1) [1885] 9 Bom. 371.

over the property which was the subject-matter of the suit. In *J. S. Hessee* v. *A. Hussain Ally & Co.* (2), it was held that in a case where the pauper had arranged to pay his advocate a fee of Rs. 100 and five per cent of the amount realized by the case, the advocate had, got a direct interest in the subject-matter of the suit; and obviously he had, for he was to get one-twentieth of the damages recovered. In the present case there is nothing definite enough to go upon.

I therefore set aside the order rejecting the application and direct the Judge to examine the applicant more fully as to the nature of the agreement into which she has entered, and if he finds that the agreement does not actually give the pleader an interest in the subject-matter of the case as opposed to the success of the case he should proceed with the case in the usual way and issue notice to the respondent. No order as to costs of this application.

P.N./R.K. *Application allowed.*

(2) [1892-96] 2 U.B.R. 272.

** A. I. R. 1932 Rangoon 69
Special Bench

PAGE, C. J., CUNLIFFE AND BAGULEY, JJ.

S. N. S. Mudaliar—Applicant.

v.

Secy. of State—Opposite Party.

Civil Misc. Appln. No. 105 of 1931, Decided on 23rd December 1931.

**** Press (Emergency Powers) Act (1931), S. 4 (1)—In considering whether any words come within S. 4 (1), one has to look to the circumstances under which they were published and readers to whom they were addressed— Article in insignificant Tamil newspaper situated at Rangoon though using seditious words in support of political movement in India held as not coming within mischief of S. 4 (1).**

In considering whether a certain publication comes within the mischief of S. 4 (1) one has to look to not merely the words used or the intention of writer, but the effect that the words are likely to produce on the minds of the hearers. For this purpose the circumstances under which they were published and the audience to which they were addressed must be considered.

An insignificant Tamil newspaper situated at Rangoon and having small circulation published in its leading article of 23rd October 1931 militant and seditious words purporting to exhort the readers to support the present political movement in India,

Held: that the words though seditious and intended to inflame the readers did not come within the ambit of S. 4 (1). 38 *Cal.* 202, *Dist.*

[P 72 C 1]

Tambe—for Applicant.

A. Eggar, Govt. Advocate — for the Crown.

Page, C. J.—This is an application to set aside two orders of 25th November 1931, passed upon the applicant by the Local Government under S. 3, sub-S. 3, and S. 7, sub-S. 3, Press (Emergency Powers) Act, 1931.

The applicant is the proprietor and keeper of the "Swadantran" Press, Rangoon, and also the publisher and editor of a newspaper in the Tamil language known as the "Swadantran." The applicant printed at the Swadantran Press and published in the daily issue of the Swadantran on 21st October 1931, and in the weekly edition of the same newspaper on 23rd October 1931, a leading article containing certain passages which appeared to the Local Government to offend against the provisions of S. 4, sub-S. 1, of the Act. Under S. 3 (3) it is provided that:

"Whenever it appears to the Local Government that any printing press kept in any place in the territories under its administration, in respect of which security under the provisions of this Act has not been required, or having been required has been refunded under sub-S. (2), is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations of the nature described in S. 4, sub-S. (1), the Local Government may, by notice in writing to the keeper of the press, stating or describing such words, signs or visible representations, order the keeper to deposit with the Magistrate within whose jurisdiction the press is situated security to such an amount, not being less than five hundred or more than three thousand rupees as the Local Government may think fit to require. in money or the equivalent thereof in securities of the Government of India as the person making the deposit may choose."

Section 7 (3) provides that:

"Whenever it appears to the Local Government that a newspaper published within its territories, in respect of which security under the provisions of this Act has not been required, or having been required has been refunded under sub-S. (2), contains any words signs or visible representations of the nature described in S. 4, sub-S. (1), the Local Government may, by notice in writing to the publisher of such newspaper, stating or describing such words, signs or visible representations, require the publisher to deposit with the Magistrate within whose jurisdiction the newspaper is published, security to such an amount, not being less than five hundred or more than three thousand rupees, as the Local Government may think fit to require, in money or the equivalent thereof in securities of the Government of India as the person making the deposit may choose."

The words, signs or visible representations of the nature described in S. 4 (1)

referred to in S. 3 (3) and S. 7 (3) are:

"any words, signs or visible representations which (a) incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence, or

(b) directly or indirectly express approval or admiration of any such offence, or of any person real or fictitious, who has committed or is alleged or represented to have committed any such offence."

Accordingly, on 25th November 1931, the following orders were served upon the applicant under S. 3, sub-S. 3, and S. 7, sub-S. 3, of the Act, respectively. (The judgment then set out the two orders served by the Local Government on the applicant, as a keeper of the press and as publisher of the paper, and proceeded). The applicant now applies to the High Court for an order setting aside the said orders and each of them under S. 23 (1) of the Act. Now the Court is not concerned to decide whether, if the words set out in the orders were a correct translation of the Tamil words used in the offending article, such words would fall within the ambit of S. 4 (1), because it is common ground that the words in the orders of which complaint is made are different from the corresponding words in the translation of the article by the Court translator and both the applicant and the learned Government Advocate on behalf of the Local Government are content that the application should be decided upon a consideration of the words contained in the translation by the Court translator which runs as follows:

"Today we have worshipped all the tools and offered incense (to them). In the same way the labour (or work arts and crafts) parsued with the aid of these tools and the labourers (or workers) who follow these arts and crafts should also be adored . . . . Let the grip be on the handle of the sword of 'Ahimsa' (nonviolence). As soon as order is issued let us draw out (unsheath) thirty-three crores of swords in one sweep (or cast) and raise (or lift) them up. Until full or complete freedom is attained there will be no rest or cessation in the meantime. May the Goddess of Victory live? Let the Goddess of Heroism shine."

It cannot, we think, be doubted that in using those words those responsible for the publication of this article intended to bring into hatred and contempt, and to incite disaffection towards His Majesty and the Government established by law in British India. The question however that falls to be determined on the present application is not whether the applicant has committed the crime of sedition, but whether the words under consideration

"incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence"

This is not an academic inquiry, in which the Court is invited to determine whether certain words are capable of bearing a certain meaning. On the present application the Court has to decide a practical and not an abstract question, namely, whether the words of which complaint is made fall within S. 4, sub-S. 1, of the Act. In considering this question it is the duty of the Court to have regard to the surrounding circumstances; for instance, the context in which the words appear, the persons to whom the words were addressed, the political atmosphere in which the words were delivered, and the place where they were published. Such matters as these are ad rem, and must be borne in mind when a problem of this nature is under consideration.

Now, the article of which the offending words form part is to be read as a whole, and undoubtedly it contains a number of militant and extravagant passages. Indeed, with the exception of the word "Ahimsa" the language in which the article is couched sounds strangely like a war-cry, and lies ill in the mouth of a pacifist. Yet such the applicant claims to be. What is the meaning of the word "Ahimsa"? "A" means "not," and "himsa" "injury" or "harm," and the essence of the doctrine of "Ahimsa," we are told, is that the surest way to overcome evil is to do good, and the best method of combating force is spiritual endeavour, to the end that there may be brought about a new era of kindness, mutual consideration and good will.

Now, the applicant stated that he had published the article in question because he was a follower of one Gandhi, a political doctrinaire and agitator from the west of India; but the doctrine of "Ahimsa" appears to me to differ toto coelo from the precepts of Gandhi. Gandhi is not a pacifist but a fighting politician, although, no doubt, he is wont to protest that he relies for success in his campaign against the British Raj upon such weapons as satyagrayha, the refusal to pay taxes, and the boycott of British goods, rather than upon the cannon or the sword; and he commends passive resistance, nonviolence, and nonphysi-

cal force, as the weapons best suited to overthrow the British Government in India. I am not prepared however to hold that all propaganda in support of passive resistance necessarily tends to incite persons to commit crimes of violence. It depends upon the language that is used and the surrounding circumstances. A firework thrown into the jungle in July would be innocuous; in March it might cause a conflagration. But upon one subject there will be found unanimity of opinion on every side, for there is no doubt, I apprehend, in the mind of any reasonable man that whereas the doctrines of "Ahimsa" or "non-violence" or "passive resistance" may possess a clear, definite, and, it may be a laudable, meaning in the minds of educated people such expressions may be wholly unintelligible to illiterate or untutored persons, and if the spiritual fight connoted by those terms is not explained with care and moderation that emotional people may be carried away by the fervour of their enthusiasm into dangerous and violent courses. Only a hardened controversialist, I take it, would challenge the assertion that in recent years the practice of passive resistance not infrequently has resulted in violence and disorder.

The decision in *Sarat Chandra Mitra* v. *Emperor* (1), to which the learned advocate for the applicant referred in the course of his argument, turned upon its own facts. Whether this Court would have reached the same conclusion upon the question of fact which in that case was under consideration it is unnecessary to say. It is to be observed however that the provisions of the Act which applied in the circumstances of *Sarat Chandra Mitra's* case (1) were more restricted than those of S. 4 (1) of the present Act, and it may be that in order to meet the difficulty raised in *Sarat Chandra Mitra* v. *Emperor* (1) it was thought advisable in S (4) (1) (a) to add the words "or tend to incite to or to encourage" which are found in that section.

Now, as I understand the article in which the offending passages occur, the object of the writer was to induce those who read it to join a campaign for "redeeming India," and freeing it from alien domination. He referred to the example set by Joshi Bai, who

> "in order to save the high virtue of her chastity and to redeem the beautiful country of her birth plunged her dagger deep in her bosom in the august presence of Rajput Kings of Bikanir, Sanderi and Marwar, shed her womanly blood and (thus) infused the spirit of heroism in the blood of the brave Rajputs."

The author of the article then proceeded to exhort his readers to free India from the British Raj:

> "Today, let us carry our polished (or shining) weapons and start for the battlefront. Come ye all;"

and he concluded in a minatory vein:

> "Last year we observed devoutly this festival by doing penance in the prison Today we celebrate it in the wide open prison without the four walls. We have well and pointedly sharpened the weapon of "Ahimsa" (nonviolence) and tested its sharpness and sheathed (it). The Round Table Conference also is being impeded and is tottering. If it failed or was overturned, our General Gandhi would start the battle as soon as he returned. Be watchful (or vigilant)! Let the grip be on the handle of the sword of "Ahimsa" (nonviolence). As soon as order is issued let us draw out (unsheath) thirty-three crores of swords in one sweep (or cast) and raise (or lift) them up. Until full or complete freedom is attained, there will be no rest or cessation in the meantime. May the Goddess of Victory live! Let the Goddess of Heroism shine!"

Now, if these words had been addressed in their own tongue to the Burmans in Burma, or to the Hindus in Cawnpore, without doubt, in the highly charged political atmosphere that now obtains, I should have held that they were within the mischief to obviate which S. 4 was enacted. But the question is, would they have the same tendency when addressed to the Tamil community in Rangoon? To the general body of Tamils in Rangoon the word "Ahimsa" probably means little or nothing, and I do not suppose that they have the vaguest notion of its import or connotation; and let it be assumed that the impression that the article under consideration would convey to their minds would be that they were therein being exhorted to free India from an alien Raj by joining in a campaign of passive resistance. In such circumstances—and the case for the Local Government cannot be put higher than that—the question is, can the Court reasonably infer that the tendency of the words used in the offending passages is to incite the Tamils in Rangoon to commit murder or some other crime of violence? In my opinion it cannot. How would such conduct on their part advance the cause of "freedom" in India? Rangoon is in Burma, and Burma is not India. What use

(1) [1911] 38 Cal. 202=11 Cr. L. J. 515=7 I. C. 641.

would it be? Obviously, none at all. I cannot persuade myself that the effect of the language used in the offending passages upon the few Tamils in Rangoon who read such an insignificant newspaper as the "Swadantran" would be to induce them to commit murder or any criminal act of violence. So to hold, in my opinion, would be to attribute to the Swadantran authority and importance that it neither merits nor possesses. I am not prepared to hold that the Swadantran newspaper is of any account, or entitled to claim that it exerts any influence over the Tamils in Rangoon or anyone else. Moreover, an Oriental is wont to express himself in allegory and parable, and delights in hyperbole. Why should the Tamils in Rangoon give to the militant passages in this political effusion a literal meaning that normally they would not expect it to bear? No doubt the intention of the applicant in publishing this article, and the language in which it is couched, is incriminatory and seditious, but, taking all the circumstances into account, and bearing in mind the occasion upon which the words were used, the place where they were published, the context in which they appear, and the persons to whom they are addressed, in my opinion, it cannot fairly or reasonably be held that the words of which complaint is made

"incite to or encourage or tend to incite to or encourage the commission of any offence of murder, or any cognizable offence involving violence,"

or are otherwise within the ambit of S. 4 (1) of the Act. The result is that the application succeeds, and the orders will be set aside.

Cunliffe, J.—I am of the same opinion, but I think that this is a case which is near the line. There is no doubt that the translation of the excerpt from the Tamil article which was under consideration of Government was of a stronger nature than the translation which we have accepted, and which has been accepted by both counsel in the case.

To take an instance: the translation, which was before the Government official who advised action in this case, in one particular, runs as follows: "Beware! Let your grip be on the handle of the "Ahimsa sword;" whereas, as we know, the correct translation is: "Let the grip be on the handle of the sword of Ahimsa." It sounds as if the word "Ahimsa" indicated a person and not an abstract political term. The intention of the writer of the article, in my view however was frankly seditious, and it is no fault of his that he escapes the provisions of the statute.

The language of the article of which complaint is made is of a very florid character. It is also distinguished by a very commonplace line of thought. The author appeals to the religious and political prejudice of those who may read it. In appealing to the religious passions of the masses, he adopts a well-known allegorical basis in adjuring his hearers to consider themselves soldiers of an army.

We are not unfamiliar in the religions of the West with such language of hyperbole as "fighting the good fight," "the sword of righteousnesss" and "the buckling on of spiritual armour." Such expressions are very often met with in the religions of the West. I have no doubt they are common to all religions, and the curious thing to my mind is this: that the more ordinary and even timid the disposition of the hearers the more sustaining it is to them to imagine that they are the soldiers of a victorious army.

The passages complained of strike me as being on the border line. If we were looking at the intention of the writer there is to my mind direct evidence of his intention to inflame his hearers, but the nature of this offence, unlike many criminal offences, does not rest on intention. It rests on the effect produced on the minds of others. I am not satisfied that the passages complained of transgress the provisions of S. 4, and therefore am prepared to give the applicant here the benefit of the doubt. As my Lord has pointed out, in the peculiar political conditions of this Province probably the whole article would have little or no effect upon his hearers. For these reasons I agree that the course suggested by my Lord should be adopted.

Baguley, J.—I agree that to find out whether words tend to have a certain effect one must look not merely to the words themselves, but also to the circumstances under which they were published and the audience to which they were addressed. I agree to the course that my Lord the Chief Justice has suggested.

S.N./R.K. *Order accordingly.*

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OTTER, J.

Mrs. L. J. Swaine—Petitioner.

v.

Mr. D. H. Swaine and *another*—Intervener.

Civil Regular No. 9 of 1931, Decided on 27th November 1931.

(a) Divorce Act (1869), S. 16—Intervention proceedings—Any person, excepting respondent and co-respondent and anyone acting at instance of either of these may intervene.

Any person, with the exception of respondent and co-respondent and anyone acting at the instance of either of these persons, may proceed by way of intervention proceedings. Where it is not established that the intervener is in truth acting on behalf of the respondent, the mere fact that the intervener is the mother of the respondent is not sufficient. The intervener can be allowed to call her own husband into the witness-box to prove the acts of adultery on his part with the petitioner alleged to have been not disclosed at the time of obtaining a decree nisi: *Howarth* v. *Howarth*, (1884) 9 *P. D.* 219, *Rel. on.* [P 73 C 2]

(b) Divorce Act (1869), S. 16—Intervention proceedings—Court satisfied that charges disentitling petitioner to decree absolute made out—Motive prompting intervention is immaterial.

Where the intervention proceedings are started on the grounds of collusion and that the petitioner fails to disclose her own adultery, the Court has full power to refuse a decree absolute irrespective of the motive prompting the intervention if the Court is satisfied that the charges are made out. [P 74 C 1]

(c) Divorce Act (1869), S. 16—Intervention proceedings— Failure to deal with Court with utmost good faith—Decree nisi should be rescinded.

It is not in every case that a petitioner, who has committed adultery is disentitled to a decree. In certain cases the Court will exercise its discretion in favour of a petitioner. But it is the duty of every petitioner to place the facts of his or her case most fully before the Court, and the wholesome rule that on intervention a decree nisi may be rescinded if there is a failure to deal with the Court with the utmost good faith, is one that is not to be relaxed: *Wilson* v. *Wilson*, (1920) *P.* 20; *Elliott* v. *Elliott*, (1921) 37 *T. L. R* 834; *Apted* v. *Apted*, (1930) 46 *T. L. R.* 456 and *Stuart* v. *Stuart*, (1930) *P.* 77, *Rel. on.* [P 75 C 2]

(d) Divorce Act (1869), S. 16—Undefended proceedings—Evidence must be sifted with great particularity.

In divorce proceedings and especially in undefended cases, the evidence must be sifted with great particularity. [P 74 C 2]

Gregory—for Petitioner.

Paw Tun—for Intervener.

Judgment.—On 30th January 1931, Mrs. Lilly Joan Swaine obtained a decree nisi from this Court for the dissolution of her marriage. The case was undefended. At the same time an order was made giving the custody of a female child of the marriage, then about five years old, to the petitioner. This order forms part of the decree. The present proceeding was instituted on 27th July 1931, by Mrs. C. F. K. Sharrock by way of intervention under S. 16, Divorce Act of 1869, whereby she asks that the decree should be rescinded upon two main grounds:

(i) That the divorce was arranged for and obtained in collusion between the parties; and

(ii) that the petitioner failed to disclose her own adultery.

There is also an application by the petitioner to make the decree absolute.

The case is an unusual one, not only because intervener proceedings are rare in this province, but also because the facts relied on by the intervener are themselves peculiar.

It should be stated that the husband of the petitioner is the son of the intervener by her first husband. Further she alleges that the undisclosed adultery of the petitioner was committed with her own second husband.

It is clear, I think, that with the exception of the respondent and the co-respondent, and any person acting at the instance of either of these persons, in this country, any person may proceed by way of intervention proceedings.

Some suggestion was made that Mrs Sharrock was in truth acting on behalf of her son (the respondent), but I regard this as not established. The mere fact of her relationship to the respondent is not sufficient [see as to this *Howarth* v. *Howarth* (1)], and there was no other evidence in support of the suggestion made.

A further point of some importance was raised in the early part of the case, viz., as to whether the intervener could call into the witness box her own husband to prove the acts of adultery on his part with the petitioner. It is clear, I think, that in India in proceedings for divorce instituted by a wife a Court has no power to allow the alleged adulteress to be made a party, and so to cross-examine the witnesses for the petitioner, give evidence and call witnesses herself [see *Ramsay* v. *Boule* (2)]. It is also clear

(1) [1884] 9 P. D. 219=51 L. T. 872.
(2) [1903] 30 Cal. 489.

that formerly in England, in a case where the King's Proctor intervened, alleging adultery on the part of the petitioner, the Court had no power to allow the person with whom such adultery was said to have been committed to intervene as a party to the proceeding: see inter alia *Grieve* v. *Grieve* (Queen's Proctor intervening) (3). This is not now the law; see the cases cited in Note (L), on pp. 149 and 150, Edn. 11, Browne & Latey's Law of Divorce.

The present case is, I think, quite different. It is not sought to make Mr. Sharrock a party, but merely to call him as a witness. In spite therefore of objection on behalf of the petitioner I allowed this to be done.

One further point must be mentioned. It will be seen that the motive which prompted Mrs. Sharrock to intervene is that she wishes to prevent the operation of the order giving custody of the child to the petitioner. She is desirous of herself obtaining such custody. It is true that had it not been for the existence of the child the intervener proceedings would in all probability not have been brought. It is said therefore that as the real motive of the intervener was not to expose the conduct of the petitioner, but to obtain custody of the child, this Court would be bound to pronounce a decree absolute. I am clearly of opinion however that this suggestion is unfounded; for should I come to the conclusion that the charges against the petitioner are made out, I should have full power to refuse a decree absolute, irrespective of the motive prompting the intervention.

The substantial question however which does arise is whether I am satisfied that because of her own conduct, the petitioner is not entitled to a dissolution of her marriage.

I would point out that it is not in every case that a petitioner, who has committed adultery, is disentitled to a decree: see as to this S. 14, Divorce Act, of 1869. In certain cases the Court will exercise its discretion in favour of a guilty petitioner. In the present case however I am not asked to exercise such discretion, and the case for the petitioner is, that the adultery alleged by the intervener did not take place. It will be necessary to return to this aspect of the matter at a later stage.

I do not propose to discuss in any detail the evidence called. It must speak for itself. I must however refer to certain matters which were deposed to before me. (His Lordship then discussed the evidence regarding adultery and collusion and proceeded). It is hardly necessary to point out that had there not been some evidence of the desertion which she alleged, the petitioner could not have obtained a decree nisi. The attitude of the petitioner in this regard reveals in my view a deliberate misrepresentation of fact, which it is the duty of this Court to guard against with the greatest care. It seems to me necessary to say that in divorce proceedings, and especially in undefended cases, the evidence must be sifted with great particularity.

In the present case I now have upon the one hand the testimony of Mr. and Mrs. Sharrock, coupled with the correspondence I do not propose to refer further to this evidence, except to state that that of Mrs. Sharrock seemed to me to have been given with candour. The position of Mr. Sharrock was obviously a difficult one, and I feel bound to say whatever may be thought of his conduct from the point of view of morality, he did not appear to be endeavouring to deliberately deceive the Court.

Upon the other hand I have the oral testimony of the petitioner which for the reasons I have indicated, I regard with profound distrust; and the conclusion I have come to is that the intervener has satisfied me that adultery did take place between the petitioner and Mr. Sharrock.

Upon the question of collusion, there are grounds for suspicion, especially in view of the answers of the petitioner to me. I need only say however that I do not regard this as proved.

The only question remaining therefore is whether though (and I think rightly) not invited to do so by Mr. Gregory who appeared for the petitioner, it could possibly be said that it is my duty to exercise my discretion in favour of the

(3) [1893] 2 P. 288=63 L. J. P. 29=1 R. 533 69 L. T. 462.

latter in spite of the case proved against her. I have no hesitation in refraining from taking this course for the following reasons. The petitioner admitted that she was warned by her lawyer that if she had misconducted herself she would not obtain divorce. She may not have been expressly told to place all the facts before the Court, but I have no real doubt that she knew perfectly what she was doing, and that her deception of the Court was deliberate. I make every allowance for the fact that the petitioner was a guest in the house of Mr. Sharrock; and I have little doubt that, at first at least, it was he and not the petitioner who made advances. Had she however made a clean breast of the matter before me I might perhaps have taken a more lenient view as to her conduct. She however in my opinion not only suppressed the fact of her adultery when she asked for the decree nisi, but committed deliberately perjury in the present proceeding.

After a consideration of a number of authorities upon the point, inter alia *Wilson* v. *Wilson* (4); *Elliott* v. *Elliott* (5), and the judgment in *Wilkinson* v. *Wilkinson*, (unreported), there cited; *Apted* v. *Apted* (6) and *Stuart* v. *Stuart* (7), I have no doubt at all that it would not be my duty to exercise discretion in favour of the petitioner in this case.

I wish to say that the recent authorities to which I have referred contain weighty pronouncements upon cases similar to the present. They among others should be studied by all legal practitioners who have to advise in like circumstances. The present case presents regrettable features. I realize that there must be little prospect of the parties effecting a reconciliation. In other circumstances it might be well that the marriage should be dissolved, but the present case, owing to the conduct of the petitioner, is different. I must emphasize that it is the duty of every petitioner in this Court to place the fact of his or her case most fully before the Court; and the wholesome and well-established rule that on intervention a decree nisi may be rescinded, if there is a failure to deal with the Court with the utmost good faith, is one that is not to be relaxed.

In the present case the petitioner has not acted in good faith, and I have no doubt that it is not my duty to overlook her conduct.

There still remains the question as to the custody of the child. As the matter stood at the first hearing the petitioner was entitled to an order for custody. Today she is not so entitled. The intervention therefore succeeds and the decree of 30th January 1931 is set aside. In the circumstances I propose to make no order for costs.

The future care of the child is a matter for this Court; and if the intervener desires to be appointed guardian, as I have no doubt she does, she must institute proceedings to this end, under the Guardians and Wards Act, within two weeks, otherwise the case will be placed in my miscellaneous list for mention.

P.N./R.K. *Decree set aside.*

(4) [1920] P. 20=89 L. J. P. 17=122 L. T. 223 =36 T. L. R. 91.
(5) [1921] 37 T. L. R. 834=136 L. T. 28= (1921) W. N. 215.
(6) [1930] 46 T. L. R. 456=143 L. T. 353=99 L. J. P. 73=(1930) P. 246.
(7) [1930] P. 77=99 L. J. P. 17=142 L. T. 359 =46 T. L. R. 132.

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PAGE, C. J. AND CUNLIFFE, J.

F. G. Robson and *others*—Appellants.

v.

Dawsons Bank, Ltd.—Respondents.

Civil Misc. Appeal No. 158 of 1931, Decided on 10th December 1931, against order of High Court, on Original Side, in Civil Misc. No. 125 of 1931.

Companies Act (1913), Ss. 162 and 174—Object of compulsory winding up of company is closing down its business—In ordering compulsory winding up Court should have regard to wishes of majority of creditors and if petition for compulsory winding up is opposed by majority of creditors, Court should not ordinarily grant petition.

The object and effect of an order for the compulsory winding up of a company is the closing down of its business. No doubt in order that the assets of the company should be distributed among those entitled to them in the most efficient and fair manner, the Court in some cases may permit the realization of the assets to be suspended temporarily, but for no other purpose.

The reason why an order is made that the affairs of a company should be wound up by the Court is because it is deemed expedient, that the company should come to an end and no longer remain in existence as a business undertaking. If the general body of creditors are of opinion that it will best serve their interest that an order for compulsory liquidation should be made and the company closed down, their views are entitled to respect; on the other hand if the creditors think that it will be more to their interest that the company should go into voluntary liquidation, again it is primarily a matter for them to decide. But the wishes of the majority of the creditors are not binding upon the Court though in every case the Court might try to give them serious consideration. It is true that as between creditor and the company and his debtor the creditor who proves insolvency is entitled ex debito justitiae to a winding up order. But the right ex debito justitiae is not his individual right, but his representative right. If majority of the class are opposed to his view and consider that they have a better chance of getting payment by abstaining from seizing the assets, then upon general grounds, the Court should give effect to such right as the majority of the class desire to exercise. [P 76 C 2, P 77 C 2]

One Dawsons Bank was formed for financing cultivators in order to enable them to cultivate the land without undue harassment and anxiety, the success of the bank depending largely upon the proceeds of the paddy crop from year to year. A number of persons had deposited money with the bank for fixed periods and the money so deposited had mainly been invested by way of loan upon petty adventures. Recently there was a partial collapse of the paddy market and the matter was further complicated by reason of a rebellion. The bank was in a position to pay its debts as they became due, but they pointed out that if the period of depression was prolonged the result might be that the depositors might not be prepared to renew their deposits and it would also be difficult for the bank to collect the loans which it had made to the cultivators in the district. To meet the situation they suggested that the best scheme for ensuring the success of the bank in the future would be to change the system of raising capital by way of fixed deposits and substituting for it a system of long term debentures. The shareholders of the bank passed a resolution for the voluntary winding up and reconstruction of the bank. The creditors of the bank of Rs. 2,69,346 filed a petition for compulsory winding up of the bank and the petition was opposed by depositors in respect of Rs. 1,35,556. The total value of deposits was over Rs. 66 lakhs :

Held : that it would be extremely unwise for the Court before the wishes of the creditors as a whole had been formally ascertained that the bank should be closed down by compulsory liquidation and that the application should be refused : *In re Uruguay and Hyguerites Ry. Co.*, (1879) 11 *Ch D.* 372 and *In re Criggleston Coal Co.*, (1906) 2 *Ch. D.* 327, *Rel. on.*

N. N. Burjorjee—for Appellants.

Page, C. J.—The appeal fails. In my opinion this is a mala fide and idle petition, which was properly dismissed by my brother Das, J. It is mala fide because it is not only apparent from the argument, but it was specifically stated by the learned advocate who appeared for the appellants, that the real ground upon which his clients desire that this company should be wound up compulsorily by order of the Court is because the liquidators of the company, Mr. Dawson and Mr. Heaton, are not considered to be fit and proper persons to conduct the liquidation of the company having regard to the way in which they have managed the affairs of the bank from 8th to 22nd June 1931. The object and effect of an order for the compulsory winding-up of a company is the closing down of its business. No doubt, in order that the assets of the company should be distributed among those entitled to them in the most efficient and fair manner the Court in some cases may permit the realization of the assets to be suspended temporarily, but for no other purpose. The reason why an order is made that the affairs of a company should be wound up by the Court is because it is deemed expedient that the company should come to an end, and no longer remain in existence as a business undertaking.

Now, in order to ascertain whether the present petition was filed bona fide or not it is necessary to refer to a letter written on the 22nd July 1931 by Sir Oscar de Glanville, an advocate employed by Mr. Hormasji, to Messrs. Leach and Clark, who had been instructed by Mr. Dawson in connexion with a complaint that a statement had been made by Mr. Hormasji that was defamatory of Mr. Dawson. In this letter Sir Oscar de Glanville stated on behalf of Mr. Hormasji that

" he did not and does not suggest that the present position of the bank is due to bad management. At no time was there any intention to make any charges or to reflect on Mr. Dawson's conduct or on that of any of the officials of the bank . . . .

In conclusion if any of Mr. Hormasji's remarks have been misunderstood as casting aspersions on your client or on the bank he expresses regret and asks you to assure your client that he makes no charges against him, and that he is actuated solely by the desire, which he believes Mr. Dawson shares, that the affairs of the bank shall be fully investigated, and he will render all assistance in his power to any reasonable scheme calculated to restore it to its former flourishing condition, which has been due to the care and assiduous attention of your client as its Managing Director."

Now, if the terms of that letter accurately represent the view that Mr. Hormasji took of the way in which the affairs of the bank had been managed, and he really desired to restore the bank to "its former flourishing condition," it is difficult to understand why he should have been a party to this petition for the compulsory winding up of the bank, and he could not consistently or bona fide have instructed the learned advocate who appeared for him to contend that the real objection of the petitioners to the voluntary winding up of the bank was that they disapproved of the way in which the bank had been managed, and h[illegible] confidence in Mr. Dawson or Mr. [illegible]as liquidators, having regard to the manner in which they were carrying out the voluntary liquidation of the bank.

Now, who are petitioning for the compulsory winding up of this .bank ? Mr. and Mrs. Robson, who are depositors to the amount of Rs. 11,000, but as between them and the bank there is a dispute as to whether Mr. and Mrs. Robson are presently entitled to withdraw the sum which they have deposited; Mr. Hormasji, who is a depositor for Rs. 8,000, but the sum which he deposited was not payable until 16th July 1931; and the deposit of Rs. 1,200 by Mr. Hormasji was repayable on the same day, and Mr. Blake, who had joined with the other petitioning creditors in filing the petition but who withdrew from the case before the petition was heard.

Mr. Burjorjee on behalf of the appellants has stated that in addition to the depositors for whom he appears affidavits in support of the petition were filed at the hearing by other depositors in Dawson's Bank the value of whose deposits amounted to Rs. 2,69,346. The total value of the deposits in Dawson's Bank in June 1931 was Rs. 66,09,276 and depositors in respect of Rs. 11 35,556 at the hearing of the petition supported the bank in opposing an order for the compulsory winding up of the company.

Now, under S. 174, Companies Act : "the Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence."

The reason for the enactment of S. 174 is plain. A company is a business concern, and it is fair and reasonable that the Court in considering whether it should order that the company be wound up or not should have regard to the views and wishes of the creditors of the company. If a company is unable to pay its debts or is temporarily in embarrassed circumstances it is peculiarly a matter for those primarily concerned in its assets and well being to determine whether the company shall be wound up or not. If the general body of creditors are of opinion that it will best serve their interest that an order for compulsory liquidation should be made and the company closed down, their views are entitled to respect; on the other hand, if the creditors think that it will be more to their interest that the company should go into voluntary liquidation, again it is primarily a matter for them to decide. Voluntary liquidation may have as its object the closing down of the business; on the other hand the creditors may resolve upon a voluntary liquidation, and their object in winding up the company may be not that the business should cease, but that the company should continue to transact business in a reconstructed form and under new conditions. Of course, the wishes of the majority of the creditors are not binding upon the Court, but in every case the Court ought to give them serious consideration. It may be that the condition of the company is such that its very substratum has ceased to exist. For example, suppose a company has been formed for the purpose of performing stage plays at some particular theatre, and the site of the theatre has been acquired by a public body. In such circumstances the Court would probably hold that the company should be wound up because its substratum has been removed ; or, again, suppose the condition of the company is such that, although the majority of the creditors might be content that it should stagger on as a business concern, the Court takes the view that there is no reasonable prospect of the company being carried on in the future as a successful commercial undertaking. In such a case, too, no doubt, the Court would order the compulsory winding up of the company. But whether the Court ought to pass such an order depends upon the circumstances obtaining in each case.

Now, it is often contended that a creditor, who is unable to obtain payment

of his debt, is entitled ex debito justitiae to an order for the compulsory winding up of the company. I will assume, without deciding, that the petitioners in the present case at the time when they filed the petition were creditors entitled to do so. It is urged on their behalf that they were entitled in the circumstances obtaining on 22nd June to claim ex debito justitiae an order for the compulsory winding up of Dawson's Bank. The course that the Court ought to follow in cases where a minority of the creditors seek a compulsory winding up order while the majority of the creditors are opposed to the company being wound up by the Court, was never explained with more robustness and good sense than it was by Jessel, M. R., in *In re Uruguay Central and Hygueritas Ry Co. of Monte Video* (1). In that case a railway company had covenanted with the trustees of certain bond-holders that it would pay interest upon the bonds at certain fixed dates. The Government of the Republic of Uruguay, owing to temporary financial embarrassment, was unable to pay the interest which it had guaranteed, and in the events that happened interest was not paid by the company to the trustees. Thereupon a petition for the compulsory winding up of the company was filed by a minority of the creditors. In the course of his judgment the Master of the Rolls observed :

"There is another ground on which I think also the petition should be dismissed, and it is this: that bondholders to the amount of £142,700 have instructed counsel to appear for them to oppose the petition. Now under S. 91 (which corresponds to S. 174, Companies Act) it has been decided that the Court may have regard to the wishes of persons opposing a winding up petition. It has been decided that the section authorizes the Court even to refuse a winding up order. I agree that, as a general rule, a creditor is entitled to a winding up order ex debito justitiae ; but that rule is not without an exception ; and if ever there was a case of exception, I think I have it here. Supposing my view of the nature of the instrument is not correct, and that the petitioner is a creditor of the company, he is a pari passu creditor with the others : that is, he has only £600 compared with £142,700, and he has not got a single person to support him. He has £600 compared with £142,700, the holders of which large amount actually appear to oppose him. He then being a pari passu creditor can only sue on behalf of himself and all the other creditors. Any judgment that could be obtained by a winding up order or otherwise is to enure to the benefit of all. If ever there was a case in which the Court might say that it should have regard to the wishes of the creditors I think we have it here. Mr. Buckley did not suggest they were not fairly represented, nor did he desire that a meeting should be called. But then I have to look also to the circumstances of the case, and though I should have regard to the wishes of the creditors, I must also see what sort of case it is in which they express their wishes. Now the matter stands in this way. The railway earns something, and the trustees divide all they can from that. The Government of this Republic of Uruguay has guaranteed the payment of the interest to a certain extent, and has not performed its guarantee. There is no means of suing the republic, or making the republic pay, but there is some expectation that when the republic is in funds, as it is to be hoped will be shortly the case, it will pay. Therefore it appears to me that the petitioner will never get anything more by a winding up order than he is getting now . . . . . Looking at the peculiar circumstances of the case, and seeing what has been decided by the authorities and having regard to the wishes of the creditors in the matter, I think, on the second ground, the Court will properly exercise its judicial discretion by refusing the order."

In *Re Crigglestone Coal Co.* (2), Buckley, J., observed :

"I think that, as between the creditor and the company as his debtor, the creditor who proves insolvency is, without exception, entitled ex debito justitiae to a winding up order. But then comes another consideration, viz., that the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex debito justitiae is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then upon general grounds and upon S. 91, Companies Act, 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class ; that it is for the majority to seek or to decline the order as best serves the interest of their class."

Now, what attitude have the creditors adopted towards this petition ? I do not suppose that the creditors of Dawsons Bank, while it is being wound up voluntarily, would be prepared to give a free hand to the liquidators of the company to manage the affairs of the company in their own way without consulting the wishes of the creditors, and it is always open to the creditors at any time to petition the Court to wind up a company compulsorily when it is in voluntary liquidation. In the present case we have to consider how matters stood on 22nd June 1931, when the present petition was filed. The petition for compulsory liqui-

(1) [1879] 11 Ch. D. 372=48 L. J. Ch. 540=27 W. R. 571.

(2) [1906] 2 Ch. D. 327=75 L. J. Ch. 662=95 L. T. 510=13 Manson 233=22 T. L. R. 585.

dation was opposed by creditors representing more than Rs. 11,00,000 and was supported by creditors of only Rs. 2,69,346 out of a total of more than Rs. 66 lakhs. What were the circumstances prevailing at that time ? On 8th June a meeting of the shareholders had been called, and they had unanimously resolved upon a voluntary winding up of the company with a view to its reconstruction upon certain terms. On 23rd June the resolution of 8th June was confirmed by an overwhelming majority of the share-holders. Between 8th June and 23rd June, that is on 22nd June, the present petition was launched, obviously for the purpose of preventing the resolution of 8th June being confirmed on 23rd June.

Now, in the petition an order for compulsory liquidation of the bank was sought on three grounds :

(1) Because it is "unable to pay its debts" ;

(2) Because of "the conduct of the management since the passing of the resolution of 8th June 1931, in paying one class of its creditors in preference to, and to the serious prejudice of, another and much larger class in order to give colour to the contention that it is not insolvent" ; and

(3) Because "it is just and equitable that the bank should be wound up" as the scheme of reconstruction is necessarily prejudicial to the class of creditors to which the petitioner belong.

As regards the first ground upon which the petition was founded, namely, that on 22nd June, the company was unable to pay its debts, reference has been made to Exs. B, C and D, for the purpose of establishing by way of admission that on 22nd June the company was unable to pay its debts, and the learned Judge has found that upon 22nd June the bank was not in a position to pay its debts. With all respect I am unable so to construe these exhibits. (After considering the evidence, his Lordship held that the evidence adduced at the hearing of the petition to prove that the bank was unable to pay its debts on 22nd June would not have justified the Court on that ground in making a compulsory order for winding up the company and that the second group upon which the petition was based was utterly fallacious, and had no substance in it.) The third ground namely that it was otherwise just and equitable that an order for compulsory liquidation should be made, in my opinion also fails. When the learned advocate was invited to state upon what grounds he based the contention that it was just and equitable that an order for compulsory liquidation should be made he stated that from the terms of the scheme for reconstruction it necessarily followed that if the scheme was carried out the class of depositors to which he belonged would be prejudiced. Depositors however of sums amounting to Rs. 11,35,556 took a different view, and at the hearing before Das, J., instructed learned advocates to oppose the petition. Moreover, the shareholders of the company unanimously on 8th June and by a vast majority on 23rd June, have taken the same view as the depositors of 11 lakhs took at the hearing of the petition. Why should the Court pay more regard to the opinion of the petitioners and those who think with them than to the wishes of the far larger body of creditors who have taken the opposite view? As I have stated prima facie the creditors are in the best position to decide whether their interest in the company will be better served by the compulsory winding-up of the bank, or by voluntary liquidation for the purpose of reconstruction. I go further and say that it would be extremely unwise for the Court, on a petition filed on 22nd June and before the wishes of the creditors as a whole had formally been ascertained to determine that Dawsons Bank should be closed down by compulsory liquidation in the circumstances obtaining on that date and the view that I have expressed has been confirmed by the events that have happened because on 22nd July at a meeting of the creditors a motion for the compulsory winding-up of Dawsons Bank was defeated by Rs., 21,30,130 against Rs. 1,81,647. A scheme of reconstruction requires the sanction of the Court, and when an application in that behalf is made the Court will determine whether it ought to sanction the proposed scheme for reconstructing Dawsons Bank in whole or in part. For the purpose of disposing of the present petition it is enough to hold that the Court is not satisfied in the circumstances obtaining on 22nd June that the proposed scheme if carried out would of necessity work prejudice to the depositors.

Having regard to the principles by which the Court should be guided in determining whether an order for the

compulsory winding-up of a company should be made or not I am of opinion that there is no substance in this petition, that it is not a bona fide petition and that it was rightly dismissed by the learned Ju lge who heard it. The appeal is dismissed with costs 15 gold mohurs.

Cunliffe, J.—I find myself in complete agreement with what my Lord the Chief Justice said, and have very little to add to his observations. In my view too this application is put forward mala fide. I can put no other construction on the combination of the two conflicting assertions in the letter of 22nd July which the petitioner instructed Sir Oscar de Glanville to write on his behalf when he specifically withdrew all charges of fraud or denied all charges of fraud and mismanagement against those in charge of Dawsons Bank but still we find on the file this para. 11 in which he has asserted that because of the conduct of the management since the passing of the special resolution of 8th June 1931 in paying one class of its creditors in preference to and to the serious prejudice of another and much larger class they are to my mind important words in order to give colour to its contention that the bank is not insolvent. That must in my opinion be a charge of fraud and it is persisted in. It is my considered view also that it is the inherent right of every Court of law to dismiss and disregard mala fide applications of this kind. Further I hold the view, as my Lord has pointed out,' that all compulsory liquidation spells finality. I asked the learned advocate for the appellants if he could produce any authority in which a compulsory liquidation had been accompanied by any formal or substantial reconstruction but so far he has been unable to produce that authority. I have no doubt in my mind that if he had been able to do so he would have done so. I express no opinion as to the complete desirability of the scheme which has been outlined on the file before us but it seems to me that the care with which those who have been placed in charge of the voluntary liquidation of this concern should continue. I notice that the legal adviser was present at the last meeting. I see the directors of the bank at the meeting of 22nd July were present. There was also present a chartered accountant and it was decided that instead of appointing a separate chartered accountant to keep an eye on the affairs of the bank a committee of four depositors should be in charge of that aspect of the management. I express no opinion whether this would be a successful scheme or not but do say this, that it has to receive the sanction of this Court. On consideration of that application the present applicant will have every opportunity of being heard, and in these difficult times, both in political and commercial affairs, I consider that it would be contrary to public policy to compulsorily wind up a substantial company of this character against which no substantial allegations of fraud have been proved before the Court. For these reasons I agree that the appeal should be dismissed.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Rangoon 80

PAGE, C. J. AND MYA BU, J.

N. Sankara Iyer—Appellant.

v.

S. A. S. M. Ramaswamy Chettyar —Respondent.

First Appeal No. 18 of 1931, Decided on 23rd March 1932, against decision of Dist. Judge, Mandalay.

*** Malicious prosecution—Reasonable and probable cause—Absence of, must be proved by plaintiff — "Reasonable and probable cause", meaning explained—It is sufficient if there is reasonable and probable cause for prosecuting plaintiff when criminal law is set in motion by defendant—It is unnecessary that there should be such reasonable and probable cause throughout criminal proceedings which terminated in plaintiff's favour.**

In a suit to recover damages for malicious prosecution, a plaintiff must prove that the defendant prosecuted him without reasonable and probable cause and with malice and unless he obtains a finding in his favour on each of the issues he cannot succeed. "Reasonable and probable cause" means an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable bona fide belief in the existence, of such a state of things as would amount to a justification of the course pursued in making the accusation, no matter whether the belief arises out of the recollection and memory of the accuser or out of

the information furnished to him by another. Where the complaint is filed by the defendant on the information given by another, the Court has to see how far the defendant can be said to have reasonably and discreetly trusted the informant, since regard must be given to every shade of difference between the amount of credit to be given to one person and to another according to the character of the informant. Information given by one person of whom the party knows nothing, would be regarded differently from information given by one whom he knows to be sensible and trustworthy person. And the question whether or not a reasonable man would or would not act upon the information depends in a great degree upon the opinion to be formed of the position and circumstances of the informant and of the amount of credit which may be due under those circumstances to the person who thus conveys the information. Further the fact that the defendant persists in prosecuting a false charge against the plaintiff after it has become reasonably clear that there was no ground to justify the prosecution of the plaintiff would be evidence of malice, but would not be evidence that at the time when he became the prosecutor the defendant had acted without reasonable and probable cause. A man's motive is one thing, his opinion is something very different, and however malicious the motive may have been that induced the defendant to launch the prosecution against the plaintiff, the malice of the defendant does not preclude him from justifying the course he took by establishing that when he became the prosecutor he honestly and on reasonable grounds believed that the accused was guilty of the offence for which he was prosecuted. No doubt the absence of reasonable and probable cause is evidence of malice for an honest belief in the guilt of the plaintiff based on reasonable grounds is the very essence of the defence to a suit for malicious prosecution. Consequently it is not necessary. that the defendant must have had reasonable and probable cause for prosecuting the plaintiff, throughout the criminal proceedings terminated in plaintiff's favour. It is sufficient if the honest belief in the guilt of the plaintiff exists in the mind of the defendant at the time the charge is laid : In *Broad* v. *Ham*, 5 *Bin.* (*n. s.*) 722 ; *Hicks* v. *Faulkner*, 8 *Q. B. D.* 167 ; *Delegal* v. *Highley*, 3 *Beng. N. C.* 950 ; *Abrath* v. *North Eastern Ry. Co.*, 11 *Q. B. D.* 440 and *Musgrone* v. *Newell*, 1 *Mee & W. P.* 403, *Rel. on. Fitzjohn* v. *Mackinder*, 9 *C. B.* (*n. s.*) 505, *Expl.*

MacDonnell—for Appellant.

Leach—for Respondent.

Page, C. J.—On 27th November 1929, the following article was published in the Rangoon Mail and the Rangoon Daily News :

Money lenders and Forged Currency Notes. A Mandalay A. P. Message contradicted.

"To the Editor, Rangoon Mail.

"Sir,—On 6th November 1929, there appeared an Associated Press news item in all newspapers regarding a case of forged currency notes being found in the business premises of a non-Chettyar firm , Messrs. P. L. S. and A. L. A. on B Road, Mandalay. This information is absolutely incorrect and misleading. The facts are as follows :

"In Mandalay there are seven non-Chettyar money-lending firms, P. L. S , R. M. G., R. K. K., A. L. A. P. M., P. R. M. and M. A K ; these or rather the majority of them have been doing business for over two years, and their familiarity with the business and public have greatly improved their business. P. L. S. was at one time a clerk in the firm of S. A. S. M. Chettyar firm. When so employed he desired to proceed to his native place and wanted leave and some money. This was refused, so he resigned his appointment and after borrowing Rs. 60 from a friend was about to leave Mandalay, when a complaint was lodged with the police to the effect that P. L S. had stolen Rs. 60 and was trying to abscond. This however proved false and P. L. S. was acquitted. Since then P. L. S. started on his own and his example was followed by other Chettyar clerks with the result much of the business once handled by the Chettyar firms went into the hands of the nonChettyar houses and there was naturally jealousy. In 1923, this took place, and in 1925, the nonChettyar houses came into existence and have been carrying on smoothly when a kind of boycott propaganda was started against them. Donations to the temple funds were refused; entry in the temple books, all current accounts and material help that existed before were stopped and nonChettyar firm hundis and memos refused. These were put into effect since 1928 and are still in effect. As recently as 28th October 1929, there was a quarrel on the street between P. L. S. and S. A. S. M. in the course of which there was an exchange of hot words, and the latter in the presence of a large number of people threatened to ruin both P. L. S. and his business. On the third day, that is, 1st November 1929 a report was lodged by a Burman to the effect that he had been paid by P. L. S., a forged currency note of Rs. 10 denomination for some jewellery pledged. The police did not search the business of P. L. S. and A. L on B Road, as stated in the Associated Press message, but the private residence of these two persons. The police did not make a search of the premises at once, but a policeman went straight to the window from behind which he extracted a plain envelope which contained 28 ten-rupee forged notes. A search of the other parts of the house and the business premises produced nothing. The matter was reported to the D. S. P., who personally inspected the places and in his report stated that the case was a false one and further noted in that report that there was a good deal of jealousy between the Chettyars and the non-Chetty business firms and classing the case as false closed the case. In the course of the inquiry it was found that the Burman was not paid a currency note but in cash. The case was not sent up to the Courts but thrown out by the D. S. P on 3rd November 1929. The Associated Press message, it will therefore be seen, is not only false but also unjust.

Yours sincerely,
Sd/- N. S. AIYER,
Mandalay."

It is common ground that this article contained defamatory statements of and concerning S. A. S. M. On 11th Decem-

ber 1929, S. A. S. M. R. Chettyar, the defendant, filed a complaint in the Court of the Senior Magistrate in Criminal Regular No. 60 of 1929 against the plaintiff, N. S. Iyer, a medical practitioner, carrying on business in Mandalay, and S. C. Battacharjee, the Editor of the Rangoon Mail for defamation under S. 500, I P. C., and on the same day the defendant filed a similar complaint in Criminal Regular No. 59 of 1929 against Y. D. Motala, the Editor of the Rangoon Daily News.

On 4th February 1930, the defendant compounded the offence alleged to have been committed by Battacharjee, and he was acquitted.

On 15th October 1930, after the case for the prosecution had been heard and the accused N. S. Iyer had been examined by the Court, the accused was discharged without being called on for his defence. On 29th November 1930, the plaintiff filed the present suit against the defendant to recover damages for malicious prosecution. It is common ground that the prosecution of the plaintiff was instituted by the defendant and that the criminal proceeding terminated in the plaintiff's favour.

The two issues which fall for determination in the appeal are whether the defendant prosecuted the plaintiff: (1) without reasonable and probable cause, and (2) with malice. The onus of establishing these issues is on the plaintiff, and unless he obtains a finding in his favour on each of the issues the suit must fail. The learned District Judge found for the defendant on both the issues, and dismissed the plaintiff's suit.

Now, what does "reasonable and probable cause" mean in a suit to recover damages for malicious prosecution?

In *Broad* v. *Ham* (1), Tindal, C. J., laid down that

"in order to justify a defendant there must be a reasonable cause, such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him."

And in *Hicks* v. *Faulkner* (2), Hawkins, J., defined "reasonable and probable cause" as

"an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

"The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of, no matter whether this belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another. It is not essential in any case that facts should be established, proper and fit and admissible as evidence, to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts to establish actual guilt and those required to establish a bona fide belief in guilt should never be lost sight of in considering such cases as that I am now discussing. Many facts admissible to prove the latter would be wholly inadmissible to prove the former."

Now at the hearing of the appeal the learned advocate for the appellant contended that there must be reasonable and probable cause for prosecuting the plaintiff, not only when the defendant first set the criminal law in motion, but throughout the proceedings and if at any stage of the prosecution (specially in respect of an offence compoundable at the discretion of the complainant), there is an absence of reasonable and probable cause it is no defence that when the defendant first became the prosecutor he had reasonable and probable cause for prosecuting the plaintiff.

In my opinion, this contention is unsound in law, and cannot be accepted. I do not think that the case of *Fitzjohn* v. *Mackinder* (3) upon which the learned advocate for the appellant relied, supports any such proposition or tells in the appellant's favour. In that case Mackinder having been bound over to prosecute Fitzjohn for perjury preferred an indictment against him at the Oakham Assizes. Fitzjohn was acquitted, and thereafter brought a suit to recover damages for malicious prosecution against Mackinder. The jury found a verdict for the plaintiff for £200 damages, but Williams, J., directed that a non suit be entered. In *Fitzjohn* v. *Mackinder* (3) the only issue raised on appeal was whether the defendant had caused the prosecution of the plaintiff. The case proceeded upon the footing that the defendant at all material times knew that the plaintiff had not committed perjury and was guilty of

(1) 5 Bing. N. C. 722=8 Scott 40=8 L. J. C. P. 357.

(2) [1878] 8 Q. B. D. 167=30 W. R. 545=51 L. J. Q. B. 268.

(3) [1861] 9 C. B. (n.s.) 505.

malice in preferring the indictment against the plaintiff. In the appeal before the Court of Common Pleas and also before the Exchequer Chamber it was contended that, inasmuch as the defendant had been bound over to prosecute, he could not be regarded as having prosecuted the plaintiff by preferring a bill of indictment against him at the assizes. When the case was before the Court of Common Pleas, Erle C. J., and Williams, J., held that the defendant had not caused the prosecution of the plaintiff. Willes, J., dissentiente, was of opinion, "that the mere fact that the defendant had been bound over to prosecute the plaintiff at the assizes ought not to aid the defendant firstly, because it was occasioned by his own contrivance and wrong; secondly, because it is void as a judicial act inasmuch as it was obtained by a fraud upon the Court in scena non in foro": 8 *C. B.* (*n.s.*) 109[1].

In the Exchequer Chamber Blackburn and Wightman, JJ., were for affirming the judgment of the Common Pleas (Erle, C. J., and Williams, J.) on the ground that the defendant had not caused the prosecution of the plaintiff); Cockburn, C. J., Channell, B., and Bramwell, B., on the other hand held that the non-suit must be set aside and judgment entered for the plaintiff. The case is not a satisfactory authority, as four of the Judges who decided the case were in favour of the plaintiff and four in favour of the defendants and the decision of the majority of the Judges in the Exchequer Chamber was based on different and to some extent inconsistent grounds. Bramwell, B., held that the defendant was not liable for having preferred the indictment but for

"having laid a case before the Grand Jury, false to his own knowledge, which caused them to find a true bill".

Cockburn, C. J., and Channell B., were however of opinion that so far as the defendant is concerned the prosecution commences with the preferring of the indictment. Having been bound over to prosecute, to prefer an indictment is for him the first step of the prosecution. Their Lordships in these circumstances held that it must be taken that the defendant caused the prosecution of the plaintiff, and following *Dubois* v. *Keats* (4) that the fact that the defendant was bound over to prosecute the plaintiff afforded no defence to the action. Cockburn, C.J., Bramwell, B. and Channell B., however were all of opinion that in one form or another the defendant was the prosecutor, and that finding was sufficient to support the decision of the majority of the learned Judges in the Exchequer Chamber. Whether or not the defendant was the prosecutor in the criminal proceedings is, of course, the first issue that arises in every suit to recover damages for malicious prosecution.

In the passage in Cockburn, C. J.'s judgment in *Fitzjohn* v. *Mackinder* (3), upon which the appellant relied, his Lordship observed that

"no doubt, under ordinary circumstances, where the question of malice is still open the fact that some one else set the law in motion would be conclusive in favour of the defendant; or if the existence of reasonable and probable cause were in dispute, the fact that a Judge or Magistrate had spontaneously bound over the defendant would go very far to show that the prosecution was a proper one. But this reasoning can have no application where the maliciousness of the prosecution and the absence of probable cause are necessarily implied in the fact that we have the guilty man pursuing the innccent. To say, in any other view than the one which I have just been putting, that a man's liability to an action for a malicious prosecution depends on his having first set the law in motion, appears to me untenable in principle and unwarranted by authority; and assuredly nothing short of the most conclusive authority would induce me to assent to such a position."

No Judge, I imagine, would hold to the contrary, and it appears to me plain that because the defendant in a suit for malicious prosecution did not in the first instance set the law in motion against the plaintiff, that fact in itself does not determine that he was not the prosecutor. Whether the defendant was the prosecutor or not depends in each case upon the facts and circumstances disclosed in the evidence: *Weston* v. *Beeman* (5) and *Clements* v. *Ohrly* (6). If Cockburn, C. J., or Bramwell, B., in *Fitzjohn* v. *Mackinder* (3) intended to lay down that in an action for malicious prosecution the defendant must have had reasonable and probable cause for prosecuting the plaintiff not only when he first became the prosecutor, but also throughout all the subsequent stages until the criminal proceedings terminated in the plaintiff's favour, with all respect I should have been unable to agree with them. But as I understand *Fitzjohn* v. *Mackinder* (3), Cockburn, C.J., and Bramwell, B.,

(4) 11 A. & E. 329=3 P. & D. 306=9 L. J. Q. B. 65=4 Jur. 148.

(5) 27 L. J. Ex. 57.

(6) 2 C. & K. 686.

did not, and did not intend to lay down any such proposition, which, in my opinion, is neither common law nor common sense. If the defendant in the present case had reasonable and probable cause for prosecuting the plaintiff at the time when he filed the complaint for defamation under S. 500, I. P. C., and thus set the law in motion against the plaintiff, why should he be deprived ex post facto of that ground of defence because it subsequently transpired in the course of the proceedings that if at the time when he filed the complaint he had known the true facts he would not have been justified in launching the prosecution against the plaintiff: *Musgrove* v. *Newell* (7). The law, in my opinion, was correctly laid down in *Delegal* v. *Highley* (8). That case was decided on a special demurrer on the ground

"that the defendant had not averred that at the time he made the charge before the Magistrate he had knowledge of any facts sufficient to make him believe the truth of the charge."

In delivering the judgment of the Court, Tindal, C. J., observed that

"the gravemen of the declaration is that the defendant laid the accusation without any reasonable and probable cause operating on his mind at the time; and under the plea of not guilty the defendant must have failed at the trial if he had not proved that the facts of the case had been communicated to him, or at all events so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt on the mind of any reasonable man, previous to the charge being laid before the Magistrate. This was held by the Court of King's Bench in the course of last term upon a motion for a new trial in a case of *Dockwara* v. *Hilton*. And if the defendant instead of relying on the plea of not guilty elects to bring the facts before the Court in a plea of justification, it is obvious that he must allege as a ground of a defence that which is so important in proof under the plea of not guilty, viz, the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the Magistrate, existed in his mind at the time the charge was laid and was the reason and inducement for his putting the law in motion:" see also *Abrath* v. *North Eastern Ry. Co.* (9).

In my opinion, the fact that the defendant in a suit for malicious prosecution persists in prosecuting a false charge against the plaintiff after it has become reasonably clear that there was no ground to justify the prosecution of the plaintiff would be evidence of malice, but would not be evidence that at the time when he became the prosecutor the defendant had acted without reasonable and probable cause. A man's motive is one thing, his opinion is something very different, and, however malicious the motive may have been that induced the defendant to launch the prosecution against the plaintiff, the malice of the defendant does not preclude him from justifying the course he took by establishing that when he became the prosecutor he honestly and on reasonable grounds believed that the accused was guilty of the offence for which he was prosecuted. No doubt the absence of reasonable and probable cause is evidence of malice, for an honest belief in the guilt of the plaintiff based on reasonable grounds is the very essence of the defence to a suit for malicious prosecution. As Cockburn, C. J., pointed out in the passage in *Fitzjohn* v. *Mackinder* (3) to which reference has been made:

"A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or a Magistrate, or, if spontaneously undertaken, from having been connected under a bona fide belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor having acquired positive knowledge of the innocence of the accused, perseveres malo animo in the prosecution, with the intention of procuring per nefas a conviction of the accused." ; see also *Broad* v. *Ham* (1); *J. B. Lister* v. *Henry Ferryman* (10), *Shrosbery* v. *Osmaston* (11); *Brown* v. *Hawkes* (12) and *Meering* v. *Graham White Avitation Co.* (13)."

On the other hand, the fact that malice is proved is not evidence of the absence of reasonable and probable cause, for as Denman, C. J., observed in *Turner* v. *Ambler* (14)

"the unfair use made of the charge may prove malice, as the jury held that it did, but does not any inference on a belief that there was no reasonable and probable cause; for the contrary belief is perfectly consistent with the malice."

In the course of the argument in the same case Patterson, J., observed:

"The most express malice would not be sufficient if there were probable cause."

(7) 1 Mee & W. P. 403.
(8) 3 Bing N. C. 950=5 Scott. 154—8 C. & P. 444=3 Hodges 158=6 L. J. P. C 337.
(9) [1884] 14 Q B. D. 440=52 L. J, Q. B. 620 =49 L. T. 618=47 J. P. 692=32 W. R. 50.
(10) [1871] 4 H. L. 521=39 L. J. Ex. 177 =23 L. T. 269=19 W. R. 9.
(11) [1878] 37 L. T. 792.
(12) [1891] 2 Q. B. 718 =61 L. J. Q. B. 151 =65 L. T. 108=55 J. P. 823.
(13) [1919] 122 L. T. 44.
(14) 10 Q. B. 252 =16 L. J. Q. B. 158 = 6 Jur. 346.

In *Musgrave* v. *Newell* (7), Abinger, C. B., laid down, and I entirely agree with the law as enunciated by the learned Chief Baron in that case, that

" to support an action of this kind there must be both malice in the defendant and want of reasonable and probable cause. It is admitted that even if there be excessive malice, if it is combined with probable cause, the action cannot be supported. So also it is admitted that a total want of probable cause is sufficient evidence from which the jury may infer malice inasmuch as in such case the party could have no ground for proceeding in the charge but a malicious one. But, on the other hand, from any decree of malice you cannot infer a want of probable cause; that stands upon a class of facts to be looked at by themselves."

Now applying the above principles to the facts of the present case the question is whether the plaintiff at the trial proved that at the time when the defendant launched the prosecution against him and thus became a prosecutor the defendant acted without a reasonable and probable cause. Did the defendant then honestly believe on reasonable grounds that Dr. Iyer had caused the defamatory article to appear in the Rangoon Mail ? What was the information in the defendant's possession at the time when he filed the complaint ? (Here his Lordship discussed evidence and proceeded). The learned District Judge held and there was evidence to support the finding, that the defendant before filing the complaint had made inquiries from the Rangoon Mail in order to discover who was the writer of the article and that the evidence of the defendant that his clerk had informed him on returning from Rangoon that the writer of the article was N. S. Iyer, Medical Hall, Merchant Street, Mandalay, was corroborated by the letter containing the article Ex. D, which purported to have been signed in that manner. On the evidence adduced at the trial I am not prepared to disturb these findings of the learned District Judge.

On behalf of the appellant it was strenuously argued that a reasonable and prudent man before instituting criminal proceedings against the plaintiff would have made further inquiries (1) by sending a letter to Dr. Iyer formally demanding that he should either admit or deny that he was the author of the article and (2) by taking steps to ascertain whether the signature purporting to be that of " N. S. Iyer " on Ex. D was in the handwriting of the plaintiff.

Now it would have been reasonable that the defendant should have made these further inquiries but the question is whether in the circumstances it was unreasonable that the defendant should have launched the prosecution without making further inquiries, resting satisfied that the plaintiff was guilty upon the information then in his possession : *Lister* v. *Perryman* (10), *Abrath* v. *North Eastern Railway Co.* (9), *Brown* v. *Hawkes* (12) and *Bradshaw* v. *Waterlow & Sons Ltd.* (15).

The defendant stated that when he filed the complaint he held no doubt that the article had been written by the plaintiff, and if the defendant honestly believed that the information then in his possession was true and in particular the report that had been made to him by his clerk as the result of inquiries at the office of the Rangoon Mail, I am of opinion that the defendant had reasonable and probable cause for prosecuting the plaintiff. Why should the defendant in the light of the other circumstances of which he had information, as a reasonable and discreet man not have believed the report that his clerk had made to him on his return from Rangoon to Mandalay ?

What is now to be decided is, this, how far this gentleman, having this information conveyed to him may be said to have reasonably and discreetly trusted his informant. Because I apprehend that you are to have regard to every shade of difference between the amount of credit to be given to one person and to another, according to the character of the informant. Information given by one person of whom the party knows nothing would be regarded very differently from information given by one whom he knows to be a sensible and trustworthy person. And the question whether or not a reasonable man would or would not act upon the information must depend in a great degree upon the opinion to be formed of the position and circumstances of the informant, and of the amount of the credit which may be due under those circumstances to the person who thus conveyed the information. per Hatherley, L. C., in *Lister* v. *Perryman* (10).

The fact that the defendant selected this particular clerk to make inquiries in Rangoon indicates that the defendant

(15) [1915] 3 K. B. 527=85 L. J. K. B. 318.

regarded him as reliable and trustworthy, and I can see no reason why the defendant should not have believed what the clerk reported to him as the result of the inquiries that he had made. In my opinion it was not incumbent upon the defendant to have made any further inquiries having regard to the information already in his possession, and I have no doubt that the learned District Judge was right in holding that the defendant had reasonable and probable cause for instituting the criminal proceedings in Criminal Regular No. 60 of 1929 against the plaintiff.

In the circumstances disclosed in the evidence however it must not be taken that I should have arrived at the same conclusion upon the issue of malice as that which commended itself to the learned District Judge. But for the reasons that I have stated, and as the Court is of opinion that the plaintiff has failed to prove that the defendant prosecuted the plaintiff without reasonable and probable cause, it is unnecessary to determine the issue of malice, and I refrain from expressing an opinion upon it one way or the other. For the purpose of deciding this appeal it is sufficient to hold that the plaintiff did not prove that the defendant prosecuted the plaintiff without reasonable and probable cause and upon this issue the finding of the learned District Judge must be upheld. The result is that the appeal is dismissed with costs.

Mya Bu, J.—I agree.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Rangoon 86

PAGE, C. J. AND MYA BU, J.

Official Assignee—Appellant.

v.

H. Pope—Respondent.

Civil Misc. Appeal No. 6 of 1932, Decidad on 14th March 1932.

*** Presidency Towns Insolvency Act (1909), S. 55—Unsecured creditor taking transfer for valuable consideration of whole of his assets from debtor knowing him to be in insolvent circumstances—Transfer is not made in good faith within S. 55.**

If an unsecured creditor elects to take a transfer of the whole of his property from a debtor who is insolvent, the transfer has the double effect of preferring his claim against the transfer to the claims of other unsecured creditors, and further of removing from the reach of other creditors the whole of the assets out of which the unsecured creditors are entitled to receive a rateable distribution. Consequently where such a creditor takes a transfer of property for valuable consideration from the debtor knowing that he is in insolvent circumstances that he had no other available assets except those which are transferred to him and further knowing that if the whole of the assets are transferred to him there would be nothing left out of which any other creditors that the debtor might have could receive a rateable distribution, the transfer is not made in good faith within S. 55 and is void against the estate of the insolvent : *Tomkins* v. *Saffery*, 3 *A. C.* 213 ; *In re Sinclair*, 26 *C. D.* 319 ; 19 *Cal.* 223 ; *A. I. R.* 1925 *Cal.* 640 and *A. I. R.* 1927 *Mad.* 1013, *Rel. on.* [P 87 C 2]

Ba Maw—for Appellant.

Aiyengar and *U Thin*—for Respondent.

Page, C. J.—This appeal must be allowed. The proceeding out of which the appeal arises was launched under S. 55, Presidency Towns Insolvency Act, upon the ground that the transfer by the debtor within four months of her insolvency of the whole of her assets to the respondent was a transfer otherwise than in good faith and for valuable consideration, and void as against the Official Assignee.

In my opinion, the case is concluded against the respondent by authority, and is within the words of Lord Blackburn in *Tomkins* v. *Saffery* (1) :

" It comes round to this, that I think . . . . . that when they knew that the man was insolvent and unable to pay his debts, when they knew that this money was given them to prefer a particular body of creditors to all the other creditors, if there were others, they were then fixed with the knowledge of an infringement of the statute, and although they were told by the man who afterwards became a bankrupt that he had no other creditors, they cannot get out of it ; they took their chance. If he had told them the truth, and there had been in fact no other creditors, this transaction would have stood and been perfectly good; if he had any other creditors it would not stand. They knew all that it was necessary for them to know, and I think they took their chance, and they must take the consequences."

Again, in *Ex parte Chaplin, In re Sinclair* (2) Cotton, L. J. observed :

" In my opinion, if persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor or that it might afford an effectual way of paying the creditors : see *Khoo Kwai* v. *Woof Taik Hwat* (3) ; *Official Assignee of Bengal* v. *The Yokohama Specie*

(1) [1878] 3 A.C. 213=47 L.J.B.K. 11.
(2) [1884] 26 Ch. D. 319=53 L.J. Ch. 732.
(3) [1892] 19 Cal. 223=19 I.A. 15.

Bank Ltd. (4) and *Official Assignee of Madras* v. *S. M. Sheik Moideen Rowther* (5)."

The facts are simple and undisputed. The insolvent who is a Mrs. Young, was proposing to start a millinery business in 1928, and in order that she should be in a position to commence business, for she had no capital, the respondent agreed to guarantee an overdraft with the Chartered Bank in favour of Mrs. Young for Rs. 25,000 and also guaranteed the rent of the premises in which she was proposing to carry on the business.

Now, the nature of this business which is that of a milliner and dressmaker is such that Mr. Pope, who is a business man, must have known that Mrs. Young would incur ordinary trade liabilities, and must have been aware that from time to time she would come under financial obligations to trade creditors. In the course of his evidence he stated:

"I knew from the start that she would not be able to pay the bank as she was trading on an overdraft."

Periods of depression come to every trade from time to time, and in February 1931 Mrs. Young found that she could no longer carry on her business. In these circumstances on 4th February 1931 the Chartered Bank wrote to the respondent:

"H. Pope, Esq., c/o Messrs. Watson & Son, Ltd., Rangoon.

Dear Sir,

As all efforts to obtain a reduction in this client's indebtedness to the bank are proving futile, this is to advise you that, as Guarantor, we intend calling upon you to liquidate the debt at the end of this month which please note.

Yours faithfully,
(Sd.) A. R. MacQueen, Agent."

On receiving this notice of demand from the bank the respondent saw Mrs. Young, and asked her what she proposed to do about liquidating her liability to the bank. Mrs. Young frankly stated that she had not the money to pay off the debt, but that she was going to England and hoped to realize Rs. 35,000 from her father's estate. Mr. Pope added:

"So I said that I would try and make arrangements with the bank as I had not the Rs. 20,000 to spare and the bank agreed to receive it by two instalments."

On 27th February 1931, Mrs. Young transferred by registered deed of sale everything that she possessed in Burma to the respondent, and four days later left the country.

On 2nd June 1931, a petition was filed for her adjudication, and she was adjudicated an insolvent on 16th June 1931. In due course, by two payments of Rupees 16,521-2-9 and Rs. 4,000 Mr. Pope liquidated Mrs. Young's indebtedness to the Chartered Bank.

It is common ground that there was valuable consideration for the transfer, but the question that falls for determination is whether the Official Assignee has discharged the burden of proving that the transfer was not in good faith.

Now, if an unsecured creditor elects to take a transfer of the whole of his property from a debtor who is insolvent, the transfer has the double effect of preferring his claim against the debtor to the claims of other unsecured creditors, and further of removing from the reach of other creditors the whole of the assets out of which, according to the law of insolvency, the unsecured creditors were entitled to receive a rateable distribution. The learned advocate for the respondent has stated that there was no evidence that the respondent knew that Mrs. Young had any other creditors. That is not what he says. The respondent himself said:

"I had no reason to believe that Mrs. Young was in insolvent circumstances at any time. I did not know who her creditors were besides those for whom I stood surety."

It is quite obvious that the respondent must have known that Mrs. Young in the course of her business would contract certain trade liabilities from time to time, and after the letter that he received from the bank on the 4th February it is, to my mind, incredible that he did not know that she was in insolvent circumstances. The respondent knew Mrs. Young well. She was a friend of his wife. He had taken so great an interest in her business, as a milliner and dressmaker that from the outset he had guaranteed the rent of the premises in which she was to carry it on, and also an overdraft of a quarter of a lakh with the bank. In my opinion, the only reasonable inference from the circumstances disclosed in the evidence is that at the time when this transfer was made by Mrs. Young to the respondent he knew that she had no available assets except those which were transferred to him, that she was in insolvent circumstances and unable to carry on her business, and if the whole of her assets were transferred to him there would be nothing left out of which any other credi-

(4) A.I.R. 1925 Cal. 640=87 I.C. 392.
(5) A.I.R. 1927 Mad. 1013=50 Mad. 948.

tors that she might have could receive a rateable distribution. In those circumstances, in my opinion, the proper inference to draw from the facts was that, although no moral obloquy attached to the transaction, for the respondent might quite honestly in his own interest have accepted this transfer, this transfer was not made in "good faith" within S. 55, Presidency Towns Insolvency Act, and therefore as against the estate of the insolvent it is void.

The result is that the appeal is allowed and the order from which the appeal is brought set aside, and order will be passed declaring that this transfer is void as against the Official Assignee. The proceeds of the sale of the stock-in-trade of the business, which the respondent has received, must be handed over to the Official Assignee, after deducting the expenses reasonably incurred in connexion therewith.

Mya Bu, J.—I agree.

P.N./R.K. *Appeal allowed.*

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* A. I. R. 1932 Rangoon 88

BAGULEY, J.

U Ba Pe and *another*—Appellants.

v.

Ma Lay—Respondent.

Second Appeal No. 239 of 1931, Decided on 2nd March 1932.

*** Limitation Act (1908), S. 20—Suit on bond—Claim time barred as against principal debtor but not as against surety—Surety is liable to pay debt and plaintiff is entitled to decree as against him only—Contract Act (1872), S. 137.**

Though the liabilities of the principal debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct for the purpose of application of S. 20. Consequently, even if a suit is barred by limitation as against the principal debtor, if the surety has made certain payments and endorsements on the bond on which the suit is based thus preventing limitation running as against him, the plaintiff is entitled to a decree though as against the surety only: 28 *Bom.* 248; 44 *Cal.* 978; *A. I. R.* 1925 *Bom.* 244; 5 *Bom.* 647 and 33 *Mad.* 308, *Foll.*; 24 *All.* 504; 11 *All.* 310; 105 *P. R.* 1919, *not Foll.*; 17 *I. C.* 619, *Dist.*; 30 *P. R.* 1874; *Allison* v. *Frisby*, 43 *Ch. D.* 106 and *Carter* v. *White*, 25 *Ch. D.* 666, *Ref.* [P 88 C 2, P 89 C 2]

Pandit—for Appellants.

Chari—for Respondent.

Judgment.—The respondent sued the two appellants on a bond which was executed by Ba Pe as principal and Oke Gyi definitely as surety. Certain defences were raised but the plaintiff was given a decree by the trial Court with costs. On appeal the learned Additional District Judge confirmed the decree of the trial Court, so this appeal would only lie on points of law. The bond appears on the face of it time barred, but the lower Courts have found that Oke Gyi, the surety, made certain payments and endorsements on the bond which prevented limitation running as against himself. With regard to Ba Pe the findings are not definite: but there are no endorsements purporting to have been made on the bond by Ba Pe and this case was argued on the footing that limitation had set in as against Ba Pe so far as his own act was concerned, while Oke Gyi, the surety, had done certain acts which prevented limitation arising as against him.

In appeal it is argued on the one side that the claim being time barred as against Ba Pe the liability of his surety must be held to be barred by limitation also. On the other hand, it is argued that because Oke Gyi in the body of the bond states that, "in the event of Ba Pe's default he will pay on behalf of Ba Pe." Any payments made by Oke Gyi must be regarded as payments on Ba Pe's behalf as his agent and therefore limitation cannot have come into existence as against Ba Pe. This point is rather a nice one, and there seems to be a divergence of opinion between some of the High Courts. The question to be decided is whether the liabilities of the principal and his surety, as far as the creditor is concerned, are entirely separate or are inseparably linked together. The High Court of Calcutta is definite on this point, vide *Brojendro Kishore* v. *Hindustan Co-operative Insurance Society Ltd.* (1):

"Though the liabilities of the debtor as the surety arises out of the same transaction, the liabilities of the two persons are distinct for the purpose of the application of S. 20, Limitation Act."

The Bombay High Court has held that "the principal debtor and the surety can each keep his liability alive, though the remedy of the creditor may be barred as against the other on account of limitation: vide *Raghavendra Guru Rao* v. *Mahipat Krishna* (2) where reference is also made to *Gopal Daji* v. *Gopal Sonu* (3). And attention may also be drawn to *Hajarimal* v. *Krishna Rao* (4)."

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(1) [1917] 44 Cal. 978=39 I. C. 705.

(2) A. I. R. 1925 Bom. 244=87 I. C. 883=49 Bom. 202.

(3) [1904] 28 Bom. 248=5 Bom. L. R. 1020.

(4) [1880] 5 Bom. 647.

There is also an officially reported case of the Madras High Court, *Subramania Iyer* v. *Gopala Iyer* (5), in which it was held that

"the omission of the creditor to sue the debtor within the period of limitation is not an act, the legal consequence of which is the discharge of the debtor and such omission has not the effect of discharging the surety under Ss. 134 and 137, Contract Act."

It was argued as against this that the Madras High Court had not been consistent in following this owing to an unreported case, viz., *Velayudham Pillay* v. *Vaithyalingam Pillay* (6), but this case was a case in which the principal and his universal donee were sued. It was not a case of the principal debtor and his surety, and this case does not seem to have been officially reported. There is also an old ruling of the Chief Court of the Punjab, *Suja* v. *Pahilwan* (7), in which although the point was not really before the Court, the case arose out of a suit in which a surety had paid up the principal's debt to the latter's creditor after it had become time barred as against the principal debtor, but not as against the surety, and nowhere is it mentioned that the surety was not really liable. On the other hand, the High Court of Allahabad in *Ranjit Singh* v. *Naubait* (8) held that where the judgment-debtor having made a default in payment of the instalments delayed taking out execution of the decree until execution had become time barred, the creditor had forfeited his remedy against the sureties also, and in this case the Court followed the previous ruling of the Allahabad High Court: *Radha* v. *Kinlock* (9), the head note of which runs as follows:

"The omission of the creditor to sue his principal debtor within the period of limitation discharges the surety under S. 134, Contract Act, even though the nonsuing within such period arose from the creditor's forbearance."

And the same view has been taken by the Chief Court of the Punjab in *Harbans Lal* v. *Nathoo* (10) in which *Gopal Daji* v. *Gopal* (3) was disapproved and an English case, *Allison* v. *Frisby* (11), was followed. It seems to me that *Allison* v. *Frisby* (11) is a misleading case so far as the Indian law is concerned because it definitely turns upon the actual wording of the English statute, Real Property Limitation Act, 1874, S. 8, which lays down that certain suits are barred

"unless in the meantime some part of the principal money or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent ....."

and the point which was taken in the judgment that in this section nothing is said with regard to by whom the money must be paid. And it must be remembered that in the corresponding section of the Limitation Act, it is necessary that the payment which keeps the liability alive must be paid as such by the person liable to pay the debt, legacy, or by his agent duly authorized on this behalf. *Allison* v. *Frisby* (11) also is not a general statement of the English law which can be found in *Carter* v. *White* (12), where Lindley, L. J., states:

"Is it a law that the creditor who neglects to sue his debtor till the statute has run will thereby discharge his surety? There is no decision to that effect. On the contrary, the true principle is that mere omission to sue does not discharge the surety because the surety can himself set the law in operation against the debtor."

In my opinion, the Punjab case must be regarded as founded upon misapprehension. It overlooks the difference in the wordings of the statute with which *Allison* v. *Frisby* (11) was concerned, while it states that *Velayudham Pillay* v. *Vaithyalinga Pillay* (6) dissents from *Gopal Daji* v. *Gopal Sonu* (3), where, as it seems to me, that the ruling was on different facts. It was not a case in which the relative liabilities of the principal debtor and his surety were concerned. The Allahabad case is merely one of a series of Allahabad decisions in which this Court has held this view, and with respect I must dissent from it.

For these reasons I hold that the remedy of the plaintiff against Ba Pe is barred by limitation, whereas Oke Gyi is liable to pay the debt. I therefore vary the decree of the lower appellate Court and give the plaintiff-respondent a decree against Oke Gyi only. There will be no order for costs in this Court, but Oke Gyi must bear Ma Lay's costs in both the lower Courts.

P.N./R.K. *Order accordingly.*

(5) [1912] 33 Mad. 308=7 I. C. 898.
(6) [1913] 17 I. C. 619.
(7) [1878] 30 P. R. 1878.
(8) [1902] 24 All. 504=(1902) A. W. N. 166.
(9) [1889] 11 All. 310=(1889) A. W. N. 94.
(10) [1919] 105 P. R. 1919=53 I. C. 586.
(11) [1890] 43 Ch. D. 106=59 L. J. Ch. 94=61 L. T. 632=38 W. R. 65.
(12) [1877] 25 Ch. D. 666=54 L. J. Ch. 138=50 L. T. 670=32 W. R. 692.

** A. I. R. 1932 Rangoon 90

PAGE, C. J.

Vellu Thevar and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Misc. Appln. No. 47 of 1931, Decided on 19th January 1932, arising out of Criminal Regular Trial No. 141 of 1931 of Court of the Headquarters Magistrate, Pyapon.

** (a) **Criminal P. C. (1898), S. 526—Application containing specific allegations supported by affidavit—Court should regard allegations to be correct in absence of evidence in rebuttal or statement by judicial officer concerned duly tendered by Crown.**

If specific allegations are made in the application for transfer and the allegations are supported by affidavits, in the absence of evidence in rebuttal or a statement by the judicial officer concerned duly tendered by the Crown, the Court for the purpose of deciding the application for transfer ought to treat such allegations as being correct, unless the allegations appear to the Court to be inherently untrustworthy. In every case where allegations in a petition for transfer are made against a judicial officer it is fair and proper that the Crown should be represented. [P 91 C 1]

* (b) **Criminal P. C. (1898), S. 526—Attempt to influence decision of Magistrate in matter before him or to approach him except in manner permitted by law is to be condemned—Applicants reasonably fearing that they will not obtain impartial justice—Petition should be allowed.**

It is a fundamental of the due administration of justice that Judges and Magistrates should not only be fair and impartial, but also should appear to reasonable persons to be fair and impartial, and that neither accused persons nor litigants should have any reasonable ground for supposing that the Judge or Magistrate, who is trying a case in which they are concerned is biassed either in their favour or against them. Any direct or indirect attempt to influence the decision of a Judge or Magistrate in a matter of which it is his duty to take cognizance in a judicial capacity or to approach him in connexion with any proceeding within his jurisdiction except in the manner prescribed by law, invariably excites general and whole-hearted condemnation. The decision of a Judge or Magistrate may be right or wrong, but that directions should be issued, or suggestions made, to a Judge or a Magistrate as to what his decision should be in a matter or proceeding before him is utterly reprehensible, and will not be tolerated. *Serjeant* v. *Dale*, (1877) 2 *Q. B. D.* 558, *Rel. on.* [P 91 C 2]

Where the applicants reasonably fear that they might not obtain impartial justice if criminal proceedings are continued before a particular Magistrate, an order of transfer should be made. [P 92 C 2]

Rafi—for Applicants.

Gaunt—for the Crown.

Judgment.—This is an application for the transfer of certain criminal proceedings from the Court of the Headquarters Magistrate of Pyapon to a Court in some other district. If the allegations set out in the petition and in the affidavits in support of it are true I have no doubt that an order of transfer ought to be made.

Mr. Barretto is both the Deputy Commissioner and the District Magistrate of Pyapon, and I agree with the view of my learned brother Sen, J., to whom an application for the transfer of these proceedings has already been made, that the diary of the First Additional Magistrate of Bogale, who granted bail to the first petitioner, supports the allegation that he subsequently cancelled the bail bond by the sureties of the first petitioner "under orders of the District Magistrate, Pyapon": see diary order of 12th March 1931. That is one of the allegations upon which the present application for transfer also is based. If it is the fact that the District Magistrate of Pyapon gave directions to or otherwise attempted to influence a Magistrate, who for certain purposes was subordinate to him, in respect of any order that might be passed by the Magistrate in the exercise of the jurisdiction with which he had been entrusted, I do not hesitate to say that the District Magistrate acted not only indiscreetly, but most improperly.

It is further alleged that on another occasion the District Magistrate, acting either in that capacity or as Deputy Commissioner of Pyapon, wrote to the Additional Sessions Judge who had granted bail to the first petitioner requesting the Additional Sessions Judge to review the order that he had passed if he could see his way to do so. It is alleged that the Additional Sessions Judge replied: "I am afraid I have no power to review my own order." What the Additional Sessions Judge ought to have done was to have taken immediate steps to ensure that in the future he should not again be interfered with by the District Magistrate in the exercise of the criminal jurisdiction that had been committed to his trust. If this allegation also is true it would afford a further ground for concluding that the District Magistrate of Pyapon had acted in connexion with the present case in an unjustifiable and improper manner.

It is also alleged that when the second petitioner, who is an accused in the case, on 26th September 1931, complained to

the Headquarters Magistrate that he had been ill-treated by the police, the Headquarters Magistrate, who twice had refused to grant bail to the first petitioner but whose order on each occasion had been set aside, warned the second petitioner that if he failed to substantiate the complaint against the police he would be liable to be whipped.

The petition for transfer contained other allegations, but for the purpose in hand it is unnecessary to consider them. No affidavits in reply to the allegations set out in the application for transfer have been filed. What purported to be a report to the Court by the District Magistrate however has been received, but in the circumstances I do not think that the Court ought to act upon it. If specific allegations are made such as those set out in the application for transfer and the allegations are supported by affidavits, in my opinion, in the absence of evidence in rebuttal or a statement by the judicial officer concerned duly tendered by the Crown, the Court for the purpose of deciding the application for transfer ought to treat such allegations as being correct, unless the allegations appear to the Court to be inherently untrustworthy. In every case where allegations in a petition for transfer are made against a judicial officer it is fair and proper that the Crown should be represented.

A preliminary inquiry into the case against the petitioners is now being held by the same Headquarters Magistrate, and if a committal order is made the trial will probably be held before the Sessions or Additional Sessions Judge of Pyapon. The petitioners state, having regard to the action which they allege has been taken by the District Magistrate in interfering with the administration of justice by judicial officers in the district, they apprehend that they may not obtain impartial justice if the case is investigated or tried by a judicial officer in the district over which the District Magistrate of Pyapon has charge.

When an application for a transfer of these proceedings was before Sen, J., on a previous occasion the learned Judge stated that he was

"not satisfied that the Magistrates who have dealt with the case have shown any real bias against the petitioners ..... The most that can be said on behalf of the petitioners is that the police have displayed excessive zeal in this case, and that the District Magistrate has also taken an active interest in the case."

With all due deference if I had taken the same view of the matter as that which commended itself to the learned Judge, and I had thought that the Magistrates in the Pyapon District had shown any bias at all against the accused, I should have felt bound to transfer the proceedings from their jurisdiction. It is a fundamental of the due administration of justice that Judges and Magistrates should not only be fair and impartial, but also should appear to reasonable persons to be fair and impartial, and that neither accused persons nor litigants should have any reasonable ground for supposing that the Judge or Magistrate who is trying a case in which they are concerned is biassed either in their favour or against them. The law, as Lush, J., observed in *Serjeant* v. *Dale* (1) at p. 567 :

"has regard not so much perhaps to the motives which might be supposed to bias a Judge as to the susceptibilities of the litigant parties. The important object, at all events, is to clear away everything which might endanger suspicion and distrust of the tribunal, and so promote the feeling of confidence in the administration of justice which is so essential to social order and security."

The Courts of law, as well in Burma as in the other provinces of British India, have consistently administered justice with a fairness and impartiality that has excited admiration not only in India and Burma but throughout the civilized world. On the rare occasions on which a judicial officer has deviated from the strict standards to which he is bound to conform, with the approbation of all right-thinking persons, it has been made impossible for him further to pollute the source from which justice flows.

Now, one of the essential ingredients of the due administration of justice is that every order passed by a judicial officer should be the outcome of his own impartial and unprejudiced opinion. It is for this reason that any direct or indirect attempt to influence the decision of a Judge or Magistrate in a matter of which it is his duty to take cognizance in a judicial capacity, or to approach him in connection with any proceeding within his jurisdiction except in the manner prescribed by law, invariably excites general and whole-hearted condemnation. The decision of a Judge or Magistrate may be

(1) [1877] 2 Q. B. D. 558=46 L. J. Q. B. 781= 37 L. T. 153.

right or wrong—no one is infallible—but that directions should be issued, or suggestions made, I care not from whomsoever they come to a Judge or a Magistrate as to what his decision should be in a matter or proceeding before him is utterly reprehensible, and will not be tolerated.

In order that injustice should not be done to the District Magistrate and the Headquarters Magistrate against whom allegations are made in the application for a transfer of these proceedings I have perused the report of the District Magistrate of Pyapon which he has forwarded to the Court, and in considering whether a transfer should be ordered I shall not travel outside the three specific allegations which I have mentioned.

As regards the allegation in para. 4 of the petition,

"that the learned District Magistrate acted wrongly in influencing the learned First Additional Magistrate to cancel the bail bond resulting in the first petitioner being re-arrested by the police,"

the report does not appear to contain any denial or explanation. As regards the allegation in para. 10 of the petition that "the Deputy Commissioner wrote to the Additional Sessions Judge 'to request if you would see your way to review your order of bail, "

the allegation appears to be borne out by the diary of the Additional Sessions Judge, and the District Magistrate has reported that

"it appeared to me that there were sufficient grounds for the Additional Sessions Judge to review his order, and instead of returning the report to the District Superintendent of Police I submitted it to the Additional Sessions Judge requesting him if he could see his way to review his order of bail. The Additional Sessions Judge returned the report to me saying that he had no power to review his order, and I accordingly instructed my office to put up the ruling on the subject (vide p. 1064, para. 7, Sohoni's Criminal Procedure Code, Edn. 10) which possibly escaped the Additional Sessions Judge's attention. The Additional Sessions Judge, on receipt of the ruling quoted, reviewed his order and cancelled the bail."

I feel bound to say that in approaching the Additional Sessions Judge in this manner the District Magistrate acted most improperly. If it was considered expedient to obtain a reversal of the order granting bail to the first petitioner a formal application should have been presented to the Court in that behalf as provided by law, and for the action of the District Magistrate in communicating with the Additional Sessions Judge in the manner he did, in my opinion, there can be no justification or excuse. I regard it as a matter of the utmost importance that it should be made known and understood that any attempt to interfere with a judicial officer in the exercise of his judicial functions is not to be permitted and will not be countenanced under any circumstances, and that any person who seeks to approach a judicial officer in connexion with a proceeding that is sub judice before him otherwise than in the manner permitted and prescribed by law will incur the reprobation of all right-thinking people, and will be subjected to such pains and penalties as the Court has at its disposal. As regards the allegation in para. 14 of the petition that, when the second petitioner complained to the Headquarters Magistrate who is now investigating the case against the petitioners that he had been ill-treated by the police, the Magistrate

"warned him that if he failed to substantiate his allegations he was liable to whipping,"

the only explanation vouchsafed in the report of the District Magistrate is that:

"the learned Magistrate stated to me that he warned the accused Manickam that he would be liable to punishment if he failed to substantiate his allegation against the police. This he states is the practice he adopts in all such complaints."

If that is the practice of the Magistrate the sooner it comes to an end the better. It must not be taken that I desire or pretend to express any opinion as to the merits of the case against the petitioners. I know nothing, and I say nothing, about it. On the present application the sole question that falls for determination is whether it is expedient in the interest of justice that the proceedings should be transferred from the Pyapon District. I think it is.

In the circumstances to which I have referred it appears to me not unreasonable that the petitioners should fear that they might not obtain impartial justice if the criminal proceedings against them now under investigation are continued in the Pyapon District, and I have no doubt that an order of transfer should be made. These proceedings will be transferred from the Court of the Headquarters Magistrate of Pyapon, and will be forwarded to the District Magistrate of Rangoon to be disposed of by the District Magistrate or some other Magistrate in Rangoon as he may direct according to law.

P.N./R.K. *Petition granted.*

A. I. R. 1932 Rangoon 93

CARR, J.

Maung Kyi Pe—Applicant.

v.

Ma Htu In—Opposite Party.

Criminal Revn. No. 437-B of 1931, Decided on 15th December 1931, against order of Headquarters Magistrate, Mergui.

Criminal P. C. (1898), S. 488 (3)—Person who has already undergone imprisonment for default cannot be sentenced second time for same default.

Under S. 488 (3) a person making default in respect of payment of certain arrears of maintenance cannot be sentenced a second time to imprisonment for the same default for which he has already undergone a sentence of imprisonment : 3 *W. R.* 61 and 12 *P. R.* 1919 *Cr., Dist.* [P 94 C 1]

Judgment.— This proceeding arises out of two successive applications for the recovery of arrears of maintenance under S. 488 (3), Criminal P. C., made in the Court of the Headquarters Magistrate of Mergui.

Both cases were very carelessly dealt with by the Magistrate, and the District Magistrate in making his order of reference has been to some extent misled by the Headquarters Magistrate's orders, so that the facts stated in tha order of reference are not entirely correct.

On 9th May 1931, Ma Htu In applied for the recovery of Rs. 40, being arrears of maintenance at Rs. 5 a month from the respondent, Maung Kyi Pe. A distress warrant was issued and after considerable delay Rs. 5 was realized by the sale of the respondent's property. This distress warrant was actually issued for nine months' arrears, being the sum of Rs. 45. This was incorrect and the Magistrate displayed great carelessness in signing it. After the Rs. 5 had been realized, the Magistrate proceeded to sentence the respondent to one month's simple imprisonment. That order was passed on 24th August 1931.

On 19th September, Ma Htu In filed a further application in which she stated that there were Rs. 30, arrears of maintenance, and Rs. 29-8-0, as costs, still outstanding from the first application and furthar that since then there had accumulated further arrears of Rs. 20 for four months' allowance and she asked that a warrant might be issued under S. 488 (3), Criminal P. C. The Magistrate apparently did not read this petition. He examined Ma Htu In on oath, but her statement was solely confined to the arrears of Rs. 35, maintenance from the previous application and the question of costs and of the further arrears was not even touched upon. The Magistrate did not issue a fresh warrant but again passed an order sentencing the respondent to one month's rigorous imprisonment for the same arrears of Rs. 35 for which the previous sentence had been passed. Again, in his order he made no mention of the fact that further arrears had accumulated and was being claimed. He remarked in his order :

"The imprisonment, if served, does not absolve the person from liability for arrears of maintenance : *Queen* v. *Moodoosoodun De* (1) and *Emperor* v. *Budhu Ram* (2); (Sohoni's Criminal Procedure Code, latest edition, p. 1045)."

He seems to have considered that as justifiction for passing a second sentence for the same arrears for which the respondent had already been imprisoned.

The original decisions quoted in Sohoni's Criminal Procedure Code are not, I think available at Mergui, and therefore neither the Headquarters Magistrate nor the District Magistrate can be blamed for not referring to the original decisions. I have myself referred to them and I find that in fact neither of them touches on the question now in issue at all.

Queen v. *Moodoosoodun De* (1). This case deals simply with the question whether after imprisonment in default of payment of fine has been served the offender is still liable to have the amount levied by a sale of his moveable property. There is nothing whatever about maintenance in this case.

The other case *Empress* v. *Budhu Ram* (2), also does not touch this question. The petitioner had been sentenced to six months' simple imprisonment for default in paying maintenance for a period of over six months, and the High Court at Lahore held that this was a legal sentence.

These decisions are therefore of no use in the present proceeding and I am compelled to say also that even the misleading note in Sohoni'a Code of Criminal Procedure did not justify the Magistrate in passing a second sentence of imprisonment for the same default.

(1) 3 W. R. 61 Cr.

(2) [1919] 12 P. R. 1919 Cr.=20 Cr. L. J. 367 =50 I. C. 847.

There does not appear to be any positive decision on the question whether under S. 488 (3) of the Code a defaulter can be sentenced a second time to imprisonment for a default for which he has already undergone a sentence of imprisonment ; but I have not the slightest hesitation in saying that the passing of the second sentence in such circumstances is entirely at variance with the principle of criminal law and cannot be upheld.

I set aside the order of the Headquarters Magistrate sentencing Maung Kyi Pe in his Criminal Miscellaneous Case No. 58 of 1931 to one month's rigorous imprisonment and direct that Maung Kyi Pe be discharged in respect of the arrears of Rs. 35, and that the bail bond on which he has been released under the District Magistrate's orders be cancelled.

That however cannot be the end of the case. As I have already said, Ma Htu in her second application claimed to recover further arrears of Rs. 20 for four months' allowance and that claim the Magistrate has not yet dealt with. His Criminal Miscellaneous Case No. 58 of 1931 is therefore remanded to the Magistrate who will proceed to deal with it in accordance with law by issuing a warrant for the total amount claimed and if on that warrant the arrears are not realized, by considering the question whether Maung Kyi Pe should or should not be sentenced to imprisonment in respect of the arrears of Rs. 20, which was not dealt with in the earlier case and I express the hope that this time in dealing with the application the Magistrate will display more care than he has done in the previous proceedings.

The District Magistrate in his order of reference has raised the question whether under S. 488 (3) of the Code the total sentence which may be passed at any one time is restricted to one month or whether a defaulter may be sentenced to one month's imprisonment in respect of each month's arrears. Since in both proceedings the Headquarters Magistrate passed only a sentence of one month's imprisonment, this question does not seem to me to arise, and I, therefore express no opinion upon it except that the decision in *Zaw Ta* v. *Emperor* (3), appears to be the latest authoritative Burma ruling on the question and that therefore unless and until that decision is overruled, Magistrates in Burma should be guided by it.

P.N./R K. *Order set aside.*

(3) A. I. R. 1914 L. B. 163= 7 L. B. R. 351= 15 Cr. L. J. 434=24 I. C. 170.

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* A. I. R. 1932 Rangoon 94

HEALD AND BROWN, JJ.

U Ba Thaung—Applicant.

v.

Ma Aye—Opposite Party.

Criminal Revn. No. 521-B of 1931, Decided on 2nd February 1932, against order of Second Addl. Magistrate, Ingabu, in Criminal Misc. Trial No. 23 of 1931.

*** Criminal P. C. (1898 as amended by Act 18 of 1923), S. 488 (1) and (3) — "Sufficient cause"—Claim for arrears of maintenance in favour of child—Person against whom it is made can raise plea that child has become major and is able to maintain itself.**

The words "sufficient cause" are very wide to justify the raising of a plea that the order of maintenance passed under S. 488 in favour of a child has become spent owing to the child having attained majority and being able to maintain itself. Consequently if the Court finds on defence raised that the child has attained the age of majority and is able to maintain itself during the period for which arrears are claimed, it should refuse to grant those arrears : 19 *All.* 50 (*F.B.*), *Rel. on.*; 5 *All.* 226 and 25 *All.* 165, *Ref.* [P 95 C 2]

Venkatram—for Applicant.

Carlos—for Opposite Party.

Judgment.—On 26th June 1911, an order was passed by the First Additional Magistrate of Ingabu, directing the petitioner U Ba Thaung to pay to the respondent, his wife Ma Aye, a sum of Rs. 5 a month as maintenance for his daughter aged 2. In 1916 an application was made by Ma Aye for an increase of the amount of maintenance but that application was unsuccessful. On 4th June last Ma Aye applied to the Magistrate claiming arrears of maintenance for four months. Ba Thaung objected to the claim on the ground that his daughter is now of age. The Magistrate refused to consider this application but directed Ba Thaung to make a separate application under S. 489 to have the order for maintenance of his child set aside. Ba Thaung made an application in revision against this order to the Sessions Judge and the Sessions Judge has submitted the proceedings to this Court with a recommendation that the order of the Magistrate should be set aside.

We are given to understand that in the interval Ba Thaung has made an applica-

tion under S. 489 and that that application has been successful. The respondent Ma Aye however claims that in the interval until the setting aside of the orders she is entitled to claim maintenance. It is admitted that the daughter for whom maintenance is claimed is now 22 years old. Two matters have been argued before us in the hearing of this application : firstly as to the meaning of the word "child" in S. 488, Criminal P. C., and secondly as to the meaning of Cl. 3 of that section. S. 488, Cl. (1), lays down that

"if any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate . . . . . may order such person to make a monthly allowance for the maintenance of his wife or such child."

There is no definition in the Code of Criminal Procedure as to the meaning of the word "child." It is argued on behalf of the petitioner that the word "child" must mean a person, under the age of majority. The term "child" does ordinarily signify a young person but it is also sometimes used as synonymous with the term "son" or "daughter." There is authority for the view that the provisions of S. 488 as to children cannot apply after the child has attained the age of majority, but cases undoubtedly do arise where a son or daugther after attaining the age of majority, is unable to maintain itself and we should hesitate to lay down as a rigid rule that in no such case could an order of maintenance in favour of a child be enforced as regards a major. It is clear however that the section ordinarily contemplates a case of a child unable to maintain itself owing to its tender years, and in ordinary cases a strong presumption would arise that when a child reached the age of majority it was no longer unable to maintain itself under the provisions of the section. It is not necessary however for us to come to any definite finding on this point as that is not the question which directly arises in the application before us.

The question we have to decide is whether the person against whom an order for maintenance has been passed when ordered to pay up arrears of maintenance is entitled to resist that order on the ground that his child is now of age and able to maintain itself. A number of rulings on this point have been cited to us. It was held in *In re Din Muhammad* (1) that in a defence for an application for arrears of maintenance a husband could plead that he had been divorced from his wife. In the case of *Shah Abu Ilyas* v. *Ulfat Bibi* (2) a Full Bench by a majority took the same view of the law. In the case of *Prabhu Lal* v. *Rami* (3) it was held that an agreement come to between the parties subsequent to an order of maintenance could not be pleaded in answer to a claim for arrears. This view of the law was founded on the wording of S. 490 which lays down:

"A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any or to the person to whom the allowance is to be paid and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the nonpayment of the allowance due."

These cases were however all decided prior to 1923. Before that date Cl. (3) of S. 488 read :

"If any person so ordered wilfully neglects to comply with the order, any such Magistrate may . . . . issue a warrant."

In 1923 the section was amended and the clause now reads:

"if any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may. . . . . issue a warrant."

A warrant can therefore only issue when the person ordered to pay has failed to do so without sufficient cause. The words "without sufficient cause" are very wide and seem to us to justify the raising of a plea that the order has become "spent" owing to the child for whom the maintenance was ordered having attained the age of majority and being able to maintain itself. That is the view which was taken even under the old section by a majority of the Full Bench of the High Court of Allahabad in *Shah Abu Ilyas'* case (2) where the defence raised was the divorce of the wife in whose favour maintenance was ordered. We do not consider it can have been the intention of the legislature that an order which obviously is spent can still be enforced until the person affected thereby shall have made a formal application under the provisions of S. 489. The fact that an order is so spent seems to us to be sufficient cause within the meaning of Cl. (3), S. 488.

(1) [1882] 5 All. 226=(1882) A. W. N. 237.
(2) [1896] 19 All. 50=(1896) A. W. N. 173.
(3) [1903] 25 All. 165.

We therefore set aside the order passed by the Magistrate on 11th June refusing to entertain Ba Thaung's objection to the payment of maintenance on behalf of his daughter, and direct that the Magistrate shall consider that petition on its merits and that if the Magistrate is satisfied that Ba Thaung's daughter was of age and able to maintain herself during the period for which the arrears were claimed the application of Ma Aye, to have an order passed for payment of those arrears should be dismissod. The respondent Ma Aye will pay the applicant Ba Thaung his costs in this Court; advocate's fee two gold mohurs.

P.N./R.K. *Order set aside.*

A. I. R. 1932 Rangoon 96

PAGE, C. J. AND MYA BU, J.

L. Dawson and *others*—Creditors.

v.

J. Hormasji and *others*—Liquidators.

Civil Misc. Appeals Nos. 19 and 25 of 1932, Decided on 1st February 1932, against order of High Court on Original Side in Civil Misc. No. 180 of 1931.

(a) Companies Act (1913). S. 153—Order rejecting proxy forms used at meeting under S. 153 and requiring that another meeting should be held is "judgment" within Letters Patent Rangoon (1922), Cl. 13.

Under the provisions of S. 153, creditors casting their votes at a duly convened and conducted meeting of creditors for or against a scheme of arrangement are entitled to have the result of the poll recorded. Where the Court orders that proxy forms used at a meeting should be rejected and another meeting of the creditors should be held, such an order is a "judgment" within Cl. 13, Letters Patent, and is appealable since the effect of the order is to finally determine that the decision of the creditors who had duly voted for or against a scheme at the meeting should not be ascertained or recorded and to render inoperative the poll, that had been taken at the statutory meeting: *A. I. R.* 1927 *Cal.* 689, *Rel. on.* [P 96 C 2]

(b) Companies Act (1913), S. 153—Scrutineers appointed to help chairman whose decision under order of Court is to be final as to admissibility of any proxy, have no locus standi to file petition for directions as to validity of certain proxies used at statutory meeting.

Where certain scrutineers are appointed by the Court to assist the chairman of a statutory meeting of creditors held under S. 153, and under order of the Court the decision of the chairman as to the admissibility of any proxy is to be final subject to Court's order of revision, the scrutineers have no locus standi to file a petition for directions as to the validity of certain proxies used at the statutory meeting The Court ought not to exercise its powers of revision unless and until the chairman of the meeting has given his decision as to the admissibillty of the proxies. [P 97 C 2]

McDonnell, *Young* and *Leach* — for Creditors.

Lambert—for Liquidators.

Page, C. J.—On 15th December 1931, Messrs. Stuart, Smith and Allan, Chartered Accountants, who had been appointed scrutineers by the Court to assist the chairman of a statutory meeting of creditors held under S. 153, Companies Act (7 of 1913), filed a petition for directions as to the validity of certain proxies which had been used at the statutory meeting.

My learned brother Das, J., heard the petition and held that as

"the contravention of R. 145 is fatal to the proxy form all the proxy forms used in this matter must be rejected; so the result is that another meeting of the creditors must be held."

Appeals against the order of Das, J., have been preferred by the liquidators, by certain gentlemen who have been elected to form a committee of the creditors, and by certain other creditors.

A preliminary objection has been raised on behalf of certain of the creditors that no appeal lies from this order. In my opinion the preliminary objection fails. Under the provisions of S. 153 creditors casting their votes at a duly convened and conducted meeting of creditors for or against a scheme of arrangement are entitled to have the result of the poll recorded. The decision of the creditors at such a meeting has an important bearing upon the future of the company, and the interests of those connected with it; it may in effect determine whether the company is to continue as a business undertaking or not. If the votes duly cast in favour of the scheme are less than the statutory majority prescribed under S. 153 (2), the result will be that the scheme of arrangement cannot be presented to the Court for sanction. *E contra*, if as the result of the poll the statutory majority of creditors in favour of the scheme is obtained the creditors who voted in favour of the scheme of arrangement have a right to have the scheme presented to the Court for sanction. The effect of the order of the learned trial Judge that another statutory meeting for ascertaining the wishes of the creditors with respect to the proposed scheme is to be held was finally to determine that the decision of the creditors who had duly voted for and against the

scheme at the meeting of 11th December 1931, should not be ascertained or recorded; and to render inoperative the poll that had been taken at the statutory meeting held on that day. In my opinion the order of Das, J., as made was a "judgment" within Cl. 13, Letters Patent, and as such was appealable: see *Levy Brothers and Knowles Ltd.*, v. *Subodh Kumar Day* (1). It is necessary therefore to consider the case on the merits, and in my opinion the appeals should be allowed, and the order of Das, J., set aside. The petition appears to me to be wholly misconceived. The function of the applicants as scrutineers, pursuant to the order of Sen, J., was merely to assist the chairman. If, and in so far as, the chairman required them to assist him with their experience and advice in connexion with the poll; it was the duty of the scrutineers to comply with his request. It was not the duty of the scrutineers, and they had no right to decide whether any proxy was good or bad. The persona designata to determine that question was the chairman of the meeting. Upon that matter nothing could be clearer than the order of Sen, J., of 2nd December 1931:

"I also direct that the decision of the Chairman as to the admissibility of any proxy shall be final for the purpose of this meeting, subject to the Court's power of revision."

These words connote that, unless and until the chairman of the meeting has given his decision as to the admissibility of the proxies tendered at the meeting, and his decision has been impugned and duly brought before the Court by way of revision, the Court ought not to consider or determine whether any proxy was valid or not. In my opinion the Court was not justified in embarking upon a consideration of the matters raised in the petition for two reasons: (1) that the petitioners had no locus standi to present the petition; and (2) that, having regard to the order of Sen, J., the Court ought not to exercise its powers of revision unless and until the chairman of the meeting has given his decision as to the admissibility of the proxies that have been tendered. I do not propose, and for the purpose of deciding these appeals it is unnecessary, to consider whether any of the proxies tendered at the meeting were admissible or not. At this stage of the proceedings it is premature for the Court to consider or determine that question.

We have decided that the Court is entitled to entertain the appeal, and that being so all parties to the appeals consent to the appeals being allowed, and the order from which the appeals are brought set aside. The costs of the liquidators will be defrayed out of the funds of the bank, five gold mohurs.

Mya Bu, J.—I agree.

P.N./R.K. *Order set aside.*

(1) A. I. R. 1927 Cal. 689=103 I. C. 659.

* A. I. R. 1932 Rangoon 97

PAGE, C. J. AND MYA BU, J.

P. R. M. P. R. Perchiappa Chettyar—Appellant.

v.

Muniyandi Servai—Respondent.

First Appeal No. 134 of 1931, Decided on 9th March 1932, against decision of Dist. Judge, Myaungmya, in C. R. No. 14 of 1928.

*** Promissory Note—Person or firm charged should be clearly stated—Person signing pro-note as agent of firm not describing himself as agent of firm—It is not open to him to prove that he really signed as agent.**

The name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand. Where a person signs a pro-note as the agent of a firm, it is not sufficient that the principal's name should be in some way disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name liable upon the pro-note. Where the person signing the pro-note has not described himself as agent it is not open to him to prove that he signed as agent : *A. I. R.* 1918 *P. C.* 146 and *A. I. R.* 1927 *Cal.* 376, *Rel. on.* [P 98 C 1]

E. Hay—for Appellants.

Venkatram—for Respondent.

Page, C. J. — This appeal must be allowed. The suit is brought upon a promissory note against the P. R. M. P. R. Chettyar Firm, money lender, of Kyonmange Wakama, represented by its agent Veluswami Pillay. The sole question which it is necessary to consider for the purpose of determining the appeal is whether, having regard to the terms of the promissory note, the defendant firm was liable. This is not a case in which a claim is made in the alternative upon the original consideration in respect of which the promissory note was given as security. The suit purports to be, and in fact is based solely upon the promissory note.

Now the promissory note is in the following form:

"11th Thai of Ruthrothkari year
(24th January 1924).

"The promissory note written and given in favour of Muniyandi Servai, son of Jaganathan Servai Karar of Tiruppattur, Ramnad District, by Ramanathan Chettyar, son of P. R. M. P. R. Perchiappa Chettyar, of O. Siruvayal in the aforesaid District, is as follows: Having gone into the account up to the 11th of Chithirai—current, in respect of the moneys given and kept with the firm and of the money given (to us) as hand loan while you were in Kyonmange, a receipt was written and given in your favour on the 15th of the said month at Rangoon for Rs. 12,000. On taking it back and deducting the payment of Rs. 1,798 made on this date and of Rs. 12,798, being the amount arrived at together with interest up to the 10th instant on the receipt, the balance is Rs. 11,000. This sum of Rs. 11,000 (eleven thousand) I promise to pay on demand, either to you or your order, with interest at the rate of "three quarters" (of a rupee, Re. 0-12-0) per cent per mensem, that is, principal together with the interest accrued, and take back the promissory note with the payment noted thereon.

(Sd.) P. R. M. P. R. Ramanathan Chetty."

The case, in my opinion, is concluded against the respondent by well settled authority, *Sadasuk Janki Das* v. *Kishan Pershad* (1) and *Ramgopal Ghose* v. *Dhirendra Nath* (2). It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand. . . . . It is not sufficient that the principal's name should be:

"in some way disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bill: *Sadasuk Janki Das* v. *Kishan Pershad* (1)."

In this case it is contended on behalf of the respondent that the promissory note was signed by the firm. It does not so appear on the face of the document and if it was signed by the firm, inasmuch as it is conceded that the firm consisted of a number of persons who were the members of a joint Hindu family, the signature on the promissory note is inconsistent with the body of the document in which it is stated that

"the promissory note was written and given . . . by Ramanathan Chettyar, son of P. R. M. P. R. Perchiappa Chettyar and, I promise to pay on demand. . . ."

The learned District Judge stated in the course of his judgment:

"It is further argued that Ramanathan Chettyar has not signed on Ex. C as agent of the defendant. Such a description would have made matters absolutely clear, but it is open to the plaintiff to prove that he did sign as agent, although he did not describe himself as such."

That is not a correct statement of the law as laid down in the cases to which I have referred. It is quite clear upon the face of this document that there is no liability imposed thereunder upon the defendant firm. For these reasons, in my opinion, the appeal must be allowed, the decree from which the appeal is brought set aside, and the suit dismissed with costs.

Mya Bu, J.—I concur.

S.N./R.K. *Appeal allowed.*

(1) A. I. R. 1918 P. C. 146=50 I. C. 216=46 I. A. 33=46 Cal. 663 (P.C.).

(2) A. I. R. 1927 Cal. 376=101 I. C. 573=54 Cal. 380.

A. I. R. 1932 Rangoon 98

PAGE, C. J. AND CUNLIFFE, J.

Maung Ohn Khin and *others*—Appellants.

v.

U Nyo—Respondent.

First Appeal No. 187 of 1930, Decided on 3rd December 1931, against decision of High Court on Original Side, in Civil Regular No. 246 of 1925.

Buddhist Law (Burmese) — Succession — Mother in possession of property belonging to father — Son living with mother till his death—Mother and not childless widow of son is his heir.

Where certain property belonging to the deceased father is in possession and keeping of the mother and a son has been living with his mother till the time of his death, the mother and not the childless widow of the son is his heir in respect of such property. The fact that the son by a certain deed possessed a vested interest in the property is immaterial. [P 100 C 2]

M. N. Burjorjee—for Appellants.

Thein Maung—for Respondent.

Page, C. J. — This appeal must be dismissed. One U Toke Pyo was a Burman Buddhist possessing considerable property. He married as his first wife Daw Kho, who died in 1870. At the time of U Toke Pyo's death in 1890, there were surviving him three children of his first marriage with Daw Kho, his second wife Daw Sone, and five children by Daw Sone—Ma Si, Maung Nyun, Po Aung, Ma Kyin and U Nyo, the respondent. After the death of U Toke Pyo, disputes arose between the children of Daw Kho and Daw Sone and her children, with respect to the right to partici-

pate in the property of which he was possessed at his death.

In 1892 an award was made in an arbitration, by which one-quarter of the estate left by U Toke Pyo was awarded to the children of the first marriage, one-half of the estate to Daw Sone, and one-quarter to the children of U Toke Pyo and Daw Sone. At the time when the award was made Ma Si had attained her majority, but the other children of Daw Sone were all minors. At all material times till their death the children of Daw Sone—other than Maung Nyun—lived with, and were supported by their mother.

Now, under the Burmese Buddist law, on the death of U Toke Pyo, subject to any rights that the children of the first marriage might possess to inherit the estate of their father, Daw Sone, as his widow, would be his sole heir, and entitled to the residue of the estate.

On 21st October 1905 a deed of assignment and release was entered into between Daw Sone, Maung Nyun, and the other children of Daw Sone. All the parties to this agreement had then attained their majority. In the deed of 21st October 1905 it is recited, inter alia:

"Whereas after the death of the said U Toke Pyo his property was divided in the manner following:

(a) It was divided into four equal parts;

(b) one of the said parts was given to the children of U Toke Pyo by his first wife;

(c) two of the said parts to the said Daw Sone;

(d) and the remaining one part was given to and was set aside for the children by the said Daw Sone:

and whereas by arrangement the share of the children by Daw Sone was made over to her in trust for the said children and she is in possession thereof on their account and whereas the said Maung Nyun is desirous of having his share apportioned and paid to him and whereas the said Maung Nyun has agreed to accept a sum of Rs. 40,000 (forty thousand only) in full satisfaction of his share of the said one-fourth share and whereas the said Mah Tsee, Maung Nyo, Maung Po Aung and Ma Kyin have agreed that a sum of Rs. 40,000 (forty thousand only) be paid by the said Daw Sone to the said Maung Nyun out of the one-fourth share to which they are jointly entitled with the said Maung Nyun. Now this Indenture witnesseth that in consideration of the payment to the said Maung Nyun by the said Daw Son of Rs. 40,000 (forty thousand only) (the receipt of which is hereby acknowledged by the said Maung Nyun). He the said Maung Nyun his heirs representatives and assigns hereby releases and relinquishes all his right interest claim and demand in the said one-fourth share of the estate of the said U Toke Pyo and the said Maung Nyun on behalf of himself his heirs representatives and assigns covenants with the said Mah Tsee, Maung Nyo, Maung Po Aung and Mah Kyin and the heirs representatives and assigns of each of them that he the said Maung Nyun will not make any claim or demand from the said Mah Tsee, Maung Nyo, Maung Po Aung and Mah Kyin or the heirs representatives and assigns of each of them in respect of the said one-fourth share of the said U Toke Pyo's estate and that the said one-fourth share shall be held by the said Daw Sone entirely in trust for and on behalf of the said Mah Tsee, Maung Nyo, Maung Po Aung and Mah Kyin their heirs representatives and assigns without any interruption claim or demand by him the said Maung Nyun his heirs representatives and assigns."

Ko Po Aung died on 10th June 1915, and Daw Sone on 30th December 1924. Ma Kyin died on 5th August 1926. Po Aung left surviving him Ma Tha, whom he had married in 1904, and who died on 7th March 1916. The contesting parties in this suit are the brothers of Ma Tha and U Nyo, the surviving son of U Toke Pyo and Daw Sone. The plaintiffs claim, as the heirs and legal representatives of Ma Tha, the interest in the one-fourth share of U Toke Pyo's estate to which they allege that Po Aung was entitled at his death.

A number of defences were raised by the defendant. He contended inter alia that the submission and the award were invalid in law as well because, with the exception of Ma Si, the children of Daw Sone, who were parties to the submission and the award, were all minors, as because the submission was to five arbitrators and the award was made only by four of them. It was further contended that Daw Sone at all material times was solely entitled to the estate left by U Toke Pyo, and that neither under the award nor under the deed of 1905 nor in any other way did she ever relinquish, release, or lose her right as the sole heir of U Toke Pyo to obtain and remain in possession of his estate subject to the rights of the children of the first marriage.

The defence set up by the respondent was accepted by the learned trial Judge but it is unnecessary for the purpose of this appeal to determine all the questions which were raised and elaborately argued at the trial because, in my opinion, this appeal may be disposed of on one short but conclusive ground.

The plaintiffs must succeed upon the strength of their own title, and unless

Ma Tha was the heir of Po Aung it is conceded that they are out of Court.

Now, normally Ma Tha as the widow of Po Aung, would have been entitled to obtain possession of any property that he possessed at his death as his sole heir. It has been contended however by the respondent both at the trial and in the appeal that Ma Tha was not the heir of Po Aung, but that his sole heir was Daw Sone. If that be the correct legal position ex concessis the suit must fail.

This defence that has been raised on behalf of the respondent is based upon S. 28, Vol. 10 of the Manukye which runs as follows:

"28th. The parents, sons, daughters, sons and daughters-in-law, living together if a husband or wife dies, the law for the partition between the son or daughter, son or daughter-in-law, and the father and mother, or father and mother-in-law, what shall and what shall not be divided.

In cases the parents and their children, sons and daughters-in-law are living together, if a son or daughter dies, the two laws by which their property is shared by the son or daughter-in-law (relict of deceased) and the father and mother-in-law are these. If the daughter dies before she has any family, let the son-in-law have all the property, animate and inanimate, which was given to him at the time of marriage; let him also have all her personal chattels, and all property actually in possession; the parents of the deceased shall have no share in these nor shall the son-in-law, though he demands the wife's inheritance of her parents, have any right to obtain it. Besides this, he shall not recover any of his wife's property actually in the possession or keeping of her parents, they shall retain it. But if it has been placed in their charge after the marriage, the parents and son-in-law shall share it equally between them; this is said when the (young couple) have no family. If there be any children they shall inherit the property left by their grandparents. Thus the lord recluse said.

In another case if the woman shall live with her husband in his parents' house, and the husband shall die, let the law be the same as above, that is to say, if there be no children born to them. If there be any children, let them inherit the grandparent's property."

It was incumbent upon the defendant to satisfy the learned trial Judge that at the time of his death Po Aung and Daw Sone were living together. The learned Judge has found that Po Aung had not separated from Daw Sone, and usually lived with Daw Sone at whose house he died, though sometimes he lived in his wife's parents' house, and that he always managed Daw Sone's property as her agent, and not being entitled thereto as an heir of U Tok Pyo.

Now it is not uninteresting to observe that in para 12 of the first plaint that was filed it is alleged that after the award of 1892 and the deed of 1905:

"the said Ko Po Aung, Ma Si, Ko Nyo and Ma Kyin continued to live and work together with their mother."

No doubt, the plaint was subsequently amended for the purpose of pleading that after Po Aung's marriage he and his wife lived separately from Daw Sone; but, in my opinion, there is force in the view taken by the learned Judge:

"that the plaintiff should not be allowed to resile from the original statements in the plaint four years after it was filed."

It is true that the defendant originally pleaded that Po Aung, after his marriage lived separately from Daw Sone, and that subsequently he obtained leave to amend his defence, and by his amended written statement pleaded that they did not live separately. In para 12 he denied, inter alia:

"(a) that Ko Po Aung lived separately from Daw Sone, except for a month or two after his marriage which took place about 28 years ago, and (b) that Ko Po Aung had any establishment separate from Daw Sone's."

I think it is clear from the evidence that for two or three months after his marriage Po Aung and Ma Tha lived at the house of Daw Me, the bride's mother and that for the purpose of some of her confinements she went to her mother's house; but there is evidence that according to Burmese custom it is not unusual that directly after the marriage, for a short period, the bride and bridegroom should reside in the house of the bride's parents, and that a wife, when she is to be confined not infrequently goes home to her own father and mother before the child is born.

There is ample evidence upon the record, in my opinion, to justify the finding of the learned Judge that Ko Po Aung, and after his death Ma Tha, at all material times, were not separated from Daw Sone, but were living with her, or in one of her houses, and were being maintained by her, and that Ko Po Aung at any rate until a year or two before his death, when he lost his reason, was looking after Daw Sone's property as well as the property in suit as the paid agent of his mother.

In these circumstances I see no ground for differing from the finding of the learned Judge that Ko Po Aung and his mother were living together at the time

of his death within the meaning of those words in S. 28, Vol. 10 of Manukye. In my opinion, therefore Daw Sone and not Ma Tha. his childless widow, was the heir of Ko Po Aung.

Now what was the nature of the property in suit? It was property which belonged to U Toke Pyu, and formed part of his estate on his death. More than that, it was property which from the death of U Toke Pyu until the death of Daw Sone in 1924, remained in the possession and keeping of Daw Sone. For the purpose of S. 28 it matters not whether the plaintiffs are able to prove that Po Aung possessed a vested interest in that property under the award or the deed of 1905 or not; for, it was property which had formed part of the estate of U Toke Pyu, and was "actually in the possession or keeping" of Daw Sone at the time of Ko Po Aung's death. It would be ille to urge the contrary in the face of the terms of the deed of 21st October 1905, which was signed by all the parties concerned, including Po Aung. It would be sufficient to dispose of any such contention that in the deed of 21st October 1905 it is recited that

"by arrangement the share of the children by Daw Sone was made over to her in trust for the said children and she is in possession thereof on their account."

That possession she retained until long after the death of Po Aung.

For these reasons, in my opinion, the plaintiffs have failed to establish that they possess any title to the property in suit as the heirs of Ma Tha or otherwise, and the appeal must be dismissed.

It is unnecessary in these circumstances to consider the other issues which were raised at the trial, and which were decided adversely to the appellants.

The appeal is dismissed with costs. The appellants will pay the usual court-fees.

Cunliffe, J.—I am of the same opinion both on the facts and on the law, although I am bound to confess that at first I was somewhat doubtful about the whole aspect of the case. As my Lord has pointed out, the legal position depends upon S. 28, Vol. 10 of the Manukye Dhammathat. That section is, in my opinion, quite unequivocal, but curiously enough it has not been interpreted by any direct judicial authority.

An attempt was made to distinguish the fact that the section would have bound a vested interest as property to inheritance. That argument was based upon a passage, I think, contained in p. 224 of the late Mr. Justice May Oung's book which deals with this subject; but it is to be noted here that even if that arrangement was sound it is doubtful whether a vested interest does in fact exist on the facts before us.

The arbitration which has been mentioned in this case has, as the defence pointed out, a good deal of tainted authority owing to various points. It was apparently not properly signed, and it dealt with the rights of persons, or some of them at any rate, who were minors at the time. No doubt it attempted to embody a family arrangement, but even if it did, the ruling which we are directed by the Privy Council to regard as the leading authority on Burmese Buddhist law—which is that of the Manukye Dhammathat—clearly, in my view of the peculiar facts of the case, will prevail.

For these reasons I agree with my Lord that the appeal must be dismissed.

P.N./R.K. *Appeal dismissed.*

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PAGE, C. J. AND MYA BU, J.

Abdul Sattar Abdul Aziz—Appellant.

v.

V. E. A. R. M. Chettyar Firm and *another*—Respondents.

Civil Misc. Appeal No. 213 of 1931, Decided on 1st March 1932, against order of High Court in its Insolvency Jurisdiction, D/- 1st December 1931.

Presidency Towns Insolvency Act (3 of 1909), S. 9—Whether act of insolvency of agent is act of principal depends on circumstances of each case.

Whether the act of an agent is to be treated as an act of his principal depends upon the circumstances of each case. It is a fundamental principle of insolvency law that a person is not to be adjudicated insolvent except for an act of insolvency which he has personally committed, or which has been committed by his agent under such circumstances that it must be taken that the act of insolvency by the agent has been expressly or impliedly authorized by the principal against whom an order of adjudication is sought: 23 *Cal.* 26 (*P. C.*), *Foll.*; 14 *I. C.* 576; *A. I. R.* 1923 *Bom.* 107 and *A. I. R.* 1926 *Mad.* 206, *Ref.* [P 102 C 1, 2]

Hormasji—for Appellant.

Talukdar—for Respondent 1.

Page, C. J.—This appeal must be allowed.

The question that arises for determination is whether there was an available act of insolvency set out in the petition

upon which the firm could be adjudicated.

On 25th August 1931 a creditors' petition was presented for the adjudication of the firm of Yusoof Abdul Aziz and Company,

"a firm which carried on business at No. 84, Tseekai Maung Tulay Street, Rangoon through its partners Yusoof Abdul Aziz of No. 74, Tseekai Maung Tulay Street, Rangoon and Abdul Sattar Abdul Aziz of No. 62, Edward Street, Rangoon."

The act of insolvency upon which the petition was based was an alleged notice that the firm had suspended payment of its debts, contained in the following letter written on 19th August 1931 to the advocate of the petitioning creditors by an advocate on behalf of Yusoof Abdul Aziz:

"To

Messrs. Bose, Venkatram, De and Basu,
Advocates, Rangoon.

Dear Sirs,

Your notice dated 18th August 1931 has been placed in my hands by Yusoof Abdul Aziz to reply thereto as follows :

My client Yusoof Abdul Aziz has been adjudged insolvent in Insolvency Case No. 304 of 1930 of the High Court of Judicature at Rangoon. The firm of Yusoof Abdul Aziz and Company has suspended payment of its debts and the said firm cannot satisfy your claim."

Now the question is whether in the circumstances obtaining in the present case this letter was an available act of insolvency upon which the petition to adjudicate the firm could be supported. In India, for the purpose of committing an act of insolvency under S. 9, Presidency Towns Insolvency Act (Act 3 of 1909) :

"The act of an agent may be the act of the principal even though the agent has no specific authority to commit the act."

Whether the act of an agent is to be treated as an act of his principal depends upon the circumstances of each case : see *Kastur Chand* v. *Dhanpat Singh* (1) : *Harish Chandra* v. *East India Coal Co., Ltd.* (2), *In re Mohamed Hasham and Company* (3) and *Gopal Naidu* v. *Mohanlal Kanyalal* (4).

It is a fundamental principle of insolvency law that a person is not to be adjudicated insolvent except for an act of insolvency which he has personally committed or which has been committed by his agent, under such circumstances that it must be taken that the act of insolvency by the agent has been expressly or impliedly authorized by the principal against whom an order of adjudication is sought. That principle was illustrated and emphasized by the Judicial Committee in *Kastur Chand* v. *Dhanpat Singh* (1).

Now, the material facts are few and simple. Yusoof Abdul Aziz was adjudicated insolvent on 16th December 1930, and after that date the firm of Yusoof Abdul Aziz and Company ceased to carry on business. The petitioning creditors alleged that the business carried on in the name and style of Yusoof Abdul Aziz and Company did not belong to Yusoof Abdul Aziz but to a firm consisting of Yusoof Abdul Aziz and Abdul Sattar Abdul Aziz. The petitioning creditors, having failed to obtain payment of a debt which they alleged to be due to them from this firm, filed the present petition for the adjudication of the firm. They founded the petition upon the letter from the advocate of Yusoof Abdul Aziz of 19th August 1931. No business had been carried on under the style of Yusoof Abdul Aziz and Company by anyone since 16th December 1930, but it was common ground that a business in that name had been carried on in partnership by Yusoof Abdul Aziz and Abdul Sattar Abdul Aziz, that the firm had not been dissolved by the adjudication of Yusoof Abdul Aziz, and that it was still in existence when the letter of 19th August 1931 was written. Now on 19th August 1931 Yusoof Abdul Aziz was an insolvent whose estate had vested in the Official Assignee and the appellant, who has consistently denied that he was a partner in the firm, alleged that the letter of 19th August 1931 was written in collusion between the petitioning creditors and Yusoof Abdul Aziz for the purpose of obtaining an adjudication order against him. Be that as it may, there was no evidence that the appellant Abdul Sattar Abdul Aziz either expressly or impliedly authorized Yusoof Abdul Aziz to cause this letter to be written or sent to the petitioning creditors and in the circumstances obtaining in the present case I am of opinion that the letter cannot be treated as a notice, that the firm had suspended payment of its debts, or as an available act of insolvency upon which a petition to adjudicate the firm could be based.

(1) [1896] 23 Cal. 26=22 I. A. 162 =6 Sar. 617 (P. C.).
(2) [1912] 14 I. C. 576.
(3) A. I. R. 1923 Bom. 107=75 I. C. 203.
(4) A. I. R. 1926 Mad. 206=91 I. C. 874 = 49 Mad. 189.

For these reasons, in my opinion the appeal must be allowed, and the petition dismissed with costs five gold mohurs in each Court.

Mya Bu, J.—I agree.

K.N./R.K. *Appeal allowed.*

A. I. R. 1932 Rangoon 103

PAGE, C. J. AND CUNLIFFE, J.

S. P. L. K. S. M. Chettyar Firm—Appellants.

v.

U Sient—Respondent.

Civil Misc. Appeal No. 126 of 1931, Decided on 13th January 1932, against order of Dist. Court, Tharawaddy, in Civil Misc. Case No. 138 of 1929.

Civil P. C. (1908), S. 64—Mortgage of property attached—All money due under execution in which property is attached paid—Mortgage transaction is re-habilitated in law.

It is true that if the amount under the execution in respect of which the property has been attached is not paid a mortgage of the property is void as against all claims enforceable under the attachment. But when the amount due under the writ of execution is paid and the attachment comes to an end there are no further claims enforceable under the attachment in respect of which the mortgage can be said to be void and ex post facto the mortgage transaction is re-habilitated in law: 35 *Bom.* 516; 41 *Mad.* 265 (*F.B.*) and 14 *M. I. A.* 543 (*P.C.*), *Rel. on.* [P 104 C 1]

Tun Tin—for Appellants.

Aiyangar—for Respondent.

Page, C. J.—This is an application by a petitioning creditor in the insolvency of Ma Thein Mya for an order setting aside a certain mortgage transaction to the extent of a third interest therein, which it is alleged contravened the provisions of S. 64, Civil P. C. At the hearing of the application it was also contended on behalf of the applicant who is the respondent in this appeal, that the mortgage transaction contravened the provisions of S. 53, Provincial Insolvency Act. The learned District Judge, upon a consideration of the evidence, held that the case did not fall within S. 53 or S. 54, Provincial Insolvency Act; that the mortgage transaction was a bona fide one and that there was fair and reasonable consideration passing from the mortgagor in respect of the property which was mortgaged to him.

This finding by the learned District Judge is not challenged on appeal, for the learned advocate who appeared for the respondent properly stated that upon this issue of fact he could not hope to succeed in persuading this Court on appeal to interfere with the conclusion at which the learned District Judge arrived.

The sole question that falls for determination in the appeal is whether the mortgage transaction falls within the ambit of S. 64 of the Code.

Section 64 runs as follows:

"Where an attachment has been made any private transfer or delivery of the property attached or any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment shall be void as against all claims enforceable under the attachment."

Now the material facts are simple. The petitioning creditor in insolvency obtained a money decree against the insolvent in 1927 and in execution of the decree attached the property in dispute on 28th April 1927.

An application was made by the insolvent's mother Daw Sein in those execution proceedings for removal of the attachment upon the ground that the property was not liable to be attached in execution of a decree against the insolvent, and on 13th September 1927 as appears from the diary order of that date the execution case was closed and the attachment withdrawn, on the petitioning creditor informing the Court that he was filing a declaratory suit to establish his title in the property. The petitioning creditor thereupon filed Civil Regular Suit No. 4 of 1928 and on 25th April 1929 the High Court held that Daw Sein's allegations were without substance and passed a decree in favour of the petitioning creditor. On 10th May 1929, the insolvent and two others mortgaged the property which had been attached to the appellant Chetty and as I have stated it is common ground that a fair and reasonable consideration passed to the mortgagors in respect of the mortgage of this property. On 25th July 1929 the insolvent applied to the Subdivisional Court, Tharawaddy, to be allowed to deposit the decretal amount with costs in Court.

Now the petition for execution by way of attachment dated 7th April 1927 stated that the sum due with interest and costs amounted to Rs. 3,150-1-0 and the form of the writ of attachment was that set out in Appendix "E" of the Civil Procedure Code No. 24. The learned Judge held that the decretal amount with costs was Rs. 3,172-1-0 and not

Rs. 3,150-1-0 as stated in the application, and an order was passed permitting the applicant to deposit in Court Rupees 3,172-1-0 on 29th July 1929. On 29th July 1929, as appears from the diary order of that date, the applicant Ma Thin Mya deposited in Court a sum of Rs. 3,172-1-0 and received the bailiff's receipt for same, and an order was passed that full satisfaction of the amount due under the writ of execution in respect of which the properties had been attached had been paid by the judgment-debtor to the judgment-creditor and on the following day, 30th July 1929, a voucher for Rs. 3,172-1-0 was delivered to the decree-holder who is the petitioning creditor in the present proceedings. On 6th August 1929 the decree-holder filed an application for leave to execute the decree for further interest due from the date of the decree to the date of realization and on 29th August 1929, the Court issued a warrant of attachment in respect of the insolvent's interest in the property in respect of the additional interest which was found due under the decree. On 30th August 1929 the property was attached. Meanwhile on 5th August the petitioning creditor had filed a petition for the adjudication of Ma Thein Mya as insolvent, and on 4th October 1929 an order of adjudication was passed against her. The question to be determined is whether in these circumstances the mortgage transaction of 10th May 1929 was void under S. 64 of the Code.

Now we are satisfied having regard to the form of the writ of attachment, that upon the payment of the sum therein stated and satisfaction of the amount due thereunder being registered the execution came to an end and the attachment ceased with it. On 10th May 1929 however when the mortgage was executed the amount due under the execution in respect of which the property had been attached had not been paid and therefore the mortgage was void "as against all claims enforceable under the attachment." In my opinion when the amount due under the writ of execution was paid and the attachment came to an end, there were no further claims enforceable under the attachment in respect of which the mortgage could be said to be void and ex post facto, in my opinion the mortgage transaction was re-habilitated in law.

As stated by Chandravarkar, J., in *Khushalchand Pemraj* v. *Nandram Sahibram* (1):

"All obstruction to the legal validity of the private alienation made during the continuance of the attachment having been removed, the alienation revived and became legal because the question then became to be one entirely between the alienor and the alienee: see also *Annamalai Chettyar* v. *Palamalai Pillay* (2) and *Anund Loll Das* v. *Jullodhur Shaw* (3)."

For these reasons in my opinion the appeal must be allowed, the order from which the appeal is brought set aside, and the application dismissed with costs, advocate's fee three gold mohurs in the lower Court and five gold mohurs in this Court.

Cunliffe, J.—I agree.

P.N./K.K. *Appeal allowed.*

(1) [1911] 35 Bom. 510=12 I. C. 572.
(2) [1918] 41 Mad. 265=43 I. C. 539 (F.B.).
(3) [1871] 14 M. I. A. 543 (P.C.).

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* A. I. R. 1932 Rangoon 104

PAGE, C. J. AND MYA BU, J.

U. Tezawunta—Appellant.

v.

Maung Saw Pe and *another*— Respondents.

First Appeal No. 76 of 1931, Decided on 14th March 1932, against decision of Dist. Court, Tharawaddy, in C. R. No. 31 of 1930.

*** Buddhist Law (Burmese)—Gift—Death-bed gift is gift made while donor is in fact on his death-bed or when his death is imminent—Mere fact that donor has been ill for few months and is weak and infirm contemplating early death at the time of making gift is insufficient to bring them within purview of death-bed gifts—Such gifts intended to take effect after donor's death are in substance dispositions of property by will and as such are invalid.**

It is contrary to the principles of Burmese Buddhist Law, that a Burman Buddhist by means of what is, or is in effect, a testamentary disposition, should attempt to evade the rules of succession and inheritance prescribed under the personal law to which he is subject. If a Burman Buddhist by a voluntary transfer inter vivos assigns property to a person who is, or is deemed to be, a stranger, with the intention that such transfer should become operative after his death, the transfer is null and void. Whether, having regard to this rule of law, a transfer is void or not depends upon the facts of the particular case. When such a transfer is made by a Burman Buddhist whose death is imminent, and who is under an apprehension that his dissolution is at hand, *presumptio juris et de jure* arises that the transferor intended the transfer to become operative after his death. A transfer of this nature is invalid as being a device by which a Burman Buddhist has attempted "to defeat his own personal law and practically to dispose of his pro-

perty by a method which would be in all essentials equivalent to a will." [P 107 C 2]

"Death-bed gift" is a gift made while the donor is in fact on his death-bed and about to die, or in other words when his death is imminent. The gift must also be made by the donor in the hopeless expectation of death, or under pressure of the sense of the imminence of death. The mere fact that the donor has been ill for a few months and is weak and infirm, contemplating an early death at the time of the making of the gifts is insufficient to bring them within the purview of death-bed gifts. But if such gifts are intended to take effect after the donor's death, the gifts are in effect and substance dispositions of property by will and as such are invalid: *A. I. R.* 1924 *Rang.* 13; 35 *Cal.* 1 (*P.C.*); (1902-1903) 2 *U. B. R. Buddhist Law Gift*, 1 ; (1907-1909) 2 *U. B. R. Buddhist Law, Gift* 1 ; 50 *I. C.* 522 and *A. I. R.* 1927 *Rang.* 271, *Rel. on.* [P 106 C 2; P 107 C 1]

Sein Tun Aung—for Appellant.

Thein Maung—for Respondents.

Mya Bu, J.—The main question for determination in this appeal is whether certain gifts made by a Burmese Buddhist lady, since deceased, were death-bed gifts, or were tantamount to dispositions of property by will and were therefore null and void.

The donor was Daw Saw, the minor plaintiffs' maternal grandmother, who died on 15th September 1930 at the age of 69. The defendant-appellant, a Burmese Buddhist monk, was Daw Saw's son and the plaintiffs-respondents are the children of Ma Chit, Daw Saw's daughter. It is said that in or about 1925 Daw Saw had made a gift of certain landed property in favour of the defendant-appellant, which led to a dispute between Daw Saw and Ma Chit as to its validity. The result of the dispute was that Daw Saw executed a registered deed in October 1926 under which Ma Chit was constituted a joint owner with Daw Saw in respect of all the paddy lands which then belonged to Daw Saw. After that Ma Chit died, and subsequently a partition of the lands mentioned in the deed of October 1926 was effected by means of a registered instrument in January 1928 among Daw Saw, Mg. Si (Ma Chit's widower) and the plaintiffs, Daw Saw being described in the instrument as the plaintiff's guardian. On 1st August 1930, Daw Saw executed two registered deeds of gift conveying to the defendant-appellant certain lands which had been allotted to her share in the instrument of January 1928. According to the finding of the learned trial Judge, which has not been seriously disputed, Daw Saw had been ill for a few months and was weak and infirm, contemplating an early death. Daw Saw resided at Mataungda village, Minhla township, where she died on 15th September 1930, or about one and a half months after she had executed the deeds of gift at the office of the Sub-Registrar at Minhla. The learned District Judge held that the gifts were death-bed gifts according to the Burmese Buddhist law and were void as such, but was of the opinion that the contention on behalf of the plaintiffs that the gifts amounted to a will was untenable.

It is not disputed that the question as to the validity of a death-bed gift arising between Burman Buddhists must be decided according to the Burmese Buddhist law, nor is it disputed that a death-bed gift is invalid under the Burmese Buddhist law. It has been urged on behalf of the defendant-appellant that the gifts in question are not death-bed gifts under the Burmese Buddhist law, while the learned advocate for the respondents supports the decree of the trial Court, not on the ground that the gifts are death-bed gifts, but on the ground that though in form the transactions are gifts inter vivos in reality they are dispositions of property by will inasmuch as the transfers were meant to take effect after the death of the donor.

The Burmese Buddhist law recognizes only one form of succession, i. e., intestate succession ; and testamentary succession is opposed to the fundamental principles of the Burmese Buddhist law. Therefore a Burman Buddhist cannot dispose of his property after his death by will and consequently no Burman Buddhist can, under the guise of making a gift, be allowed in effect to make a will ; for he cannot set at naught the provisions of his personal law as to the inheritance of his property after his death: see *Ma Thin Myaing* v. *Maung Gyi* (1). Subject to this, there is nothing in the Burmese Buddhist law within the scope of its applicability as regulated by S. 13, Burma Laws Act 1898, which renders a gift inter vivos invalid unless it is a death-bed gift.

What are the essential elements which distinguish a death-bed gift from an ordinary gift ? It is stated that a death-bed gift is one made when the donor is "on

(1) A.I.R. 1924 Rang. 13=75 I.C. 166=1 Rang. 351.

the couch from which he is never to rise again" (U May Oung's Leading Cases on Buddhist Law, p. 182) or "a gift made in contemplation of death" (Lahiri's Principles of Modern Burmese Buddhist Law, p. 248). In my opinion, these statements are too wide to define the essential elements of a death-bed gift. The subject of death-bed gifts is dealt with in the Dhammathats of which appropriate extracts are collected in S. 79 of Kinwun Mingyi's Digest of the Burmese Buddhist Law, Vol. 1. In the translation of the Digest, the descriptions given in the Burmese extracts are uniformly described as a "gift made in extremis" without reference to the "bed" which appears in all the Burmese extracts. The terms employed in the Burmese extracts are as follows :

Kaingza : (The-kha nee-wai nyaung-zaung-htet-knike) while on his death-bed about to breathe his last. Kandaw : (Thenee son-sun nyaung-thalun htet). At the royalties "(or aristocrats)" death-bed about to breathe (his) last and to come to an end of (his) life. Vannadhamma: (Mahtathaw eikchin phyin kyein-eik-ya phyitthaw myinze nyaung-zaung knike). While on the middle of (his) death-bed which is (his) sleeping place where he sleeps to awake no more. Rasi : (The kha-nee nyaung-zaung htet knike). While on (his) death-bed about to breathe (his) last. Panam: (On-eik-ya wai khan-da-pyat-kywe the-lu-kha-tan). While lying on the bed when the mortal body must die as the time for its death is come.

The Burmese word "nyaung-zaung" appearing from the extracts from the Kaingza, the Vannadhamma and the Rasi by itself means "bed" only. Similarly each of the words "nyaung thalun" and "on-eik-ya" appearing in the extracts from the Kandaw and the Panam, respectively by itself means no more than "bed." But when each of these words is taken together with the remainder of the phrase in which it appears or is read in the light of the context, it becomes evident that the bed referred to must necessarily be the death-bed.

I reproduce these Burmese phrases in this judgment to show the necessity of laying stress upon the term "extremis" as used in the translation of the Digest. The ordinary meaning of the Latin expression "in extremis" is "at the last gasp," "in extremity (of a person at the point of death implying mortal illness under which the sufferer, if conscious is aware that his end is near)."

It is clearly deducible from the Burmese phrases quoted above that what is known as "death-bed gift" under the Burmese Buddhist law is a gift made while the donor is in fact on his death-bed and about to die, or in other words, when his death is imminent. In my opinion, the gift must also be made by the donor in the hopeless expectation of death, or as observed by their Lordships of the Privy Council in *Ibrahim Goolam Ariff* v. *Saiboo* (2) "under pressure of the sense of the imminence of death;" the underlying idea of the rule that a death-bed gift is invalid under the Burmese Buddhist law being that such a gift, if recognized, would enable a Burman Buddhist to defy his own personal law and practically to dispose of his property by a method which in effect would be equivalent to, and would operate as a will: *Ma Pwa Swe* v. *Ma Tin Nyo* (3), *U. Nga* v. *Maung Hla* (4) and *Ma Yu* v. *Po Thaung* (5).

By one of the deeds in question (Ex. A) Daw Saw gave to the respondent "outright" a piece of paddy land measuring 9.47 acres, "to enable him to build a monastery," and by the other (Ex. B) Daw Saw gave three other pieces of land "outright," to the respondent. Turning to the facts of the case the finding of the learned trial Judge that Daw Saw had been ill for a few months and was weak and infirm at the time of the making of the transfers in question is clearly borne out by the evidence in the case. The illness is said to have been due to old age. As to the seriousness of the illness at the time of the transfers, the evidence is extremely vague. It is clear however that until a few days before her death Daw Saw was able to get up and walk about. It was only during the last few days before her death that she gave up the hope of living. In her journey to the Registration Office at Minhla to effect the registration of the deeds in question she had to be carried from her village to the railway station at Okpo, and after travelling from Okpo to Minhla by train she was taken to the deed writer's house and thence to the Registration Office in

(2) [1908] 35 Cal. 1=34 I. A. 167 (P.C.).
(3) [1902-03] 2 U. B. R. Buddhist Law Gift 1.
(4) [1907-09] 2 U. B. R Buddhist Law Gift 1.
(5) [1919] 50 I. C. 522.

a pony cart. She had to be helped by other persons in moving about, and could not walk properly without such help. After having the deeds registered, she said to the Sub-Registrar, a distant cousin of hers: "You might not see me after this alive. This might be the last meeting." I have no doubt that at the time of the execution of the deeds Exs. A and B, Daw Saw believed that she would not live much longer, and might die soon.

The fact that she gave land to the respondent so that the latter might utilize the same for the expenses of building a monastery for himself suggests very strongly that she did not expect to live long enough to dispose of the land, and see to the building of the monastery herself with the proceeds. I would therefore uphold the finding of the learned trial Judge that at the time of the execution of the deeds Daw Saw was contemplating an early death. But according to my view of what a death-bed gift is, the mere fact that Daw Saw had been ill for a few months and was weak and infirm, and contemplating an early death at the time of the making of the gifts is insufficient to bring them within the purview of the death-bed gifts under the Burmese Buddhist law. But I consider that the gifts in question are in effect and substance dispositions of property by will inasmuch as they were intended to take effect after Daw Saw's death. As I have already pointed out what Daw Saw meant to give by means of the deed Ex. A was a monastery, which she contemplated would be built after her death. As regards the transaction evidenced by the deed Ex. B, the appellant admitted that it was Daw Saw's wish that he should build a monastery out of all the lands, and make some charitable gift to the respondents if they grew up to be good men, and that he would give the lands to the plaintiffs if he was satisfied with them and if they proved deserving. This admission throws a strong light on the question as to the intention of Daw Saw in executing the deeds.

In the circumstances obtaining in this case, Daw Saw's intention in making the gifts must be deemed to be that the transfers were to take effect after her death. This view of the case justifies the declaration that the gifts in question are invalid : *Ma Thin Myaing* v. *Maung Gyi* (1) and *Maung Thu Ka* v. *U Thunanda* (6). In the result the appeal fails and it is dismissed with costs.

Page, C. J.—I concur. It is contrary to the principles of Burmese Buddhist law, to be collected from the texts and authorities, that a Burman Buddhist by means of what is, or is in effect, a testamentary disposition, should attempt to evade the rules of succession and inheritance prescribed under the personal law to which he is subject. If a Burman Buddhist by a voluntary transfer inter vivos assigns property to a person who is, or is deemed to be, a stranger, with the intention that such transfer should become operative after his death, the transfer is null and void. Whether, having regard to this rule of law, a transfer is void or not depends upon the facts of the particular case. When such a transfer is made by a Burman Buddhist whose death is imminent, and who is under an apprehension that his dissolution is at hand, *presumptio juris et de jure* arises that the transferor intended the transfer to become operative after his death. A transfer of this nature is invalid as being a device by which a Burman Buddhist has attempted :

"to defeat his own personal law and practically to dispose of his property by a method which would be in all essentials equivalent to a will" : *Ma Pwa Swe* v. *Ma Tin Nyo* (3) and *U. Nga* v. *Maung Hla* (4).

I agree that the appeal should be dismissed.

P.N./R.K. *Appeal dismissed.*

(6) A I. R. 1927 Rang. 271=105 I. C. 51=5 Rang. 371.

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* * A. I. R. 1932 Rangoon 107
Full Bench

PAGE, C. J., HEALD, CUNLIFFE, DAS AND MYA BU, JJ.

U Ba Dwe and *others*—Appellants.

v.

Mg. Lu Pan and *another* — Respondents.

Civil Refs. Nos. 2 and 3 of 1932, Decided on 2nd May 1932, arising out of Civil Revns. Nos. 218 and 160 of 1931.

*** * (a) Civil P. C. (1908). O. 33, Rr. 5 (d), 6 and 7—Court is not entitled to allow applicant to be examined under Rr. 6 and 7 on merits of case in order to determine whether he has complied with provisions of R. 5 (d):** 7 *Rang.* 361=*A. I. R.* 1929 *Rang.* 273=120 *I. C.* 131, *Overruled.*

Per *Full Bench.*—For the purpose of determining whether an applicant for leave to sue in forma pauperis has complied with the provisions of R. 5 (d), it is not competent for the

Court to allow the applicant to be examined under Rr. 6 and 7 upon the merits of the case or for such purpose to take the result of such examination into consideration: 7 *Rang.* 361 =*A. I. R.* 1929 *Rang.* 273=120 *I. C.* 131, **Overruled.**; 19 *Mad.* 197, *Diss. from*; 20 *All.* 299, *Rel; on* and 41 *Mad.* 620, *Dis. appr.* [P 112 C 2]

Per *Heald, J.*—It is open to the Court to examine the applicant regarding the merits of his claim under R. 7 (1) as well as under R. 4: *A. I. R.* 1929 *Rang*, 273, *Expl.* [P 112 C 2]

* * **(b) Civil P. C. (1908), O. 33, Rr. 5 (d), 6 and 7—Government Advocate or opposite party is not competent to adduce evidence to show that applicant has not complied with R. 5 (d) but parties can present argument in that behalf and Court can determine whether provisions of R. 5 (d) have been satisfied:** 7 *Rang*, 361=*A. I. R.* 1929 *Rang.* 273=120 *I. C.* 131, *Overruled.*

It is not competent for the Government Advocate or an opposite party under R. 6 or R. 7 to adduce evidence for purpose of proving that the applicant for leave to sue in forma pauperis has not complied with the provisions of R. 5 (d), but under R. 7 (2) it is competent for the parties to present as argument in that behalf and for the Court to determine whether the provisions of R. 5 (d) have been complied with: 7 *Rang.* 361=*A. I. R.* 1929 *Rang.* 273=120 *I. C.* 131, **Overruled.** [P 112 C 2]

* **(c) Civil P. C. (1908), O. 33, R. 5 (d)—In considering whether case falls within R. 5 (d) Court cannot use matters of which it has received notice aliunde.**

Per *Full Bench.*—To permit the Court when considering whether the case falls within R. 5 (d) to take into account other matters of which it has received notice aliunde would be to travel outside the scope of O. 33 and in effect to allow the Court to try the suit on the merits of an application for leave to sue in forma pauperis, that could never have been intended: 19 *Mad.* 197; 13 *M. L. J.* 292 (*F. B.*); 7 *All.* 661 and 13 *Bom.* 126, *Rel. on.* [P 111 C 2]

Per *Heald J.*—*(Obiter)* If a Court sends for judicial records, whether of its own motion or as a result of the argument of the opposite party heard under R. 7 (2), it may in a proper case use those records in its discretion for the purposes of the applicant under R. 7 (1). [P 113 C 1]

(d) Civil P. C. (1908), O. 33, R. 5 (d)—Where application prima facie discloses cause of action, Court should not embark upon consideration of doubtful questions of law or fact in order to see whether allegations show cause of action.

If the allegations of the applicant prima facie disclose a cause of action the Court ought not to embark upon the consideration of a complicated or doubtful question of law or fact that may arise upon the allegations of the applicant for the purpose of determining whether the allegations show a cause of action for it is contrary to the scheme and the provisions of O. 33 that the Court for the purpose of disposing of an application for leave to sue in forma pauperis should decide issues affecting the merits that more properly and fairly can be determined at the hearing of the suit: 41 *Mad.* 620, *Rel. on.* [P 111 C 2]

(e) Civil P. C. (1908), O. 33, Rr. 5 (c) and (e) and 6 — Matters in Cls. (c) and (e) relate to pauperism on which evidence can be adduced under R. 6.

Per *Heald, J.* — The matters mentioned in Cl. (c) and (e), R. 5 are matters relating to the applicant's pauperism and therefore matters on which evidence can be adduced under R. 6. [P 112 C 2]

Kyaw Din and *Sutherland (Junior)* — —for Appellants.

Po Han and *A. J Darwood*—for Respondents.

Order of Reference

Civil Revision No. 218 *of* 1931

Page, C. J.—This is an application to revise an order of the learned Additional District Judge of Mergui rejecting an application for leave to sue in forma pauperis. On the application being filed the learned District Judge of Mergui did not think fit to examine the applicant under O. 33, R. 4, but ordered that the learned Additional District Judge should hear and determine the suit "so far as the question of pauperism is concerned." The learned Additional District Judge thereupon issued the notices prescribed under O. 33, R. 6, and at the hearing under R. 7 both the applicant and respondent gave evidence, and other witnesses were called on the one side and on the other. So far as the learned Additional District Judge decided that the applicant was not a pauper upon the ground that he possessed property sufficient to pay the prescribed court-fees, in my opinion there was no evidence upon the record which would justify such a finding. The learned Additional District Judge obviously was influenced in arriving at the conclusion that the applicant was not a pauper by what he stated to be an admission by the applicant himself that the applicant was possessed of unencumbered immovable property worth Rs. 1,000. No such admission however was made by the applicant, and if the alleged admission is excluded the evidence upon the record was not such that the finding of the learned Additional District Judge could be sustained.

The view that this Bench takes upon the evidence before the Court is the same as that which was taken by another Bench of this Court in a previous suit, namely, that for the purposes of this case also the applicant must be regarded as a pauper. That however does not dispose of the application, because the learned

Additional District Judge further held that the allegations of the applicant did not disclose a cause of action within O. 33, R. 5 (d), Civil P. C. Now, the finding of the learned Additional District Judge upon that question was based neither upon the allegations set out in the application for leave to sue in forma pauperis nor upon any statements of the applicant in the course of an examination by the Court under O. 33, R. 4. At the hearing of the issue relating to the pauperism of the applicant the learned Additional District Judge purporting to act under Rr. 6 and 7, proceeded to admit the evidence of the applicant by way of examination, cross-examination and re-examination upon the merits of the case, in order inter alia that the Court might be in a position to determine whether the provisions of O. 33, R. 5 (d), had been complied with. We are of opinion, as at present advised, that in permitting an examination of the applicant under Rr. 6 and 7 for the purpose of determining whether his allegations disclosed a cause of action the learned Additional District Judge was exceeding his jurisdiction, and we are fortified in that conclusion by the following rulings: *Jogendra Narayan* v. *Durga Charan* (1), *Govindasami Pillai* v. *The Municipal Council, Kumbakonam* (2), and *Shauran Bibi* v. *Abdus Samad* (3).

On the other hand, as we understand the ruling of a Division Bench of this Court (Rutledge, C. J., and Brown, J.), in *Ma Shopjambi* v. *Mubarak Ali* (4), their Lordships in that case purported to lay down that it is competent for the Court in order to determine whether the provisions of O. 33, R. 5 (d), have been complied with, to permit the applicant to be examined, cross-examined and re-examined under O. 33, Rr. 6 and 7. With all due deference if the judgment of the Court in *Ma Shopjambi* v. *Mubarak Ali* (4) was such as I have stated, in my opinion the law was not correctly laid down in that case. For these reasons we refer to a Full Bench, constituted as may seem best to the learned Chief Justice, the following question:

"Whether for the purpose of determining whether an applicant for leave to sue in forma pauperirs has complied with the provisions of O. 33, R. 5 (d), it is competent for the Court to allow the applicant to be examined under O. 33, Rr. 6 and 7, upon the merits of the case, or for such purpose to take the result of such examination into consideration."

Mya Bu, J.—I agree.

Civil Revision No. 160 *of* 1931.

Page, C. J.—This is an application for revision of an order by the learned District Judge of Amherst dismissing an application by the present applicant for leave to sue in forma pauperis. The learned District Judge did not examine the applicant under O. 33, R. 4, or reject the application for leave to sue as a pauper under R. 5. On 6th May 1931 an order was passed that notice should issue to the Government Pleader and to the present respondent as the opposite party under R. 6. The opposite party filed an objection to the application upon the ground that the applicant's cause of action was barred by res judicata. The Government Pleader did not file an objection. On 18th May 1931, at the hearing of the inquiry under R. 7, the learned pleader for the respondent adduced the proceedings in Civil Regular No. 28 of 1927, as evidence that the issue which fell for determination in the present suit had therein been determined in a manner adverse to the applicant. The learned District Judge, after arguments had been heard, held that the plaintiff's cause of action in the present suit was barred by res judicata.

Now, on the present application it is contended that in an inquiry pursuant to Rr. 6 and 7 the only issue upon which the evidence may be adduced or arguments presented is an issue to determine the pauperism of the applicant, and further that in an inquiry held under Rr. 6 and 7 it is not competent for the Court to determine whether the applicant had complied with the provisions of O. 33, R. 5 (d). The learned advocate for the respondent has relied upon *Ma Shopjambi* v. *Mubarakh Ali* (4) and it is contended that this case is an authority in support of the proposition that at an inquiry under Rr. 6 and 7 the Court may entertain an objection, admit evidence, and hear arguments to prove that the applicant has not complied with the provisions of R. 5 (d). With all due deference I am bound to say that I do not fully understand what was determined in that case. It would seem that their Lordships were

(1) [1919] 46 Cal. 651=52 I. C. 610.
(2) [1918] 41 Mad. 620=45 I. C. 95.
(3) A. I. R. 1923 All. 577=73 I. C. 538=45 All. 548.
(4) A. I. R. 1929 Rang. 273=120 I. C. 131=7 Rang. 361.

of opinion that the learned District Judge had held that the applicant's claim on the face of it was barred by limitation, although the Court had not acted under R. 4 or under R. 5. But in the course of an inquiry under Rr. 6 and 7 it appears that the Court examined the applicant, and took judicial notice of certain earlier proceedings to which the applicant was a party, and that after taking into consideration the evidence of the applicant and the earlier proceedings, the Court had come to the conclusion that the applicant's claim was barred by limitation. If that is what took place in the District Court I find it difficult to understand how it could have been held in that case that the applicant's claim on the face of it was barred by limitation. Their Lordships however appeared to have been of opinion that in an inquiry under Rr. 6 and 7 it is competent for the Court to consider the merits of the case with a view to determine whether the provisions of R. 5 (d) have been complied with, and if that is the effect of the judgment in *Ma Shopjambi's* case (4) it raises a question of importance as to which there is a conflict of judicial authority, and I am not satisfied that the principle laid down in or underlying that case is correct in law. For these reasons, we refer to a Full Bench to be constituted as the learned Chief Justice may determine the following question :

"Whether the Government Pleader or an opposite party duly served with a notice under O. 33, R. 6, or R. 7 to file an objection or to adduce evidence or to present an argument that the applicant for leave to sue in forma pauperis has not complied with the provisions of O. 33, R. 5 (d), and / or whether at an inquiry under R. 7 it is competent for the Court to determine whether the applicant has complied with the provisions of R. 5 (d)."

Mya Bu, J.—I agree.

Opinion

Page, C. J.—The material facts are set out in the orders of reference and need not be re-stated. The scheme of O. 33 is that before an applicant is granted the privilege of suing in forma pauperis it is incumbent upon him to satisfy the Court that his application is in proper form, that he has a good and subsisting cause of action, and that he is bona fide and in fact a pauper. The answers to the questions propounded depend upon the true construction of O. 33, Rr. 4 (1), 5, 6 and 7 which run as follows:

"4. (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

"5. The Court shall reject an application for permission to sue as a pauper: (a) where it is not framed and presented in the manner prescribed by Rr. 2 and 3, or (b) where the applicant is not a pauper, or (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or (d) where his allegations do not show a cause of action or (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

" 6. Where the Court sees no reason to reject the application on any of the grounds stated in R. 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government Pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof. "

" 7 (1). On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence. (2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application, and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in R. 5. (3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper. "

Now, for the purpose of deciding whether the allegations of the applicant show a cause of action within R. 5 (d) the Court must take into consideration not only the averments in the application, but also any statements by the applicant or his agent regarding the merits of the claim that may have been made in the course of an examination by the Court under R. 4.

" It is obvious that the mere statements in the plaint which accompanies an application for leave to sue as a pauper cannot to accepted as the sole materials on which a decision as to whether the applicant's allegations do or do not show a right to sue can depend. If the allegations in the plaint were the sole matters to be looked to and the applicant were admittedly a pauper, the granting of this application to sue as a pauper would depend, not on whether he had any merits to go upon, but on the skill of the gentleman who drafted his petition and his plaint, and the examination as to the merits under S. 406 would be superfluous : Per Edge, C. J. and Burkit, J., in *Kamrakh Nath* v. *Sundar Nath* (5). "

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(5) [1898] 20 All. 299=(1898) A. W. N. 36.

If and so far as Bakewell and Kumaraswami Sastriyar, JJ., in *Govindasami Pillai* v. *The Municipal Council, Kumbakonam* (2) intended to hold that R. 5 (d) applied only to cases where it appeared "clearly on the face of the petition" that the allegations of the applicant did not show a cause of action, I should respectfully disagree with the view that was expressed by the Madras High Court in that case. In my opinion however the Court is not entitled to take into account any other evidence, oral or documentary, in considering whether the allegations of the applicant disclose a cause of action. It appears to me that this must be so both because on an application for leave to sue in forma pauperis it is not the function of the Court to try or determine the suit on the merits, and because under R. 5 (d) it is upon a consideration of "his" that is, the applicant's, allegations that the Court is to determine whether the provisions of R. 5 (d) have been complied with.

I am further of opinion that the Court which proceeds ex parte under R. 5 is not precluded at any inquiry held under R. 7 (2) from hearing an argument on behalf of the parties upon the question whether the application should be dismissed under R. 5 (d) and that after hearing the parties, if they elect to present an argument to the Court, the Court is entitled under R. 7 (2) to reject the application upon the ground that the applicant's allegations do not show a cause of action. On the other hand I hold that the argument and decision of this question under R. 7 (2) must proceed and be based solely upon the averments in the application and any statement regarding the merits of the claim that may have been made by the applicant or his agent in the course of an examination by the Court under R. 4. As I apprehend the meaning and effect of O. 33 in considering whether the case falls within R. 5 (d) it would be as wrong to hold that the Court must have regard only to the allegations set out in the application as to hold that the Court may take into consideration any evidence other than the statements of the applicant or his agent, made in the course of an examination under R. 4. I respectfully dissent from the decision in *Vijendra Tirthaswami* v. *Sudhindra Tirthaswami* (6), which in my opinion was rightly overruled by a Full Bench of the Madras High Court in *Rathnam Pillai* v. *Pappa Pillai* (7).

To permit the Court when considering whether the case falls within R. 5 (d) to take into account other matters of which it has received notice aliunde in my opinion would be to travel outside the scope and ambit of O. 33 and in effect to allow the Court to try the suit on the merits of an application for leave to sue in forma pauperis. That could never have been intended: *Chattarpal Singh* v. *Raja Ram* (8); *Kamrakh Nath* v. *Sundar Nath* (5); *Dulari* v. *Vallabdas Pragji* (9); *Rathnam Pillai* v. *Pappa Pillai* (7); *Sankararamier* v. *Subramania Aiyar* (10); *Amirtham* v. *Alwar Manickam* (11); *Nawab Bahadur of Murshedabad* v. *Harish Chandra* (12); *Govindasami Pillai* v. *The Municipal Council, Kumbakonam* (2); *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta* (1); *Shauran Bibi* v. *Abdus Samad* (3) and *Mohamed Nasrullah* v. *Mohamed Shukrullah* (13).

Further I am of opinion that if the allegations of the applicant prima facie disclose a cause of action, the Court ought not to embark upon the consideration of a complicated or doubtful question of law or fact that may arise upon the allegations of the applicant for the purpose of determining whether the allegations show a cause of action, for it is contrary to the scheme and the provisions of O. 33 that the Court for the purpose of disposing of an application for leave to sue in forma pauperis should decide issues affecting the merits that more properly and fairly can be determined at the hearing of the suit: *Govindasami Pillai* v. *The Municipal Council, Kumbakonam* (2). Again at an inquiry held pursuant to O. 33, Rr. 6 and 7 (1), the evidence adduced by the parties and the Government Pleader and the examination of the applicant or his agent in my opinion must be confined to the issue of pauperism, i. e., to issues falling within R. 5 (b), (c) and (e) which were enacted to enable the Court to determine whether

(6) [1896] 19 Mad. 197.

(7) [1903] 13 M. L, J. 292 (F.B.).
(8) [1885] 7 All. 661=(1885) A.W.N. 156 (F.B.).
(9) [1889) 13 Bom. 126.
(10) [1903] 13 M. L. J. 425.
(11) [1904] 27 Mad. 37.
(12) [1911] 11 I. C. 55.
(13) A. I. R. 1925 Pat. 30=83 I. C. 871=3 Pat. 275.

the applicant is bona fide and in fact a pauper; and I am of opinion that it is not competent for the Court at such an inquiry to admit evidence relating to the merits of the applicant's claim. Further I hold that under R. 7 (2) the parties are entitled to present an argument to the Court for the purpose of proving that the applicant has or has not complied with the terms of Cls. (a) to (e), O. 33, R. 5 or any of them, but that in respect of R. 5 (d), for the reasons that I have stated, the argument and the decision must be based solely upon the averments in the application and the allegations of the applicant or his agent in any examination that may have been held under R. 4. In *Ma Shopjambi* v. *Mubarak Ali* (4), as I apprehend what was decided in that case, Rutledge, C. J., and Brown, J., held that in a case in which the applicant had not been examined under R. 4 and the Court had not rejected the application for leave to sue in forma pauperis under R. 5, the Court was entitled to examine the applicant as to the merits of the claim at an inquiry held under Rr. 6 and 7. Their Lordships referred to *Jogendra Narayan Ray* v. *Durga Charan* (1) as an authority supporting the view that they expressed, but it appears to me that in *Jogendra Narayan Ray's* case (1) the Calcutta High Court laid down the law in the contrary sense. Again, in *Ma Shopjambi* v. *Mubarak Ali* (4) it was held that the District Court was right in taking

"judicial notice of certain proceedings in Court in which the petitioner was a party and in which she made certain applications."

I confess that I do not appreciate the meaning and use of the term "judicial notice" in this connexion, or how statements or other matters of which the Court may have attained information aliunde (unless they are admitted by the applicant) can be treated as "his allegations" within R. 5 (d). I have perused the original record of the proceedings of the High Court in *Ma Shopjambi's* case (4), and what appears to have happened is that the learned District Judge sent for the record of certain proceedings unconnected with the application before him, in which petitions and applications were made by and against the applicant in the present case, and the learned District Judge then proceeded exhaustively to analyse the statements and actions of the parties to these earlier proceedings, and drew inferences therefrom adverse to the applicant, and arrived at findings of fact upon controversial questions relating to merger and adverse possession. The learned District Judge finally concluded his investigation and these earlier proceedings by holding that "it seems to me that her application is, on the face of it, time barred." I am at a loss to understand how in such circumstances it could be held that the "petitioner's present claim is on the face of it barred by limitation," but that appears to have been the view held and expressed both by the learned District Judge and by Rutledge, C. J., and Brown J., in the appeal in that case. With all due respect I am of opinion that in *Ma Shopjambi* v. *Mubarak Ali* (4), the law was not correctly stated and the decision in that case must be overruled.

In Reference 2, I would answer the questions propounded in the negative,and and in Reference 3, I would answer that it is not competent for the Government Advocate or an opposite party under R. 6 or R. 7, to adduce evidence for the purpose of proving that the applicant for leave to sue in forma pauperis has not complied with the provisions of O. 33, R. 5 (d), but that under R. 7 (2), it is competent for the parties to present an argument in that behalf and for the Court to determine whether the provisions of R. 5 (d) have been complied with. The costs of each reference will be in the discretion of the Court by which the reference was made.

Heald, J.—I concur in the answers which the learned Chief Justice gives to the questions referred but I would respectfully add that in my opinion it is open to the Court to examine the applicant regarding the merits of his claim under R. 7 (1) as well as under R. 4. I would also note that I regard the matters mentioned in Cls. (c) and (e), R. 5, as matters relating to the applicant's pauperism and therefore as matters on which evidence can be adduced under R. 6. With all respect I am not prepared to go so far as to say that in my opinion the judgment in *Ma Shopjambi* v. *Mubarakh Ali* (4) did not state the law correctly. The head-note to the official report is undoubtedly wrong in its suggestion that the opposite party is entitled under R. 6 to

adduce evidence to show that the applicant has no cause of action, but I venture to suggest that the learned Judges were right in holding, as I think they did hold that under R. 7 (2) the Court is entitled to consider the allegations made by the applicant in his examination by the Court under that rule for the purpose of deciding whether or not his allegations show a cause of action. On the further question whether or not the learned Judges were right in holding that the lower Court acted correctly in using judicial records, for which it had sent presumably under the powers given by O. 13, R. 10, I am not at present prepared to express a decided opinion because the question of the use which a Court is entitled to make of records so sent for has not been argued before us, but I venture to say that I am inclined to think that if a Court sends for records in such a case whether of its own mere motion or as a result of the arguments of the opposite party heard under R. 7 (2), it may in a proper case use those records in its discretion for the purposes of its examination of the applicant under R. 7 (1). I however entirely agree that the Court ought not to embark upon the consideration of a complicated or doubtful question of law or fact at the hearing under O. 33, R. 7 and that such questions would more properly and fairly be determined at the hearing of the suit. I concur in the proposed order as to costs.

Cunliffe, J.—I agree with the judgment delivered by the Chief Justice.

Mya Bu, J.—I also agree with the judgment delivered by the learned Chief Justice.

Das, J.—I agree with the judgment of my Lord the Chief Justice.

S.N./R.K. *Reference answered.*

A. I. R. 1932 Rangoon 113

PAGE, C. J. AND MYA BU, J.

M. P. M. S. Firm—Appellants.

v.

Ko Pyu and *others*—Respondents.

First Appeal No. 110 of 1931, Decided on 10th February 1932, from judgment of Dist. Court, Myaungmya, in Civil Regular No. 85 of 1930.

Transfer of Property Act (1882), S. 65-A—Lease by mortgagor, not in ordinary course of management, does not bind mortgagee—Payment of rent in advance is not defence to suit for ejectment of lessees by mortgagee.

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land or to authorize its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. A lease for three years executed by the mortgagor of his mortgaged property which was not made in the ordinary course of management is not binding on the mortgagee and the fact that the lessees had paid rent for the three years in advance is no answer to a suit for ejectment brought against them by the mortgagee who has elected to treat the lease as not binding upon him: 39 *I. C.* 182, *Appr.*; 8 *L. B. R.* 413, *Diss. from*; *A. I. R.* 1926 *Bom.* 567, *Ref.* [P 114 C 1, 2]

Chari—for Appellants.

Halkar—for Respondents.

Page, C. J.—This is a suit to recover possession of certain immovable property in the possession of the defendants and for mesne profits.

The defendants claimed to be in possession under a lease for three years granted by Daw Ngwe Yon. At the time when the lease was executed the property had been mortgaged by Daw Ngwe Yon to the plaintiff. Subsequently, the plaintiff brought a suit against Daw Ngwe Yon, and obtained a money decree against her. In execution of that decree the plaintiff attached the property in suit, brought it to sale, and purchased the property at the auction sale held in execution of the decree. After the sale the plaintiff invited the tenants of Daw Ngwe Yon to attorn to him. Upon their refusal he brought the present suit for possession of the property, alleging that the defendants were trespassers upon the land. In their written statement the defendants pleaded that they were in possession as the tenants of Daw Ngwe Yon under a lease for three years, and that the plaintiff was bound by the lease. In his reply the plaintiff contended that as mortgagee of the lands the lease was not binding upon him.

Now, the question that arises for determination is whether a lease for three years by a mortgagor is binding upon the mortgagee. Three different views have been expressed by the Courts in India upon this question, but having regard to the provisions of S. 65-A, T. P. Act, in due course the question will become academic. One line of authorities has held that without the consent of the mortgagee, express or implied, a mort-

gagor is not entitled to create a lease of the property which is the subject-matter of the mortgage: *N. C. Macleod* v. *Kissen Vithal Singh* (1) and *Rustomji Dorabji* v. *Keshavji Damji* (2).

It has also been held that a mortgagor in possession can prima facie exercise the ordinary rights of an owner in possession. The only restriction imposed on him is that contained in S. 66, T. P. Act, that is to say, he must not commit any act which is destructive or permanently injurious to the property if the security is insufficient or will be rendered insufficient by such act: per Fox, C. J., and Twomey, J., in *Tana Peena Cheena Pitchay Meera Rowther* v. *Mamakkantakath Pathumakutti Uma* (3).

In my opinion however the true view lies between these two extremes, and was enunciated by Mookerjee and Beachcroft, JJ., in *Madan Mohan Singh* v. *Raj Kishori Kumari* (4) at p. 92 (*of* 21 *C. W. N.*) as follows:

"The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land or to authorize its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage: see also *Kiran Chandra Bose* v. *Dutt & Co.* (5), *Anand Ram* v. *Dhanpat Singh* (6) and *Beni Prasad* v. *Gangoo Singh* (7)."

The opinion expressed by the learned Judges in *Madan Mohan Singh's* case (4) has now been embodied in S. 65-A, T. P. Act. In the present case the plaintiff as mortgagee by filing the suit elected to treat the lease in question as not binding upon him, and an issue was framed at the trial for the purpose of determining whether in the circumstances obtaining in the case he was bound by the terms of the lease.

The learned District Judge dismissed the plaintiff's suit upon the ground that the law was correctly laid down in *Tana Peena Cheena Pitchay Meera Rowther* v. *Mamakkantakath Pathumakutti Uma* (3). In my opinion however the law was not accurately stated in that case, and, having regard to the principles enunciated by Mookerjee and Beachcroft, JJ., in *Madan Mohan Singh* v. *Raj Kishori Kumari* (4), with which I respectfully agree, it is clear that the lease in the present case was not one that was made in the ordinary course of management, or binding upon the mortgagee.

The learned advocate for the respondents contended that it would be unreasonable and unjust that the tenants should be evicted. Notwithstanding that they had paid rent in advance to Daw Ngwe Yon, when she was the mortgagor in possession, in my opinion, and whatever rights the defendants may have against Daw Ngwe Yon with respect to the rent paid in advance, the fact that they had paid rent in advance is no answer to a suit for ejectment brought against them by the mortgagee who has elected to treat the lease as not binding upon him: *Rustomji Dorabji* v. *Keshavji Damji* (2).

The result is that the appeal is allowed and the decree from which the appeal is brought is set aside, and a decree for possession will be passed in favour of the appellant against the respondents. The proceedings will be remanded to the District Court, Myaungmya, in order that the quantum of mesne profits may be ascertained. The appellant is entitled to his costs in both Courts.

Mya Bu, J.—I agree.

K.N./R.K. *Appeal allowed.*

(1) [1904] 30 Bom. 250.
(2) A. I. R. 1926 Bom. 567=98 I. C. 436.
(3) [1916] 8 L. B. R. 413=34 I. C. 24.
(4) [1912] 39 I. C. 182.
(5) A. I. R. 1925 Cal. 251=85 I. C. 522.
(6) [1916] 1 Pat. L. J. 563=38 I. C. 37.
(7) A. I. R. 1928 Pat. 372=110 I. C. 287=7 Pat. 349.

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* A. I. R. 1932 Rangoon 114

PAGE, C. J. AND CUNLIFFE, J.

O. K. Mohideen Bawa—Appellant.

v.

Rigaud Perfume Manufacturers—Respondents.

First Appeal No. 168 of 1931, Decided on 9th December 1931, against decision of High Court, on Original Side, in Civil Regular Suit No. 283 of 1929.

(a) Trade-mark—Infringement of—Plaintiff must prove that goods sold under his label and get-up are goods having reputation in market as being those manufactured or sold by him—Evidence Act, S. 101.

In a suit for infringement of trade-mark it is incumbent upon the plaintiff in the first instance to prove that the goods sold under his label and get-up are goods which had a reputation in the market as being goods manufactured or sold by him, of which the label and get-up are distinctive and well known in the particular market. [P 115 C 2]

(b) Trade-mark—Infringement of—Court satisfied that defendant's label, and get-up

is colourable imitation of those of plaintiff—No witnesses called to prove that they were deluded into thinking that goods sold by defendant were those of plaintiff is immaterial.

Where in a suit for infringement of right to use a particular label, get-up or trade-mark, the Court is satisfied that the defendant's label and get-up are a colourable imitation of those of the plaintiff, the fact that no witnesses are called by plaintiff to prove that they are deluded into thinking that the goods sold by the defendant were the goods of the plaintiff is not of much importance. [P 116 C 1]

* **(c) Trade-mark—Infringement of—It is not necessary for trader becoming aware of infringement immediately to bring suit to vindicate his right—It may sometimes amount to acquiescence.**

There is no law that any person who becomes aware of the infringement of his right to use a particular label, get-up, or trade-mark, must forthwith file a suit against the person so infringing his legal right, and that if he does not immediately take legal praceedings against such a person he should for ever be debarred from asserting such rights in a Court of law. It depends upon the circumstances and it would be an intolerable burden upon a trader if he had had to take notice of every petty infringement by a man of straw. Of course, if he does not take steps to vindicate his rights he runs the risk of a defence subsequently being put forward that he has acquiesced in the particular infringement; but whether he has acquiesced or not is a question of fact that depends upon the circumstances of the particular case under consideration. Again, there may be reasons that would afford a ready explanation why a suit was not filed against the infringer immediately after the trader became aware that the infringement had taken place: *A. I. R.* 1930 *Cal.* 678 and *Pireto Case*, (1920) 37 *R. P. C.* 177, *Rel. on*; *A. I. R.* 1930 *Cal.* 678; *Proctor* v. *Bennis*, (1887) 36 *Ch. D.* 740 and *Ramsden* v. *Dyson* (1866) 1 *H. L.* 129, *Ref.* [P 117 C 1]

* **(d) Trade-mark — Infringement of—Fraudulent infringement—Doctrine of acquiescence does not operate in defendant's favour.**

Where the defendant is fully aware of the legal position and yet deliberately or fraudulently puts upon the market articles with designs and forms of get-up which are colourable imitation of those of the plaintiff in order to obtain trade which otherwise might go to the plaintiff, there is no room for the doctrine of acquiescence by plaintiff to operate in defendant's favour. [P 118 C 1]

Leach—for Appellants,

J. K. Munshi and *Miss Dantra*—for Respondents.

Page, C. J.—This appeal must be dismissed. The suit is the result of business rivalry between a French firm and a German firm which import perfumery into Burma. The nature of the perfumery with which we are concerned in the present case is Kadow, that is, a scent with a musk perfume.

The plaintiffs claim that for many years before action brought they had acquired a reputation in the market in Burma for Ex. A and Ex. A-1, bearing a label and get-up which was distinctive of the goods that they sold. They contend that in 1925 the defendants deliberately put upon the market Kadow perfumery in bottles Ex. B-1, with a label and get-up that was a colourable imitation of the label and get-up of A-1, and they claim an injunction and other relief against the defendant firm preventing them from selling Kadow perfumery with a label and get-up of the nature of B-1 in Burma. Plaintiffs further contend that in 1927 the defendants imported into Burma, and caused to be put on the market, Kadow perfumery with a label and get-up Ex. B, which, the plaintiffs contend, is a colourable imitation of their label and get-up A, and they seek an injunction in similar terms in respect of B. The learned Judge at the trial upheld the plaintiffs' claim, and decreed an injunction and incidental relief in favour of the plaintiffs.

Now, this is a passing-off suit, and it is incumbent upon the plaintiffs in such a suit in the first instance to prove that the goods sold under their label and get-up were goods which had a reputation in the market as being goods manufactured or sold by them, of which the label and get-up was distinctive and well known in the particular market. The learned Judge has held—and there is abundant evidence to justify his finding—that for more than 25 years before the suit was filed the plaintiffs had acquired in respect of A and A-1 a reputation as bearing a distinctive design and get-up which was well known in connexion with their Kadow perfumery. It is unnecessary to discuss in detail the evidence upon this issue, because not only was there abundant evidence adduced by the plaintiff in that behalf, but the reputation of A and A-1 in the market, as distinctive of Kadow perfumery sold by the plaintiffs was admitted by the witness for the defendant.

It appears that from 1896 onwards, including the year of the Great War, goods with the label and get-up A and A-1 have been sold in Burma, and have acquired a considerable reputation. From 1925 however there is evidence that the plaintiff's trade in A-1 perfumery began to decrease, and it is not an unnatural

inference to draw from the evidence that the sales dropped owing to B-1 having been put on the market by the defendants from 1925.

We are satisfied after examining B-1 and A-1 that the label and get-up of B-1 on the little bottles of Kadow perfumery sold by the defendants is a colourable imitation of the label and get-up of A-1 on the little bottle in which Kadow perfumery has been sold by the plaintiffs. It is true that no direct evidence was called on behalf of the plaintiffs to prove that any particular purchaser was deluded into thinking that when he wished to buy A-1 he was led to believe that he was given A-1 when in truth and in fact he was given B-1 by the seller; but that is by no means fatal to the plaintiff's claim. It is, of course, material and proper evidence, and cogent evidence where the Court is in doubt whether an article such as B-1 is a colourable imitation of A 1. But if the Court is clearly of opinion from an examination of the two bottles with the get-up upon each of them that B-1 is a colourable imitation of A-1, the fact that no witnesses are called to prove that they were deluded into thinking that B-1 was A-1 is not of so much importance.

In this case. in our opinion, B-1 obviously is a colourable imitation of A-1, and if B-1 were offered to an unwary purchaser of the type who would be likely to buy A-1 in Burma and who wished to buy A-1, such a purchaser, in our opinion. might reasonably conclude that B-1 was in fact A-1.

Having come to the conclusion that B-1 is a colourable imitation of A-1 the next question arises: Why was B-1 imported into Burma and put upon the Burma market by the defendants in 1925? The answar appears to us to be a simple one. In 1924-25 and for many years previously A-1 had been proving very attractive to purchasers of perfumery in Burma, and I have no doubt that Messrs. George Dralle and Company of Hamburg, who imported B-1 into Burma for the purpose of having it put upon the Burma market by the defendants did so because they desired by means of B-1 to obtain some of the trade which had been worked up by the plaintiffs through their successful exploitation of A-1.

After the war A-1 was being sold at Rs. 16 to Rs. 19 per gross. In 1925 B-1 was put on the market at Rs. 12 to Rs. 12-8-0 per gross. The lower price of B-1 obviously would help the defendants to obtain a market for B-1 at the expense of A-1.

Now, why is it that it so happens that the label and get-up of B-1 resembles A-1 so closely? Because the defendants deliberately intended to put B-1 on the market in such a form that the incautious buyer might be deluded into thinking that B-1 was A-1; and their endeavours were crowned with success, because the sales of B-1 since it was put upon the market in 1925 have been very great. In 1925, according to Ex. 10, which was adduced in evidence on behalf of the defendants, 9,662 dozen bottles with the label and get-up of B-1 were imported into Burma: in 1926, 6,425 dozen; in 1927, 42,464 dozen; in 1928, 36,299 dozen; and in 1929, 30,158 dozen.

What is the defence? It is two fold. Firstly, the defendants contend that, although a diminutive bottle with the particular design and get-up of B-1 was not put on the Burma market until 1925, inasmuch as B-1 is in substance only B *en miniature*, and the label and get-up of B has been on the Burma market since 1902 (or, as it is alleged in the written statement, in 1906), they are entitled to a concurrent right with the plaintiffs to use B, and the right of user that B has acquired can be fathered on B-1. Secondly they contend, upon the assumption that B-1 is a colourable imitation of A-1, that they were justified in putting B-1 upon the market as the plaintiffs did not take any steps to prevent the sale of B or B-1 in Burma from 1925, when the plaintiffs must have known that B and B 1 were being sold extensively in Burma, and the plaintiffs have allowed the defendants to build up a large business in B and B-1 in Burma, and thus must be taken to have acquiesced in the exploitation of B and B-1 in the Burma market by the defendants, and are not now entitled to take legal proceedings to prevent any further sale of these articles by the defendants.

I will first consider the defence of acquiescence. The law upon the subject of acquiescence appears to me to be what I ventured to lay down in *Moolji*

Sicca & Co. v. *Ramjan Ali* (1) in Original Suit No. 2178 of 1927, while I was a Judge of the Calcutta High Court. In that case I held that:

> Acquiescence is only a form of estoppel, and it is of the essence of acquiescence that the party acquiescing should be aware of and by words or conduct should represent that he assents to what is a violation of his rights, and that the person to whom such representation is made should be ignorant of the other party's rights, and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party. . . ."

In *Proctor* v. *Bennis* (2), Cotton, L. J., observed that:

> "It is necessary that the person who alleges this lying by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title,"

and at p. 761 Bowen, L. J., added:

> "In order to make out such acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that he had rights and meant to assert such rights: see also *Ramsden* v. *Dyson* (3)"

In determining whether the plaintiffs acquiesced in the infringement of A-1 by the defendants when they put B-1 upon the Burma market the Court has to consider the circumstances of the case in a sensible and reasonable way. It is not the law that any person who becomes aware of the infringement of his right to use a particular label, get-up, or trade-mark, must forthwith file a suit against the person so infringing his legal right and that if he does not immediately take legal proceedings against such a person he should for ever be debarred from asserting such rights in a Court of law. It depends upon the circumstances. As I ventured to point out in *Moolji Sicca's* case (1), it would be an intolerable burden upon a trader if he had to take notice of every petty infringement by a man of straw. Of course, if he does not take steps to vindicate his rights he runs the risk of a defence subsequently being put forward that he has acquiesced in the particular infringement but whether he has acquiesced or not is a question of fact that depends upon the circumstances of the particular case under consideration.

Again, there may be reasons that would afford a ready explanation why a suit was not filed against the infringer immediately after the trader became aware that the infringement had taken place. An instance of that kind is to be found in *Poiret's* case (4). Moreover although one might reasonably expect a trader in normal circumstances to take proceedings as soon as may be against an infringer who happens to be residing or carrying on business in the same locality as he does; where, as in the present case, the plaintiffs are traders carrying on business in Paris, with a local representative in Burma, it is not unreasonable before a suit is filed for infringement that the local representative should desire to place the facts before his principals in Paris, with the result that some time must elapse before the principals in Paris would be in a position to instruct their representative in Burma to file a suit.

The representative of the plaintiffs in Burma from 1909 onwards has been Mr. Isaac Meyer, and the question now is whether Mr. Meyer, who admittedly knew in 1927 that B-1 had been put on the Burma market, deliberately refrained from taking any steps to vindicate his principals' rights in such circumstances that his principals must be taken to have acquiesced in the infringement of A-1 by B-1. This question is not free from difficulty. Mr. Meyer was thoroughly conversant with the perfumery trade, and it seems to me difficult to believe that from 1927 onwards (or 1925 as the defendants allege) Mr. Meyer was not aware of the extensive and increasing trade that was being carried on in B-1 by the defendants in Rangoon. On the other hand Mr. Meyer gave evidence upon this issue at the trial, and he explained that the delay was due to several causes, that he first became aware of the infringement in 1927; that thereafter he got into communication, and had interviews with Mr. Galle, a representative of the plaintiffs who happened to be travelling in the East; that subsequently Mr. Meyer went to Paris and saw his principals; and that it was only after the matter had been fully discussed in Paris that it was decided to file a suit against the defendants for infringing the rights that the plaintiffs had acquired in A and A-1. It is unnecessary however

(1) A. I. R. 1930 Cal. 678=129 I. C. 612.
(2) [1887] 36 Ch. D. 740=57 L. J. Ch. 11=57 L. T. 662=36 W. R. 456.
(3) [1866] 1 H. L. 129=12 Jur. (n. s.) 506=14 W. R. 926.
(4) [1920] 37 R. P. C. 177.

in the present case to determine that question because there can be no doubt that at all material times the defendants were fully aware that both A and A-1 had been sold for many years by the plaintiff in the Burma market, and that in respect of the label and get-up of A and A-1 the plaintiffs had acquired a well-known reputation in the market for their goods as denoted by A and A-1.

The learned advocate for the appellants contended that the defendants were not aware of any facts which would justify them in assuming that the plaintiffs had any such rights but for the reasons which I shall now state in my opinion the defendants, when they first put upon the Burma market B-1 in 1925 and B in 1927, knew full well that in so doing they were putting upon the market articles with designs and forms of get-up that were colourable imitations of the plaintiffs' A and A-1; that the plaintiffs had acquired a right—and an exclusive right—to use A and A-1 as denoting their Kadow perfumery, and yet deliberately put upon the market B-1 in 1925 and B in 1927 for the express purpose of attempting thereby to filch trade from the plaintiffs by deluding incautious and unwary purchasers of Kadow perfumery of this description into thinking that when they were given B or B-1 they were really being given what they wished to buy, A or A-1. In my opinion such a deliberate infringement of A and A-1 by the defendants amounts in law to a fraudulent infringement. It is in my opinion, settled law that if the defendants were aware of the real legal position, and yet deliberately or fraudulently put upon the market B and B-1 in order to obtain trade which otherwise might go to the plaintiffs, there is no room for the doctrine of acquiescence to operate in their favour. (Here the judgment considered evidence and holding that the appellants had failed to prove by reason of prior user any right to put upon the Burma market Kadow perfumery with the label and get-up of either B or B-1, and proceeded to conclude.) For these reasons in my opinion, the conclusion at which the learned trial Judge arrived was correct. The appeal fails and must be dismissed. This is a case which has necessitated considerable labour and in which the facts are somewhat complex. We think the right order to make is that the plaintiffs are entitled to costs both at the trial and on the appeal and that for each day of the trial and of the appeal the plaintiffs are entitled to nine gold mohurs for the senior counsel and six gold mohurs for the junior counsel.

Cunliffe, J.—Concurred and agreed to the order proposed by the Lord Chief Justice.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Rangoon 118

BAGULEY, J.

Maung Pe Thaung and *another* — Appellants.

v.

Toungoo Timber Co.—Respondents.

Special Second Appeal No. 155 of 1931, Decided on 18th January 1932, from judgment of Dist. Court, Toungoo, in Civil Appeal No. 128 of 1930.

Contract Act (1872), S. 251 — Debts for partnership purposes by managing partner are binding on other partner though wrongfully applied for nonpartnership purposes.

A managing partner of a common trading partnership (for timber trading generally) has implied authority to borrow money for partnership purposes, and in so borrowing he may bind the other partners although he may wrongfully apply it to other than partnership purposes. Buying and selling are essential features of a trading partnership. A partner of a timber trading business is liable on a pro-note executed by the other partner for partnership business: *Case law referred.* [P 120 C 1]

N. N. Sen—for Appellants.

Thein Maung—for Respondents.

Judgment.—The point for decision in this appeal is whether the Toungoo Timber Company, a partnership consisting of Messrs. Petley & Earnshaw, was liable on a promissory note signed by Earnshaw alone on behalf of the Toungoo Timber Company. The partnership is now being wound up, and the appellants sued the receiver on this promissory note. That the promissory note was executed by Earnshaw is admitted.

It is claimed that under S. 251, Contract Act, Earnshaw was the agent of the partnership, and by signing in the way in which he did he binds both himself and his co-partner.

The trial Court found that Earnshaw had power and permission to execute it, and gave a decree for the amount sued with interest and costs.

On appeal the learned Additional District Judge held that the company was

not liable on the promissory note because he held that the partnership was not an ordinary trading company, and borrowing was not part of the ordinary business of the company. It was also mentioned in the partnership agreement that the other partner, Petley, should do the financing of the company. A similar point was dealt with in *Saremat Punamchand* v. *Kapurchand Punamchand* (1) in which authorities were reviewed. Most of the authorities are English authorities and I have referred to the authorities in the original. The leading case referred to is *Higgins* v. *Beauchamp* (2). This case does not appear to me to be of very particular importance because it was obviously decided on the facts of that particular case. To quote the last words of the judgment of Lush, J.: "At all events I am satisfied that this particular business is not a trading business." The business in this case was one of proprietors and managers of picture palaces, etc. It is mentioned however in the course of the judgment:

"that the managing partner of a common trading partnership has implied authority to borrow money for partnership purposes, and in so borrowing he may bind the other partners although he may wrongfully apply it to other than partnership purposes."

Reference was made to *Wheatley* v. *Smithers* (3), in which it was held "that buying and selling were essential features of trading", and as the partnership in question was that of an auctioneer it was not a trading partnership. That case however was reversed on appeal because the partnership deed showed that the business contemplated the sale and purchase of goods and property. There is also authority in *Elizabeth Hedley* v. *Bainbridge* (4) that a professional business was not of a commercial nature, the partnership in that case being one of attorneys; and on the particular facts of the case a quarry working partnership was held in *Thicknesse* v. *Bromilow* (5) not to be an ordinary trading partnership, although in that case the partnership was held liable because both partners were held to have known of the borrowing. In *Maung Po Mya* v. *A. H. Dawood & Co.* (6), it was held that a partnership for working a rice-mill, milling other people's paddy and charging milling hire, was not a trading partnership.

In the present case the business of the partnership is stated in the partnership deed as being that of "timber trading generally," and it is stated that the partners cut down trees in the jungle, extracted logs, floated them to the revenue stations, paid Government revenue on them and sold them. It was argued that this was not buying and selling timber. In my opinion it is clear that in the case of a parnership of a professional nature as mentioned in some of the cases referred to, the borrowing of money could not be regarded as an act necessary for or usually done in the carrying on of the business. In the case of a partnership, the main business of which consists in buying and selling goods it is obvious that at a certain time it is necessary to raise money unless the capital of the partnership is very large and not fixed. A business of this kind is one in which what may be called the trading capital necessary is large, and little fixed capital is employed. On the other hand, in the case of extracting stones from a quarry on a large scale in which the facts show that a large amount of fixed capital is involved in the way of steam engines, railway lines, etc., or in the case of working a rice-mill for the sake of milling on hire where the proportion of fixed capital is large in comparison with the amount of floating capital employed, it must be held that raising of money would not be an ordinary incident of the business. A certain amount of floating capital would be necessary, but this would be comparatively small in proportion to the amount of the fixed capital employed for the business of that description.

In the present case the amount of the fixed capital appears to have been comparatively small. There was absolutely no fixed capital so far as the record goes. The money invested in elephants and buffaloes, etc., can scarcely be regarded as fixed because an outbreak of anthrax or other disease would sweep it away in a few days. Although the partnership did not actually buy logs from anybody it

(1) A. I. R. 1924 Bom. 260=77 I. C. 548=48 Bom. 176.
(2) [1914] 3 K. B. 1192=84 L. J. K. B. 631=111 L. T. 1103=30 T. L. R. 687.
(3) [1906] 2 K. B. 321=75 L. J. K. B. 627=95 L. T. 96=54 W. R. 537=22 T. L. R. 591.
(4) [1842] 3 Q. B. 316=2 G. & D. 483=11 L. J. Q. B. 293.
(5) [1852] 2 Cr. & J. 425.
(6) A. I. R. 1921 L. B. 44=66 I. C. 584=11 L. B. R. 137.

had to expend a considerable amount in cash in order to make the logs available for sale, and even when the logs had been got to the revenue stations they did not become the property of the partnership until they had been set free from the Government claim by paying a considerable amount per ton, and this payment may well be regarded in one sense as equivalent to buying from the Government.

A reference to the partnership deed shows that the business was that of timber trading generally, and although there is a clause that the other partner Petley should supply the capital required this clause limits his total liability to Rupees 20,000, and the record shows that he had already put in considerably more than Rs. 100,000. Even if the partnership deed had been shown to the lender he might well have been under the impression that Petley had come to the end of the capital that he was bound to supply, and he had, in fact, already invested more than five times as much as he was bound to supply by the partnership deed.

I hold therefore that this must be regarded as a trading partnership which would make the signature of Earnshaw alone on the promissory note on behalf of the Timber Trading Company sufficient to bind the company itself.

I must add that I am astonished at this case having been fought to the extent that it has been fought by the receiver. This particular debt was mentioned in the accounts furnished by the receiver, and the partner Petley raised no objection to it. Earnshaw admits the debt, and has admitted it all along. One would have expected the receiver to admit the debt, and pay the appellants. He may have been advised by the Court to put the plaintiffs to strict proof of their claim, but having once defended the case unsuccessfully in the trial Court, I fail to understand how he as receiver could justify his action in filing the appeal which owing to the erroneous decision of the Additional District Judge, has merely put both parties to very considerably extra and unnecessary expense. The memorandum of appeal does not show whether he has the permission of the Court to file an appeal, and when the receiver's accounts come up for examination, the District Judge might well consider seriously the question of allowing the receiver his costs for what appears on its face to be an entirely unnecessary litigation.

For these reasons I set aside the decree of the lower appellate Court and restore that of the trial Court and give the plaintiffs a decree as prayed with costs in all Courts.

K.N./R.K. *Appeal allowed.*

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* A. I. R. 1932 Rangoon 120

BAGULEY, J.

Maung Chit Sai and *others*—Appellants.

v.

Maung Thein and *others*—Respondents.

Special Second Appeal No. 207 of 1931, Decided on 6th April 1932, from order of Dist. Judge, Myingyan, in Civil Misc. Appeal No. 5 of 1931, D/- 31st March 1931.

*** Stamp Act (1899), S. 2 (15) and Art. 45 —Suit for partition and making over of fraction of estate to plaintiff—Decree declaring plaintiff entitled to certain fraction being preliminary decree is not chargeable with stamp duty—Proceedings to effect division by metes and bounds are not execution proceedings—Partition, Decree, Executor.**

In a suit for partition and making over of certain fraction of the estate to the plaintiff, the decree stating that the plaintiff is entitled to a certain fraction does not divide the property in severalty and therefore is not required to be stamped under S. 2 (15) read with Sch. 1, Art. 45. To make the order chargeable with stamp duty it must effect an actual division by metes and bounds of the property. The decree which states that the plaintiff is entitled to a fraction is only a preliminary decree, and the suit remains pending until actual division has been effected. Proceedings instituted for dividing the property by metes and bounds cannot therefore be deemed to be execution proceedings: 29 *Bom.* 366 and 32 *Cal.* 483, *Rel. on*; 36 *All.* 137, *Doubted*; 12 *I. C.* 769 and 36 *All.* 461, *Ref.*; 35 *Mad.* 26, *Foll.* [P 122 C 2]

R. K. Roy—for Appellants.

Kale (*C. K. Tambe*) — for Respondents 2 to 13.

Judgment. — This appeal raises a point which appears to be entirely new in this Province and one which I have never before seen raised in my judicial experience extending to more than 22 years. In Civil Regular No. 5 of 1928 of the Subdivisional Court of Pagan, 14 plaintiffs sued 17 defendants for partition and recovery of an estate consisting of land and palm trees. The plaint, which is in Burmese, definitely asks that a certain fraction of the estate may be divided and made over to the plaintiffs :

The judgment ends up in the following way.

"**Order**:—There will be a decree for partition of the estate comprising the lands and toddy trees in suit giving the plaintiffs 75/112ths share of the whole estate. Costs of the plaintiffs shall be borne by defendants 8 to 14 . . . . . Partition will be made on application by the plaintiffs and by a duly appointed land records officer."

Some of the defendants appealed to the District Court, and the learned Judge dismissed the appeal but directed that each party should bear their own costs in both Courts. On second appeal to this Court it was held that as no point of law was raised the appeal must be dismissed with costs. After this order was passed by the High Court the successful plaintiffs applied in execution asking that the lands might be divided and that delivery of 75/112ths share of the same might be made over to them. They also asked for the costs awarded in the High Court. The defendants objected on the ground that the application for execution was not maintainable and they also raised certain other objections which are really objections to the decree itself and were in consequence not sustainable. In argument however it was clear that another point was raised, viz., that the decree could not be executed as it should be stamped as required by S. 2 (15), Stamp Act, read with Art. 45, Sch. 1. The executing Court held that the decree had got to be stamped, and as it had not been stamped it was not executable, so the application for execution was dismissed. On appeal by the decree-holders the learned District Judge held that the decree need not be stamped as it had not sufficiently defined the shares of the plaintiff and therefore did not effect an actual partition. He therefore set aside the order of the lower Court and said that the decree-holders would be allowed to execute the decree without being required to stamp it. He also allowed Rs. 75 pleader's fees.

In the present appeal the judgment-debtors claim that the Judge of the District Court erred in holding that the decree was not a final one; that he should have held that it could not be executed without being embossed on a stamp paper as required by the Stamp Act; and that in any event the amount of pleader's fees allowed was excessive. There seems to be no authority on this point in the rulings of this High Court, and the rulings of other High Courts appear somewhat scanty. For the appellants reliance is placed on *Balaram Budharam* v. *Ramakrishna* (1). This was a case in which a suit to recover possession of certain properties the Court ultimately held that the plaintiffs were entitled to a half-share in the house and land in dispute. The plaintiffs applied for execution of the decree, and the Court, acting under S. 396, Civil P. C. of 1882, corresponding to O. 26, Rr. 13 and 14, appointed a commissioner to make a partition and passed a final decree on the commissioner's report. It was held that the final decree based on the commissioner's report was a final order for effecting a partition passed by a civil Court and must therefore be stamped as an instrument of partition. Reliance was also placed on *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap* (2). This was an appeal arising out of a suit for partition. A suit was brought for partition and a preliminary decree was passed directing the appointment of commissioners for partition by metes and bounds. The commissioner submitted a report and the Court confirmed it. No final decree was then drawn up because no stamp paper was supplied for the decree to be embossed upon it. The point before the Court was whether the suit had come to an end, and it was argued that as no decree had been drawn up the suit must be regarded as still pending. At p. 491 occurs the passage:

"A decree to be operative must, under the Stamp Act, be engrossed on paper as required by that Act, and, until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated."

It will be seen therefore that in this case the Calcutta High Court took the same view as that taken by the Bombay High Court in the case just mentioned, viz. that a final decree for partition by metes and bounds required to be embossed on a stamp paper. A Full Bench reference made to the Allahabad High Court quoted as *Stamp Reference by the Board of Revenue* (3) was also referred to; but this does not help the case to any great extent because the question in that case was which decree, whether that of the original Court or the Court of

(1) [1905] 29 Bom. 366=7 Bom. L. R. 308.
(2) [1905] 32 Cal. 483.
(3) A.I.R. 1914 All. 177=36 All. 137=23 I.C. 98.

appeal required to be stamped. The argument of the Government Advocate is set out and the Court merely agreed with the argument put forward. The only passage in the argumeut which need be quoted is:

"It was the preliminary decree passed by any original civil Court in a partition case or the order for effecting a partition passed by any original Revenue Court that required to be stamped."

From this it is deduced that the preliminary decree must refer to the original decree defining the shares of the parties. The facts of this case are not fully set out and it is difficult to apply any general principle from the judgment. It seems to me however, that if that reference is intended to lay down that the present decree which merely says that the plaintiffs are entitled to a certain vulgar fraction of the estate comes within the definition of S. 2 (15), Stamp Act, I am with respect unable to agree with it, because it must be noted that the definition of an instrument of partition refers to a final order for effecting a partition. A preliminary order is not a final order and the main definition says:

"Instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severalty."

It seems to me that a decree stating that plaintiffs are entitled to a certain fraction does not divide the property in severalty. Reference was also made to an unofficially reported case, *T. Sheshachalam Pillai* v. *T. Alwar Chetty* (4), but the facts of this case are not given and the very short order which is quoted I confess I fail to understand.

On the other side another unofficially reported case, *Dwaraka* v. *Ram Pat* (5) has been referred to in which it was held that when a Court gave a plaintiff a decree for possession of a third share in the whole of the property but the decree was wholly silent as to the manner in which the partition was to be effected, the decree was only a preliminary decree for partition. The case which most nearly covers the present case seems to be *Thiruvengadathamiah* v. *Mungiah* (6) a ruling by a single Judge, in which it was held:

"To make an order chargeable with stamp duty under S. 2 (15), Stamp Act of 1899 it must effect an actual division of the property. An order declaring the rights of the parties and directing further proceedings for the ascertainment of the specific shares is not such an order."

This case was decided after the case last quoted had been decided and that case was brought to the notice of the learned Judge, and *Jotindra Mohan Tagore's* case (2) was also considered in this judgment as was *Balaram Budharam Marvadi's* case (1). I entirely agree with the whole of this judgment including a portion of it which shows that the executing Court in the present case has fallen into one error in entertaining the present application as an execution proceeding. In my opinion the decree which was passed in the original Court and confirmed in the appeal was no more than a preliminary decree. It does not do what the plaintiffs ask for, viz., separate and make over their shares to them. The head-note of the case *Thiruvengadathamiah* v. *Mungiah* (6) runs:

"Courts ought not to pass interim orders and direct proceedings in execution for the ascertainment of the specific shares. The final order should be passed after the specific shares have been ascertained."

In the present case the plaintiffs ask for ascertainment of their specific shares, division of those shares, and the making over of them. The making over of the shares would undoubtedly be an execution proceeding but I consider that all the proceedings up to the actual making over must be part of the original suit. This view is supported by *Jotindra Mohan Tagore's* case (2), where it was held that the original suit was pending until the Court had passed a decree dividing the property by metes and bounds and that it was this decree dividing the property by metes and bounds, or to use the expression used in the Stamp Act, "dividing the property in severalty," which has got to be embossed on stamp paper. I consider that the original Court was correct in proceeding with the ascertainment of the exact shares and their division by metes and bounds, although it fell into an error in regarding it as an execution proceeding.

So far as the amount of costs awarded is concerned an affidavit has been filed by the appellant's pleader saying that in the argument of the case neither he nor opponent exercised or required any special skill or labour. He may be speaking for himself but it seems to me that the argument of a case which is entirely new

(4) [1911] 12 I. C. 769.
(5) A. I. R. 1914 All. 272=36 All. 461=24 I.C. 235.
(6) [1912] 35 Mad. 26=12 I. C. 775.

so far as the record of decisions of this province is concerned should have required preparation and should have entailed a large amount of research even if that research may have been rewarded with somewhat small results, and I therefore consider that the pleader's fees allowed were warranted.

For these reasons I think the appeal must fail. It is accordingly dismissed with costs, and I allow advocate's fees Rs. 75. The trial Court however should not proceed with the division of the estate by way of execution. The learned Judge should take the decree already passed as a preliminary decree and should proceed to have the estate partitioned as contemplated in the original judgment of the trial Court, and after the duly appointed land record officer as commissioner has divided up the property by metes and bounds a final decree should be passed awarding the plaintiffs their portion of the entire estate by metes and bounds and this will be the final decree, which in accordance with the rulings laid down in the Bombay and the Calcutta authorities already quoted, will have to be engrossed on a stamp paper to bring the original suit to a final conclusion.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Rangoon 123
Full Bench

PAGE, C. J., AND DASS AND BA U, JJ.

The Rangoon Development Trust—Appellants.

v.

G. S. Behara and *Sons*—Respondents.

First Appeal No. 51 of 1932, Decided on 14th June 1932. against decision of High Court on its original side in Civil Regular No. 441 of 1931, D/- 18th February 1932.

(a) Rangoon Development Trust Act (4 of 1920), S. 69 (2) and Rr. 1 and 3 made under S. 95— Rr. 1 and 3 being inconsistent with S. 69 (2) are ultra vires.

Whereas both the owners and the agents of vessels are specifically made liable for the due return of passengers under S. 69 (3), it is the owners alone who are made responsible for the collection and payment of the tax under S. 69 (2). Hence it is the owners alone who are liable for the collection and payment of the tax. Rr. 1 and 3 framed under S. 95 (except in so far as it refers to the owners) are inconsistent with S. 69 (2) and therefore ultra vires. [P 126 C 1,2]

(b) Lower Burma Land and Revenue Act (2 of 1876), S. 45—Proceedings under S. 45 against those who are not defaulters are null and void.

Poceedings under S. 45 can be initiated against persons who are defaulters. Such proceedings instituted against persons who are not liable to pay the terminal tax and who are therefore not defaulters are wholly null and void. [P 125 C 2]

(c) Jurisdiction —Special tribunal—Condition precedent to vesting of jurisdiction not fulfilled—Proceedings are void.

Where it is provided that recourse may be had to a special form of procedure for the purpose of determining a dispute or recovering a valid demand upon the fulfilment of a condition precedent and the condition precedent to the vesting of jurisdiction in the special tribunal has not been fulfilled all the proceedings before that tribunal are null and void: 25 *Cal.* 833 (*P. C.*), *Foll.*; *Case law referred.* [P 127 C 2]

(d) Specific Relief Act (1877) S. 45—Order under S. 45 can be made if plaintiff has no other remedy.

An order under S. 45 is only to be made inter alia if the plaintiff has no other specific and adequate legal remedy: *A. I. R.* 1923 *P. C.* 138, *Ref.* [P 128 C 1]

(e) Civil P. C. (1908), O. 41, R. 33—Appellate Court can pass decree which it thinks fit and proper.

Plaintiffs claimed a declaration that the proceedings taken against them by the defendant were ultra vires and null and void and the trial Court passed an order of mandamus under S. 45, Specific Relief Act, against them instead of giving a declaratory decree claimed by the plaintiffs:

Held: that the appellate Court, if it was of opinion that no order of mandamus could be granted was entitled to pass a decree which it deemed proper viz. that the plaintiffs were entitled to a declaration that the proceedings taken against them by the appellants which have resulted in the writ of attachment were ultra vires and null and void and must be set aside. [P 128 C 2]

Young—for Appellants.

Cowasjee—for Respondents.

Page, C. J.—The appellants are a body corporate with a comman seal created by the Rangoon Development Trust Act, 4 of 1920. The corporation was brought into being because it was deemed expedient

"to make provision for the improvement and expansion of the City of Rangoon and for the development of certain areas in and around the said city with the object of securing proper sanitary conditions, amenity and convenience to the persons living in such areas."

As it was necessary that the corporation should possess funds to enable it to give effect to the purposes for which it was created provision was made for the acquisition of funds inter alia by the enactment of S. 69 of the Act which runs as follows:

"(1) Every male passenger liable to pay the full fare leaving Rangoon by sea-going vessel for a destination other than a port in Burma shall

pay in respect of each journey so made by him a tax of such amount not exceeding Rs. 2 as the Local Government may determine. (2) The said tax shall be collected by means of a surcharge on fares by the owner of the vessel in which the passengers are carried and shall be paid to the Board at such time as may be prescribed by rule made under S. 95 after making such deduction as the Local Government may approve, to meet any expenses incurred in connexion with the collection of the tax. (3) The owner or agent of the owner of every vessel referred to in sub-S. (1) shall prepare and deliver, or cause to be prepared or delivered, to the Chairman, each quarter, a return, in the form prescribed by rule made under S. 95, of all passengers carried by such vessel, by whom the tax imposed by that sub-section is payable; and shall subscribe, at the foot of such return a declaration of the truth thereof."

At the hearing of the appeal, Mr. Young on behalf of the appellants formally, properly and I think inevitably, abandoned the contention raised by the appellants in their defence to the suit that S. 106 (2), Government of India Act 1915, applied in the circumstances obtaining in the present case. He conceded that the appellants were not a revenue authority, and indeed it is obvious that they are not. They are a corporation created for certain specific purposes with defined rights, including the right of recovering from defaulters the sums which they are entitled to receive under S. 69 by means of a special form of procedure in execution.

Section 86 provides :

"(1) Any sum of money, or any tax, or fee due to or claimable by the Board may be recovered by the Board as if it was an arrear of land revenue. (2) The Local Government may, by notification, prescribe by whose orders and on whose application, such money, tax or fee may be recovered"

It is to be observed that under S. 86 (1) the appellants for the purpose of recovering the amount due to them from persons liable to pay the terminal tax are given the right to have recourse to the procedure prescribed for the recovery of arrears of land revenue as if the sum due to them under S. 69 (2) was an arrear of land revenue. The procedure under which the arrears of land revenue are recovered is set out in Part 4, (Lower) Burma Land and Revenue Act 1876, (Act 2 of 1876) :

"*Section* 43. Every sum payable under this act on account of any revenue tax, rate, fee, duty or composition, shall fall due on such date, and shall be payable at such place and to such person as the Local Government may from time to time by rule direct. S. 44. When any such sum has fallen due, and a written notice of demand for it has been served on any one of the persons liable for it or published in such manner as the Local Government may from time to time by rule direct, and ten days have elapsed from the service of publication of such notice without such sum having been paid, such sum shall be deemed to be an arrear, and every person liable for it shall be deemed to be a defaulter. S. 45. An arrear may be realized as if it were the amount of a decree for money passed against the defaulter in favour of any Revenue Officer whom the Local Government may from time to time appoint in this behalf by name or as holding any office."

"Proceedings with a view to the realization of such arrears may be instituted by such officer before any other Revenue Officer whom the Local Government may from time to time appoint by name or as holding any office: and, except in so far as the Local Government may otherwise by rule direct, such other officer may exercise all the powers conferred on, and shall conform to all rules of procedure prescribed for, a Court executing a decree by the Code of Civil Procedure."

Provision is made in S. 55 for appeals to officers appointed by the Local Government with a power of review by the Principal Commissioner, and the jurisdiction of the civil Courts is restricted as provided in S. 56. Now, by Municipal and Local Government Notification No. 27 of 27th January 1921, certain rules were passed by the Local Government pursuant to S. 95 of the Act. S. 95 provides :

"That the Local Government may make rules consistent with the provisions of this Act to provide for all or any of the following matters. . . (7) The collection of the duty and taxes imposed by Ss. 68 and 69 and the payment thereof to the Board."

Rule 1 runs as follows :

"The terminal tax on passengers shall be collected by means of a surcharge on fares by the owner or agent of the vessel by which the passengers are carried."

Rule 3 runs as follows :

"Every person collecting the terminal tax shall, within one month after the last day of March, June, September, December pay to the Chairman of the Board the amount of tax collected during the previous quarters after making such deduction therefrom as the Local Government authorize on account of expense incurred in connexion with the collection of the tax."

By a notification of 16th July 1931, the Governor in Council appointed certain officers to perform the duties prescribed under the various sections in Act 5 of 1920. In this notification, for the purposes of S. 45, Lower Burma Land Revenue Act the officers appointed were Akunwuns and the Land Officer and it was provided that appeals should lie to the Chairman from their orders and decisions. Now, purporting to act pursuant to S. 69 (2) and R. 1 made under S. 95, Act 5 of 1920 the appellants served a notice

of demand under S. 44, Act 2 of 1876 upon the respondents in respect of a sum of Rs. 9,508 which was claimed as being the proceeds of the collection of terminal tax by the respondents as managing agents of the Andhra Burma Steamship Company (1929) Ltd. The respondents having repudiated all liability in respect of this claim, the appellants purporting to act pursuant to the provisions of S. 45 and the section subsidiary thereto caused certain immovable property of the respondents to be attached in execution of the debt which they alleged that the respondents were liable to pay under the provisions of S. 69 (2), and R. 1, Act 5 of 1920.

On 14th September 1931, the respondents filed the present suit against the appellants in which they claimed (a) a declaration that the respondents have no right to claim payment of Rs. 9,508 or any sum from the plaintiffs in respect of the tax due from the Andhra Burma Steamship Company (1929) Ltd., under S. 60, Rangoon Development Trust Act; (b) an injunction restraining the defendants from proceeding with the sale of the plaintiffs' properties mentioned herein for realizing the above sum of Rs. 9,508 or any sum from the plaintiffs in any other way; (c) that the defendants do pay the costs of the suit; and (d) that such further or other relief may be granted as in the circumstances of the case this Hon'ble Court may deem fit and proper. The defendants filed a written statement in which they alleged that the sum of Rs. 9,508 was due and payable to the appellants by the respondents as being a debt due from the plaintiffs in the suit to the defendants as managing agents of the Andhra Burma Steamship Company (1929) Ltd. In para. 6 of the written statement the defendants specifically pleaded

"that the plaintiffs are liable under the Rangoon Development Trust Act and rules made thereunder to pay to the defendant Board the said Rs. 9,508 collected as terminal tax by them."

On the suit being called for hearing the learned advocate who then appeared on behalf of the appellants stated that the determination of the case depended mainly on points of law, the only fact that was necessary to prove other than those set out in the pleadings being that the sum in suit had been received by the plaintiffs in respect of the terminal tax payable by passengers in a vessel or vessels owned by the Andhra Burma Steamship Company (1929) Ltd. Thereupon a letter of 20th May 1931, written by Messrs. Cowasjee, Anklesaria & Jeejeebhoy on behalf of the plaintiffs to the Chairman of the Development Trust was tendered and accepted in evidence in which the plaintiffs admitted that the terminal tax was collected by them in their capacity as agents of the

"Andhra Burma Steamship Company (1929) Ltd., and the sum so collected together with the passenger money received have been credited in the accounts of the Andhra Burma Steamship Company (1929) Ltd., with their bankers."

The case accordingly, by consent of the parties, has been heard and determined in substance as upon a demurrer, the defendants contending upon the facts set out in the pleadings and in the letter of 20th May 1931, that the plaintiffs were liable for the sum for which the attachment had been made, and that if they were liable it was not open to the respondents in this Court to challenge the validity of the proceedings taken pursuant to the special procedure prescribed for the recovery of sums due from defaulters under S. 45 and the other relevant sections of Act 2 of 1876. The plaintiffs on the other hand contended upon the admitted facts and the pleadings that they were not liable to pay the terminal tax and that all the proceedings taken by the defendants culminating in the attachment of their property were ultra vires and void and that they were entitled to a declaration to that effect upon the ground that it was a condition precedent to the right to institute proceedings under S. 45 that the persons against whom the proceedings were taken were liable to pay the terminal tax and were defaulters within the meaning of S. 45. When the pleadings and the admitted facts are analyzed, the determination of the case in my opinion will be found to depend upon whether the word "owner" in S. 69 (2) means and includes also "the agent of the owner."

Now, under S. 69 (2) it is specifically laid down that the terminal tax shall be collected by the owner of the vessel in which the passengers are carried, and shall be paid to the Board at such time as may be prescribed by rules made under S. 95. Under S. 95 the Local Government may make rules consistent with the provisions of the Act and the defence of the appellants was based and

based solely, upon the alleged liability of the respondents under S. 69 (2) read with the rules made by the Local Government pursuant to the provisions of S. 95, Act 5 of 1920.

Now, if R. 1 and R. 3, are intra vires, inasmuch as it is common ground that the sum in dispute represents the terminal tax on passengers collected by the agents of the Andhra Burma Steamship Co. (1929) Ltd. the respondents upon whom a written notice of demand was served under S. 44 ex concessis are "persons liable" for the payment of the tax. But the rules made by the Local Government under S. 95, Act 5 of 1920 must be consistent with the Act, and the question therefore that falls to be determined is: Are Rr. 1 and 3 consistent with S. 69 (2) of Act 5 of 1920? My learned brother Cunliffe, J., who tried the case held that they were not. In the course of his judgment the learned Judge observed:

"I am of opinion that Rr. 1 and 3 are clearly ultra vires of the Act. They are ultra vires because the appropriate S. 69 on which they are based and with which, in law, they must be consistent, does not mention an agent as being liable to collect or pay the tax in question. The duty of collecting and remitting the tax is thrown upon the owner alone. It is true that sub-S. 3, S. 69, does mention the duty of an agent to make a return of all passengers, but in no other connexion does the Act impose a liability upon an agent, but only upon the owner of the steamship."

In so holding the learned trial Judge in my opinion placed the true construction upon S. 69 (2). It is to be observed that S. 69 (3) which prescribes the duty to make a return of the passengers carried by the vessel imposes the obligation to make the return upon both the owner and the agent of the vessel and failure duly to make the return renders the owner or the agent liable to a fine not exceeding Rs. 1,000 under S. 87 of the Act. What is the object of compelling the owner or agent to make a return under S. 69 (3)? Clearly as I apprehend the matter, in order that the trustees of the Development Trust may be in a position to ascertain the amount for which the person upon whom the obligation has been imposed to collect and pay the tax is liable to the trustees. Many owners of steamships which ply between Rangoon and other parts, of course, have agents in Rangoon, but there are also many owners of vessels here who have no agents acting for them, or who may have one agent at one time and another agent at another. It may be that shipping agents in Rangoon anticipated that hardship might accrue, and that it would be unfair to them if they were made personally liable for the terminal tax in respect of fares which they collected as agent for the benefit and on behalf of their principals. Many reasons could be advanced why the agents of the vessels should object to having the obligation imposed upon them of paying the terminal tax. Be that as it may, it is significant that whereas both the owners and the agents of vessels are specifically made liable for the due return of passengers under S. 69 (3), it is the owners alone who are made responsible for the collection and payment of the tax under S. 69 (2).

If the legislature had been minded to make the agents liable for the collection and the payment of the tax as well as their principals, nothing would have been easier than to frame S. 69 (2) in that sense; and the fact that the legislature has expressly refrained from including the agents in S. 69 (2) strongly supports the view which I take a matter of construction that under S. 69 (2) it is the owners alone who are liable for the collection and payment of the tax. If the construction that I put upon S. 69 (2) is correct in my opinion, it follows that R. 1 and R. 3 (except in so far as it refers to the owners) are ultra vires. This can be demonstrated, I think in the simplest way. I put to Mr. Young, who appeared on behalf of the appellants and who if I may be allowed to say so, presented an argument to the Court that was nonetheless cogent because it was succinct and candid, the following question: If an Act of Parliament says that AB shall pay a sum of money, and that rules may be made consistent with the Act, and a rule is made that CD shall pay the money, will that rule be consistent with the Act? The learned advocate adroitly attempted to meet that question by replying that the answer depended upon whether AB and CD were the same person, but it is conceded that this case was proceeded on the footing that the respondents and the Andhra Burma Steamship Co (1929) Ltd. are different entities, and when pressed for an answer the learned advocate perforce gave the only answer which common sense would

allow namely that such a rule would not be consistent with the Act.

Now S. 69 (2) provides that the owner of the vessel shall collect and pay the tax. The rule provides that the owner or the agent of the vessel shall collect and presumably pay the tax. In my opinion, it is manifest that R. 1 and R. 3 pro tanto are inconsistent with S. 69 (2) and ultra vires. It follows that the respondents, who are sued and sued only as agents of the Andhra Burma Steamship Co. (1929) Ltd., are not liable for the payment of the terminal tax.

Further and different questions would have arisen if the case of the appellants had been that the special tribunal set up under S. 45 had found as a fact that the respondents were the owners of the vessel in respect of which terminal tax was payable and as such liable to pay the tax as defaulters (see Ss. 55 and 56). But it must not be taken that I should hold that the appellants or the special tribunal could acquire an unchallengable right to institute execution proceedings under S. 45 against any person whom they selected for instance a local agent, a local doctor, or a local butcher, merely by holding ex cathedra that such a person was the owner of the vessel: see *Balkishen Das* v. *Simpson* (1) at p. 157 (of 25 *I. A.*) and *Harendra Kumar Roy* v. *Secretary of State* (2) at p. 1359 (of 55 *Cal.*). No such question however arises in the present case for it is common ground and an agreed fact that the respondents are not the owners and the appellants contend notwithstanding that fact that the respondents are liable to collect or pay the terminal tax under S. 69 and the rules made under S. 95 as agents for the owners and not otherwise. Now, under Ss. 44 and 45 of Act 2 of 1876, it is a condition precedent to the right of the appellants to have recourse to the special procedure prescribed in that Act that a sum has fallen due for the terminal tax:

"and a written notice of demand for it has been served on any one of the persons liable for it."

It is common ground that in this case the only notice of demand that was served was upon the respondents and if the respondents are not persons liable to pay the terminal tax it follows ex necessitate rei that there is no arrear due from them and that they are not defaulters. It is only when such conditions are fulfilled that S. 45 is brought into play. Now in my opinion, having regard to the facts and the pleadings upon which this case is to be determined, the conditions precedent to the adoption of the special procedure laid down and followed by the appellant in this suit have not been fulfilled. What is the result? In my opinion, the case is concluded against the appellants by well-settled authority. Where it is provided that recourse may be had to a special form of procedure for the purpose of determining a dispute or recovering a valid demand upon the fulfilment of a condition precedent and the condition precedent to the vesting of jurisdiction in the special tribunal has not been fulfilled, all the proceedings before that tribunal are null and void. *Balkishen Das* v. *Simpson* (1) *Mohamed Jan* v. *Ganga Bishun Singh* (3); *Harendra Kumar Roy* v. *Secretary of State* (2); *Mt. Saraswati Bahuria* v. *Surajnarayan Choudhury* (4) and *Krishna Chandra Bhowmick* v. *Pahna Dhana Bhandhar Co. Ltd.* (5). In *Balkishen Das* v. *Simpson* (1) Lord Watson in delivering the judgment of the Judicial Committee observed:

"Section 3 of Act 11 of 1859 provides that, in default of payment of revenue, within the time appointed for each district by the Board of Revenue, the 'estates in arrear' in those districts, 'shall be sold at public auction to the highest bidder.' The Act does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of S. 3 of Act 7 of 1878 (Bengal) are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty. The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived the sale will remain valid. But the chief and substantial objection upon which the appellants' plaint is based is that, at the time when their 5 annas share of the village Shahzadpur Anderkilla was sold, were no arrears of revenue due by them in respect of it. It does

(1) [1898] 25 Cal. 833=25 I. A. 151 (P. C.).
(2) A. I. R. 1928 Cal. 808=115 I. C. 45=55 Cal. 1355.
(3) [1911] 38 Cal. 537=38 I. A. 80=10 I. C. 272.
(4) A. I. R. 1931 P. C. 57=130 I. C. 676=10 Pat. 496 (P. C.).
(5) A. I. R. 1932 P. C. 61=136 I. C. 410=59 I. A. 68 (P. C.).

not appear to their Lordships to admit of dispute that the objection is founded in fact.

"The result is that the whole proceedings of the Collector with a view to a sale of the 5 annas share were beyond his jurisdiction and are not entitled to the protection given him by the Act in cases where sale is authorized, although it may be attended with some irregularity or illegality. Their Lordships are accordingly of opinion that it was rightly held by the subordinate Judge that he had jurisdiction to entertain the objection to the sale to which he gave effect."

In my opinion, the observations of Lord Watson in *Balkishendas's* case (1) apply to the facts of the present case. The respondents were not liable to pay the terminal tax and at the time when execution proceedings under S. 45 were instituted against them they were under no obligation to give effect to the notice of demand that was served upon them ; and having regard to the facts of the case, in my opinion, it does not admit of dispute that the objection of the respondents to the proceedings that have been initiated against them by the appellants is founded on fact. Now, to what relief are the plaintiff-respondents entitled ? The learned trial Judge came to the conclusion that the plaintiffs were entitled under S. 45, Specific Relief Act, to an order in the nature of a mandamus :

" ordering the trustees of the Rangoon Development Trust to collect the terminal tax in question according to the law laid down in S. 69 (2), Rangoon Development Trust Act, and in no other manner."

It must not be taken because this Court will not order a mandamus in the circumstances obtaining in the present case that I have any doubt that the learned Judge correctly held that an order in the nature of a mandamus would lie against the trustees of the Development Trust under S. 45, Specific Relief Act. If it were necessary so to hold I should agree with the view expressed by the learned trial Judge (*Alcock Ashdown & Co.* v. *Chief Revenue Authority Bombay* (6). But an order under S. 45, Specific Relief Act, is only to be made inter alia "if the plaintiff has no other specific and adequate legal remedy." Cunliffe, J., passed an order against the appellants under S. 45, Specific Relief Act, because he was of opinion that :

" the plaintiffs are not entitled to an injunction or bare declaration as they specifically claim."

With all respect to the learned trial Judge I am unable to that extent to agree with him. The learned trial Judge gave no reasons for holding that the relief claimed in the plaint could not be granted. No reference is made in the judgment and it does not appear that his Lordship's attention was called to the line of cases of which *Balkishendas* v. *Simpson* (1) is the leading authority. For the reasons that I have stated to my mind the case presents no difficulty and I am of opinion following the case of *Balkishen Das* v. *Simpson* (1) and the authorities in connexion with it, that the respondents are entitled to claim a declaration that the proceedings that have been taken against them by the appellants are ultra vires and null and void. If that be so the Court must give effect to the relief to which the plaintiffs are entitled, and is not to issue an order under S. 45, Specific Relief Act. It is true that the relief which this Court is prepared to afford to the respondents was not the relief granted by the trial Court, but the relief which the learned trial Judge granted was not the relief which the plaintiffs claimed, and under O 41, R. 33, Civil P. C., this Court is entitled to pass any decree or make any order which ought to have been passed or made as the case may require. In my opinion the proper decree to pass is that the respondents are entitled to a declaration that the proceedings taken against them by the appellants which have resulted in the writ of attachment are ultra vires and null and void, and must be set aside. There will be a further declaration that the writ of attachment is inoperative and it is ordered that the respondents' property be released from attachment. The decree of the trial Court pro tanto will be varied. As regards costs, although the form of the decree which is passed in favour of the plaintiffs by the Court differs from the form that was awarded by the trial Court, in my opinion, in substance, the appeal fails and must be dismissed with costs, Advocate's fee 15 gold mohurs.

K.N./R.K. *Appeal dismissed.*

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(6) A.I.R. 1923 P.C. 138=75 I.C. 392=50 I.A. 227=47 Bom. 742 (P.C.).

* A. I. R. 1932 Rangoon 129

BAGULEY, J.

Ganamanikam Ammal—Applicant.

v.

S. R. Samson—Opposite Party.

Civil Mis. Appln. No. 81 of 1931, Decided on 3rd May 1932, against order of High Court reported in *A. I. R.* 1930 *Rangoon* 337 (2) and Dist., Judge, Pynmanna in Civil Execution No. 19 of 1929.

*** Civil P. C. (1908), O. 47, R. 1—Mere fact that subsequent Special Bench of High Court has differed from ruling sought to be impugned is no ground for allowing review.**

A judgment cannot be reviewed under O. 47, R. 1 (1) on account of some mistake or an error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, as for instance, when the judgment is based on a precedent which has been modified by a subsequent decision. In the case of a decision that was right when it was made, an alteration in the law, the result of subsequent ruling by a High Court Bench cannot be deemed to be new and important matter within the meaning of O. 47, R. 1, nor can a review be entertained in such a case on the ground that the alteration in the law constitutes "other sufficient reason" within the meaning of that rule. The mere fact that a subsequent Special Bench has differed from the ruling that is sought to impugn is no ground for allowing review: *A.I.R.* 1924 *Pat.* 250, *Foll.*; *A.I.R.* 1928 *Bom.* 308, *Rel. on. Case law discussed.* [P 131 C 1]

Choudhury—for Applicant.

Chari—for Opposite Party.

Judgment.—This is an application for review. It arises out of the case *Samson* v. *Ganamanikam Ammal* (1) in which the facts are set out at length. There has been a previous application for review, which has been dismissed, and an application for leave to appeal to His Majesty in Council, which has also been dismissed. In this case my brother Maung Ba, J., who is now no longer a member of the Court, and myself held that a Court to which a decree had been transferred might refuse to execute such a decree which, on the face of it, was absolutely bad and a nullity as being passed by a Court which had no jurisdiction to deal with the matter which came before it.

When Mrs. Ammal had finally lost her rights under this decision, another member of the family, by name S. A. Nathan, who was entitled to costs under the same decree applied for execution against the judgment-debtor. His application was of course rejected, but he appealed, and the case ultimately came before another Bench of this Court which doubted the correctness of our previous ruling. The matter was accordingly referred to a Special Bench of five Judges, and the result is published as *Nathan* v. *Samson* (2) in which it is held:

"A subsisting decree passed by a duly constituted Court, that has not been set aside in proceedings by way of appeal, revision, review or otherwise by due process of law, is not to be treated as a mere nullity, but is binding and conclusive against the parties thereto duly impleaded in the suit. A Court to which such a decree has been transferred for execution must take the decree as it stands, and is not entitled to question the validity of the decree upon the ground that the decretal Court had no jurisdiction, territorial, personal or pecuniary, to pass it."

The ruling in *Samson* v. *Ammal* (1), previously mentioned, was accordingly overruled. It having been overruled, the present application has come before me, as the sole remaining member of the Bench, asking me to review the judgment passed in that case and bring it into line with the new ruling of *Nathan* v. *Samson* (2).

It was admitted that no authority in which the action that I am now asked to take was taken by any High Court could be referred to, but I was asked, in the event of no review lying, to alter the order as a matter of justice, because, as things now stand, Nathan can get his rights under this decree, whereas Mrs. Ammal cannot. A number of cases were put forward by the applicant, which are all more or less beside the point. *Naraindas* v. *Chirunji Lal* (3) merely states, in the course of dealing with a very different matter, that the words, "for any other sufficient reason in O. 47, R. 1," are exceedingly wide. This may be correct, but there is the Privy Council authority for holding that they are not as wide as the corresponding words of the older Civil Procedure Codes. *Mahabir Proshad* v. *Chandra Sekhar Sahi* (4) is merely an example of a case in which the Court had altered its decree. The facts are totally different to the facts in the present case.

The same would apply to *Jai Berham* v. *Kedar Nath* (5), *Nanda Kishore Singh*

(1) A. I. R. 1930 Rang. 337=129 I. C. 519=8 Rang. 544.

(2) A. I. R. 1931 Rang. 252=135 I. C. 65=9 Rang. 480 (F.B.).

(3) A. I. R. 1925 All. 364=86 I. C. 168=47 All. 361.

(4) [1915] 28 I.C. 304.

(5) A.I.R. 1922 P. C. 269=69 I.C. 278=49 I.A. 351=2 Pat. 10 (P.C.).

v. *Ram Golam Sahu* (6), is entirely beside the point. *Waghele Raisangji Shivsangji* v. *Masludin* (7), is a peculiar case. A suit was filed to recover the amount of assessment paid on certain land. The High Court passed a decree in plaintiff's favour. Directly afterwards the plaintiffs filed a second suit on the same cause of action for the assessment paid on the same lands for subsequent years, and on the strength of the High Court's decree in the former suit a decree was passed against the defendant. The defendant however had in the meanwhile appealed to His Majesty in Council and in that appeal was successful. It was held that the decree in the second case would be reviewed in view of the subsequent decree passed by His Majesty in Council upsetting the first decree of the High Court. This is a judgment of a Bench of the Bombay High Court, and I doubt very much whether, in view of later rulings of the Privy Council, it can be regarded as good law. An unofficially reported case, *Pittam Singh* v. *Hukum Singh* (8), has been mentioned before me, in which two connected appeals, both on the same point, were filed by opposite parties. One went before a Bench and was dismissed summarily ; the other on the same point was subsequently dealt with by a single Judge and decided in the opposite sense. The attention of the learned Judge was not drawn to the previous decision of the Bench, but afterwards when it came to the notice of the appellants the Judge reviewed his order. In this case clearly the Bench decision was binding on the single Judge, had he known of it at the time that he passed his order, and it seems to me that it might be regarded as being an error apparent on the face of the record.

The last case to which I was referred was *Brindaban Chandra* v. *Damodor Prosad* (9). This was a case in which a Bench had decided an appeal believing that their judgment was based on a certain Privy Council ruling. An application for review was presented, but it could not be heard for a time owing to the absence of one of the judges. It came up for hearing on 20th November, but was adjourned, and finally, it came up for decision on 1st February. In the meantime their Lordships of the Privy Council had delivered another judgment to show that the original interpretation placed upon the first judgment by the Bench was wrong, and under these circumstances, the Bench allowed a review of their own order. The Court stated that the circumstances in which they had to deal with the application were altogether unusual and with respect, it seems to me that this ruling which has not been officially reported is not correct.

Reference was made in the course of the judgment to the Privy Council ruling in the case of *Chhajju Ram* v. *Neki* (10), but the portion of that judgment which, in my opinion, shows that the Calcutta judgment under discussion is wrong has not been referred to. Turning to the other side now, it seems to me that the respondent's case that this Court cannot alter its decision is indisputable. There is one Privy Council case, *K. Venkata Subbamma Rao* v. *Venkatarama Rao* (11). This is a Privy Council case in which it is laid down that :

> "the High Court has no power to alter its own decree, except under the provisions of either S. 206, or S. 623, Civil P. C. The ground of review must have been existing at the time of the decree, S. 623 not authorizing review of a decree, which was right, on the happening of a subsequent event."

In the present case in the judgment of which review is sought a certain ruling of the Calcutta High Court by a Bench of four judges was followed by us. There was no authority of this Court binding us, and so far as I am aware, there is no Privy Council ruling on the point. We were at liberty to follow a Special Bench decision of the Calcutta High Court if we considered it correct, and we did consider it correct. The fact that there is now a Special Bench ruling of this High Court in the contrary sense, though it would bind any decision of this Court in future on the point, does not make a decision passed before the Special Bench ruling not "right" within the meaning of this head-note. Again as regards the power of a Court to review its own decision on the ground that it is incorrect, there is the ruling of the Privy Council in *Chhajju Ram* v. *Neki* (10). In this case a Bench

(6) [1913] 40 Cal. 955=18 I.C. 207.
(7) [1889] 13 Bom. 330.
(8) A. I. R. 1930 All. 621=131 I. C. 519.
(9) A. I. R. 1925 Cal. 304=85 I. C. 65.
(10) A. I. R. 1922 P. C. 112=72 I. C. 566=49 I. A. 144=3 Lah. 127 (P.C.).
(11) [1901] 24 Mad. 1=27 I. A. 197=7 Sar. 678 (P.C.).

of the Chief Court of the Punjab came to a certain decision. An application for review was made, and although certain of the grounds were rejected, the Bench hearing the application,

"proceeded to deal on the merits with the judgment brought before them under the Code for review, treating the view of the law taken by the previous Division Bench as matter that was open to them as if on an appeal."

In the end the Bench came to the conclusion that the previous decision had proceeded upon an incorrect exposition of the law and allowed the application for review. Their Lordships of the Privy Council held that O. 47, R. 1, must be interpreted in a way which excludes from the power of review the course taken by the Bench of the Chief Court of the Punjab. Clearly, in the view of the Privy Council a mere incorrect exposition of the law is not in itself a ground for review. Of course, if the error of law was a blunder, an error apparent on the face of the record, such as, for instance, the obvious misreading of an authority which it was sought to follow, the matter would be different. This ruling of *Chhajju Ram* v. *Neki* (10) was dealt with by a Bench of the Patna High Court in *Garabini Kamarin* v. *Suraja Narain Singh* (12), the head-note of which is to the following effect :

"A judgment cannot be reviewed under O. 47, R. 1 (1) on account of some mistake or an error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, as for instance, when the judgment is based on a precedent which has been modified by a subsequent decision."

This Patna ruling is direct authority which, if followed, would prevent me from allowing this application for revision. The principle that a subsequent matter cannot give ground for review was followed in *Gyanaji Pomaji* v. *Ningappa Marbasappa* (13) the head-note of which is :

"In the case of a decision that was right when it was made, an alteration in the law, the result of subsequent legislation, cannot be deemed to be new and important matter within the meaning of O. 47, R. 1, Civil P. C., 1903, nor can a review be entertained in such a case on the ground that the alteration in the law constitutes "other sufficient reason" within the meaning of that rule."

In this case the two rulings already mentioned, *K. Venkata Subbamma Rao* v. *V. Venkatarama Rao* (11) and *Chhajju Ram* v. *Neki* (10) were relied upon, and it is also worthy of note that alteration in the law in this instance was intended to have retrospective effect, which makes the decision more forcible. Following these rulings, I hold that the mere fact that a subsequent Special Bench has differred from the ruling it is now sought to impugn is no ground for allowing review. Quoting from the Special Bench ruling, *interest rei publicae ut sit finis litium*, and if the overruling of a previous ruling were to give good grounds for reviewing that ruling, there would be no end to litigation. For instance recently *Ma Paing* v. *Mg Shwe Hpau* (14), which formed the basis of numerous decisions in the Courts of this Province has been overruled by the case of *N. A. V. R. Chettiar Firm* v. *Maung Than Daing* (15). If I allowed the present application for review then every case decided on the leading case of *Ma Paing* (14) would be liable to be reopened in review, and in the same way the publication of the decision of the Privy Council in *Ariff* v. *Jadunath Majumdar* (16) which upset or modified the whole theory of equitable defences, which has been built up in the whole of India would create enough work for most of the civil Judges to be placed on special duty to deal with the applications for review that would arise.

As a last resource I am asked to alter this ruling under the extraordinary powers of the Court. It is pressed upon me that it is manifestly unjust that Nathan should be allowed to get his share undar the decree and that Mrs. Ammal should not. This argument does not impress me much. There seems to be injustice certainly, but the injustice appears to be directed not against Mrs. Ammal but against the unfortunate Samson. At the hearing of the case we decided that the decree was passed without jurisdiction and .in the referring order in *Nathan* v. *Samson* (2) at p. 485 (of 9 *Rang.*) it is shown that another Bench also agreed that the decree was passed by a Court which had no jurisdiction. It may unfortunately be necessary that the Pyinmana Court should

(12) A. I. R. 1924 Pat. 250=75 I. C. 177=3 Pat. 134.
(13) A. I. R. 1928 Bom. 308=111 I. C. 633=52 Bom. 434.
(14) A. I. R. 1927 Rang. 209=103 I. C. 568=5 Rang. 296 (F.B.).
(15) A. I. R. 1931 Rang. 262=134 I. C. 1252=9 Rang. 524 (S.B.).
(16) A. I. R. 1931 P. C. 79=131 I. C. 762=58 I. A. 91=58 Cal. 1235 (P.C.).

execute this decree but obviously the less it is executed the less injustice there will be. I do not consider it necessary in the interests of justice that Mrs. Ammal should be allowed to execute this decree. For these reasons I dismiss the application for review with costs, advocate's fee, five gold mohurs.

B.V./R.K. *Application dismissed.*

** A. I R. 1932 Rangoon 132

PAGE, C. J. AND MYA BU, J.

Johnson D. Po Min and *another*—Appellants.

v.

U Ogh and *others*—Respondents.

First Appeal No 31 of 1931, Decided on 25th April 1932, against decree of Dist. Judge, Tharrawaddy, in Civil Regular Suit No. 5 of 1930, D/- 15-12-1930.

(a) Civil P. C. (1908), S. 92 (c)—Words "vesting property in a new trustee" refer to cases where new trustee is appointed.

The words "vesting property in a new trustee" refer to cases where a new trustee is appointed and are not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it : *A. I. R* 1925 *All.* 683 and 40 *Mad.* 212 (*F. B.*), *Rel. on.* [P 136 C 1]

**** (b) Civil P. C. (1908), S. 92—Suit under S. 92—Plaintiffs are not entitled to claim against strangers to trust either declaration of title or possession or any other relief—Strangers are not necessary parties to such suit and if plaintiffs have wrongly impleaded them they cannot pray in aid provisions of Civil P. C. (1908), O. 1, R. 3 or R. 10.**

The plaintiffs in a suit framed under S. 92 are not entitled to claim against strangers to the trust either a declaration of title or possession or any other relief; and a suit under S. 92 in which a claim for relief against strangers to the trust is added to a claim for relief which the Court is competent to decree in such a suit entails a clear misjoinder both of parties and causes of action and unless the plaint is amended the suit cannot be sustained S. 92 is enacted to provide means for obtaining the directions of the Court in connexion with matters relating to the administration of the trust and for exposing the malpractices of defaulting of fraudulent trustees and issues relating to the rights of third parties are outside the scope of a suit brought under S. 92. The strangers to the trust, consequently are not proper or necessary parties to a suit under S. 92 and in such a suit the plaintiffs who have wrongly impleaded third parties cannot pray in aid the provisions of O. 1, R. 3 or O. 1, R. 10. 35 *Bom.* 470 ; *A I. R.* 1915 *Mad.* 517 ; 42 *Cal.* 1135 and *A. I. R.* 1927 *Mad.* 710, *not Foll.*; 20 *All.* 46 ; 8 *Bom.* 365; 2 *C. L. J* 431; 2 *C. L. J.* 460 ; 33 *Cal.* 789 ; 35 *All.* 459 ; *A. I. R.* 1914 *Cal.* 356; 47 *I. C.* 111 and *A.I.R.* 1924 *Lah.* 131, *Rel on. Other case law referred.* [P 135 C 1, 2]

(c) Civil P. C. (1908), S. 92—Abuse of trust confers no rights on party abusing it.

An abuse of trust can confer no rights on the party abusing it nor on those who claim any privity with him : *Taylor* v. *Phemer*, 3 *M.* & *S.* 562, *Rel on.* [P 133 C 2]

E. W. Lambert—for Appellants.

N. N. Burjorjee and *B. C. Guha*—for Respondents.

Page, C. J.—On 4th September 1903, a grant of the land in suit situate in Letpadan circle was issued by Government to respondent 2, Maung San Nyun for religious purposes, to wit, upon trust for a Christian chapel to be erected thereon. It was a condition of the grant that the land and premises might be resumed at any time by Government if the same were used for any purpose other than the specified purpose for which the grant was made.

The learned District Judge has found and there is evidence to support the finding, that San Nyun was a follower of one Po Paik San, a Karen Christian, and a fervent evangelist ; and that Po Paik San collected money from various sources with which a Karen Baptist chapel was erected upon the land in suit. The plaintiffs who are members of the Karen Baptist Christian Society, alleged that the chapel was built out of funds belonging to that society, while respondents 6 to 8 alleged that the expense incurred in erecting the chapel was defrayed out of the funds of the Po Paik San's Karen Baptist Self-supporting Mission of Letpadan. The learned District Judge has further held, and again there is evidence to support the finding, that the chapel was erected out of funds collected by Po Paik San as best he could, and not exclusively from the funds of either of the abovementioned societies. He also held, and, in my opinion, correctly held, that all Karen Christians who are Baptists are beneficiaries under the trust, and therefore that the plaintiffs are entitled as being persons interested in the trust, to file a suit under S. 92, Civil P. C., (5 of 1908). In the present suit which purports to have been brought solely under S. 92 of the Code with the sanction of the Government Advocate, the plaintiffs claim :

" (1)That defendants 1 and 2 be removed from the position of trustees of the trust property, or otherwise declared to be no longer trustees of the same ; (2) that plaintiffs 1 and 2 or any other person or persons approved by this Hon'ble Court being members of the Karen Baptist Christian Society be appointed trustees in place of defendants 1 and 2 ; (3) that the trust property be vested in the trustee or trustees so appointed ;

(4) a declaration that the mortgage decree obtained by defendant 5 against the trust property is of no effect and does not bind the said trust property, and that the trust property is the property of the Karen Baptist Christian Society; and (5) any further and other relief as this Hon'ble Court may deem fit and proper having regard to the nature of the trust and the incidentals relating thereto."

Defendants-respondents 1 to 4 did not file an appearance, or defend the suit. Defendants-respondents 6 to 8 supported the plaintiffs in their attack upon defendants 1, 2 and 5 and the documents impugned in the plaint, but claimed that the new trustees should be members of the Society to which they belonged and the property in suit vested in the trustees so appointed. Defendant-respondent 5 is the Administrator General of Burma, and represents the estate of a mortgagee to whom respondent 1 mortgaged the property in suit. The mortgagee obtained a preliminary mortgage decree in Civil Regular No. 25 of 1927 of the District Court of Tharrawaddy, and the Administrator-General in the present suit pleaded that the decree passed in the mortgage suit was binding on the property, and further that

"this defendant states that the plaintiffs cannot get a declaration in this suit that the mortgage decree passed in Civil Regular No. 27 of 1927 of this Hon'ble Court does not bind the property, as such relief is not within the scope of S. 92, Civil P. C."

On 16th August 1920, respondent 2 San Nyun by a registered deed of transfer assigned the property in suit absolutely and without consideration to respondent 1, U Ogh; and respondent 1 for himself and his children on 14th July 1921 by a registered instrument mortgaged the property in suit, together with other property, to Aga Mohamed Ally Khorasanee, whose estate is now represented by respondent 5 for Rs. 40,000; and by another registered instrument on 25th October 1921 again mortgaged the said properties to Khorasanee for a further sum of Rs. 5,000. It is plain from the terms of the mortgage deeds and an undisputed fact that the mortgagee had notice at all material times that the property in suit was trust property. As between the appellants and respondents 6 to 8 on the one hand and respondents 1 and 2 on the other, according to well-settled principles of law, it cannot be doubted that the transfer from respondent 2 to respondent 1 was invalid, and amounted to a breach of trust. It must be held also that, inasmuch as respondent 1 acquired no right or interest in the property in suit under the transfer by respondent 2 to him, the mortgages of the property to Khorasanee, who entered into the transactions with full notice that the property in suit was trust property prima facie passed no right or title to the mortgagee. Moreover, respondent 1 never became in law a trustee, and at all material times respondent 2 was, and at the date when the suit was filed remained, the sole trustee of the property in suit. It is unnecessary to cite authorities in support of the view that I take of these transactions. It is enough to repeat what Lord Ellenborough laid down in *Taylor* v. *Plumer* (1), at 574, that

"an abuse of trust can confer no rights on the party abusing it, nor on those who claim any privity with him."

Before considering the form of relief to which the plaintiffs are entitled as against respondents 1 and 2 however it will be convenient to determine whether the plaintiffs are entitled to claim any relief in the present suit against respondent 5 who is a stranger to the trust, and against whom a declaration is sought:

"that the mortgage decree obtained by defendant 5 against the trust property is of no effect, and does not bind the said trust property, and that the trust property is the property of the Karen Baptist Christian Society."

Section 92 (1) is in the following terms:

"In the case of any alleged breach of any express or constructive trust created for the public purpose of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree (a) removing any trustee, (b) appointing a new trustee, (c) vesting any property in a trustee, (d) directing accounts and inquiries, (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust, (f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged, (g) settling a scheme, or (h) granting such further or other relief as the nature of the case may require. (2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-S. (1) shall be instituted in respect of any such trust as is therein referred to except in-

(1) 3 M & S. 562=2 Rose 457=16 R. R. 361.

conformity with the provisions of that sub section."

Now S. 92 is found in part 5 of the Code styled "special proceedings" and the object for which this section was enacted was twofold: (1) to provide proceedings of a special nature for the purpose of determining questions that relate to the administration of public religious or charitable trusts; and (2) to prevent multifarious and vexatious suits being filed by irresponsible persons against the trustees whose duty it is to administer such trusts: see *ex parte Skinner* (2) at p. 456.

Bearing in mind the form of relief which it is competent for the Court to decree in a suit under S. 92 it appears to me plain that S. 92 was intended to apply only to questions relating to what I may call "the indoor management" of the trust, and that the legislature did not intend that the right or interest claimed by a stranger in the trust property should be determined in a suit framed under that section. The Court however is concerned, not with what was intended, but what was enacted by the legislature, and three clear cut and irreconcilable views have been expressed by the Courts in India as to the meaning and effect of S. 92. In some cases it has been held, having regard to Cl. (h) of S. 92 (1) that

"all suits founded upon any breach of a trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of S. 92, Civil P. C.,"

upon the ground that

"the words 'such further or other relief as the nature of the case may require' must be taken, not in connexion with the previous Cls. (a) to (g), but in connexion with the nature of the suit, viz., any relief other than (a) and (g) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case." *Abdur Rahim* v. *Mohamed Barkat Ali* (3), *Sajedur Raja* v. *Baidyanath Deb* (4), *Sajedur Raja Chowdhury* v. *Gour Mohan Das* (5) and *C. Prasanna Venkatachalla Reddiar* v. *The Collector of Trichinopoly* (6).

This view was negatived by the Privy Council in *Abdur Rahim* v. *Mohamad Barkat Ali* (3) and it must now be taken as settled that such a construction is not correct. A second view of the meaning and effect of the section which may be called "the Allahabad construction" is set out in the judgment of Stanley, C. J., in *Gazaffur Hussain Khan* v. *Yawar Hussain* (7). His Lordship observed,

"It may be that the Court has no power in a suit brought under S. 539 to set aside a deed whereby endowed property has been mortgaged or transferred to a stranger; but I see no good reason for holding that under that section the Court cannot, as it did in this case, determine of what the trust properties consisted or find that particular alienations of it could not be maintained, provided all proper parties are represented before it; if transferees or mortgagees who have been impleaded in a suit instituted under S. 539 do not accept the findings of the Court in that suit, it may be necessary for the trustee appointed by the Court to manage the trust property to institute a suit for recovery of possession."

And Richards, C. J., in *Manohari* v. *Muhammed Ismail* (8), held that

"this case is a direct authority that persons who dispute the existence of the trust can be made parties to a suit under S. 539, and, of course, it necessarily follows that they will be bound by the decision arrived at in the suit."

In the *Collector of Poona* v. *Bai Chanchalbai* (9), Chandavarkar, J., observed;

"It does not follow from the decisions on which the Courts below have relied, that to a suit of this character, where a breach of trust is complained of, and where the alienee denies that the property is a public trust for religious purposes, he is not a proper and necessary party, because relief cannot be given as against him by way of a decree in ejectment. Though such a decree does not fall within the reliefs which the Court can grant under S. 539 it has jurisdiction to determine, for the purpose of the reliefs, which can be granted, whether the property is a public trust for a religious purpose, if that question is in controversy. . . . . The question cannot be properly tried unless he is before the Court. He is therefore a necessary party, though possession cannot be recovered from him in this suit, if the issues in question are found against him:" see also *Sajedur Raja* v. *Gour Mohan Das* (5).

And in *Ramrup Goshain* v. *Ramdhars Bhagat* (10) at p. 774 (of 47 *All.*) Boys, J. added:

"It is clearly necessary for the purposes of an inquiry into the propriety of transfers by the trustee that the Court should have before it the transferees themselves.

"To consider then the first portion of the relief (d), which prays for a declaration that the alienations made by the trustee, whose removal is prayed for in relief (b), may be declared void.

(2) 2 Mer. 453=1 Wils 14.
(3) A. I. R. 1928 P. C. 16=108 I. C. 361=55 I. A. 96=55 Cal. 519 (P. C.).
(4) [1893] 20 Cal. 397.
(5) [1897] 24 Cal. 418.
(6) [1915] 38 Mad. 1064=33 I. C. 45.
(7) [1906] 28 All. 112=2 A. L. J. 591=(1906) A. W. N. 208.
(8) [1911] 33 All. 752=11 I. C. 218.
(9) [1911] 35 Bom. 470=12 I. C. 30.
(10) A. I. R. 1925 All. 683=89 I. C. 40=47 All. 770.

As the removal of a trustee is to be based on breach of trust clearly the acts of the trustee must be examined, and if those acts prove to be breaches of the trustees' duty, clearly the Court must say so, and this is equivalent to declaring the acts to be invalid and the alienations to be void."

With all respect I am of opinion, that this lame and impotent construction cannot be accepted. If the alienees from defaulting trustees are necessary and proper parties to a suit in which it is sought to remove a trustee upon the ground that the transfer amounted to a breach of trust, and in a suit under S. 92 a declaration that the alienation is void is binding upon the alienees and res judicata as against them, it would seem to follow as a necessary and reasonable corollary that the plaintiffs ought to be permitted in the same suit to perfect their title by a decree for possession against the alienees. Why halt half-way along the road? Why limit the relief to which the plaintiffs are entitled against the alienees to a mere declaration? Surely the right to a declaration of title as against the alienees and the right to recover possession of the trust property from the alienees are on the same footing, and must stand or fall together. See the observations of Wallis, Offg. C. J., in *Assam Raghavulu Chetty* v. *P. Sitamma* (11), and of Seshagiri Ayyar, J., in *Venkatarama Aiyangar* v. *Kasthuriranga Ayyengar* (12), in which case Seshagiri Ayyar, J., resiled from the opinion that he had previously expressed in *Assam Raghavalu Chetty* v. *P. Sitamma* (11) at p. 268 (of 27 *M. L. J.*).

In my opinion however the plaintiffs in a suit framed under S. 92 are not entitled to claim against strangers to the trust either a declaration of title or possession or any other relief, and a suit under S. 92, in which a claim for relief against strangers to the trust is added to a claim for relief which the Court is competent to decree in such a suit entails a clear misjoinder both of parties and of causes of action, and unless the plaint is amended the suit cannot be sustained. As I apprehend the scope and effect of S. 92, it was enacted to provide means for obtaining the directions of the Court in connexion with matters relating to the administration of the trust, and for exposing the malpractices of defaulting or fraudulent trustees, and issues relating to the rights of third parties are outside the scope of a suit brought under this section of the Code. The construction that I put upon the section embodies the third view of the meaning and effect of S. 92, to which I subscribe. In *Abdur Rahim* v. *Mohamed Barkat* (3) Lord Sinha, in delivering the judgment of the Privy Council, observed:

"Their Lordships see no reason to consider that S. 92 was intended to enlarge the scope of S. 539 by the addition of any relief or remedy against third parties, i. e., strangers to the trust. They are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under S. 539, but the general current of decisions was to the effect that, 'even if such third parties could properly be made parties under S. 539, no relief could be granted as against them."

I go further and hold, not only that no relief can be granted against strangers to the trust in a suit under S. 92, but also that such persons are not necessary or proper parties to a suit framed under that section: *Huseni Begum* v. *The Collector of Moradabad* (13), *Lakshmandas Parashram* v. *Ganpatrav Krishna* (14), *Budh Singh* v. *Nirabaran Roy* (15), *Shailajanandha Dut* v. *Umeshanunda Dut* (16); *Budree Das* v. *Chooni Lal* (17), *Muhammed Abdul* v. *Ahmad Said* (18), *Venkatarama Aiyengar* v. *Kasthuriranga Ayyengar* (12); *Ayatunnessa Bibi* v. *Kulfu Khalifa* (19); *Munshi Gholam* v. *Ali Hafiz* (20); and *Ganga Puri* v. *Mohanlal* (21).

No doubt it not only infrequently happens that in a suit under S. 92 the ground upon which it is sought to remove a trustee is that he has been guilty of a breach of trust by improperly alienating property belonging to the trust, and in a suit of that nature it will be necessary for the Court to determine whether the alienation amounted to a breach of trust; but because a trustee has committed a breach of trust by alienating the trust property it does not follow as between

(11) A. I. R. 1915 Mad. 517=25 I. C. 794.
(12) [1917] 40 Mad. 212=38 I. C. 73 (F.B.).
(13) [1897] 20 All. 46=(1897) A. W. N. 210.
(14) [1884] 8 Bom. 365.
(15) [1905] 2 C. L. J. 431.
(16) [1905] 2 C. L. J. 460.
(17) [1906] 33 Cal. 789=10 C. W. N. 581.
(18) [1913] 35 All. 459=20 I. C. 37.
(19) A. I. R. 1914 Cal. 356=22 I. C. 677=41 Cal. 749.
(20) [1918] 47 I. C. 111.
(21) A. I. R. 1924 Lah. 131=73 I. C. 645=4 Lah. 295.

the trustees and the cestuis que trust on the one hand and the alienees on the other that the transfer is invalid. The validity of alienation as between the trust estate and the transferees from defaulting trustees may, and often does, depend upon questions of law and fact that would not be relevant to an issue as to whether the trustee who effected the transfer and thereby committed a breach of trust ought to be removed from his office. Further, if it is contended that, in order effectively to vest the property in a trustee under S. 92 it is essential that it should be declared in the presence of an alienee of the property that the transfer to him is void as against the trust, and that he should be ordered to deliver up possession of the trust property, the answer is twofold: (1) that the words in Cl. (c) "vesting any property in a trustee," in my opinion, refer to cases where a new trustee is appointed, and are not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it: *Ramrup Goshain* v. *Ramdhari Bhagat* (10); *Venkatarama* v. *Kasthuriranga Ayyengar* (12); *Sajedur Raja* v. *Baidyanath Deb* (4); that as pointed out by Mookerjee, J., in *Budh Singh Dudhuria* v. *Nirabaran Roy* (15),

"till the trustee has been removed the trust estate is vested in him, and he alone is competent to institute a suit for possession; when he has been removed by a decree of Court and the estate vested in a new trustee, such new trustee may be in a position to maintain an action in ejectment, but his cause of action manifestly arises only when the estate becomes vested in him. Besides, the new trustee need not necessarily be one of the plaintiffs; but even if he were, that would not improve his position, for it is an elementary principle that at the time of the institution of the suit the plaintiff must have a subsisting cause of action, and he cannot take advantage of events that have happened subsequently, least of all, of the decree in the case, to complete his cause of action, and justify a decree for ejectment in his favour. It is conceivable that a suit under S. 539, Civil P. C., may be instituted by the Advocate-General, and I am unable to see upon what principle he may be supposed to have at the time of the institution of the suit a cause of action sufficient to support a decree in his favour for the ejectment of a person who sets up a title hostile to the trust."

The opinion expressed by Greaves, J., in *Ali Hafiz* v. *Abdur Rahman* (22) [see also the *Collector of Poona* v. *Bai Chanchalbai* (9)] that an alienee of trust property might

"be declared to be a trustee of the trust property and be directed to convey the property"

appears to me, with all due deference, to be altogether too extravagant a notion, and cannot be accepted.

"A dacoit might be that, and the provision was surely never intended to protect him from being sued too readily:" per Carnduff, J., in *Ayatunnessa Bibi* v. *Kulfu Khalifa* (19); see *Budree Das Mukim* v. *Chooni Lal* (20).

Notwithstanding any observations to the contrary that may be found in the judgments in *The Collector of Poona* v. *Bai Chanchalbai* (9), *Assam Raghavulu Chetty* v. *Pellati Sitamma* (11), *Ali Hafiz* v. *Abdur Rahman* (22) and *C. N. Evalappa Mudaliar* v. *T. Balakrishnammal* (23), in my opinion, the strangers to the trust are not proper or necessary parties to a suit under S. 92, and in such a suit the plaintiffs who have wrongly impleaded third parties cannot pray in aid the provisions of O. 1, R. 3 or O. 1, R. 10; for

"once it is held, as I think it must be held, that a suit for ejectment of a trespasser or of a transferee from a trustee is not within the scope of S. 92, it follows as a necessary corollary that the Court is not competent to bring before the forum any such person under either of the two rules mentioned:" per Mookerjee, J., in *Munshi Gholam* v. *Ali Hafiz* (20):

For these reasons, in my opinion, the suit as against respondent 5 must be dismissed. Maung San Nyun, who has been guilty of a deliberate breach of trust, must be removed from his position as trustee. We have heard the learned advocates for the appellants and for respondents 6 to 8, and by consent the appellants Johnson Po Min and Saw Kyaw Zan and the respondent U Aung Zan are appointed trustees in lieu of San Nyun and the trust property will be vested in these persons as trustees, and they will be entitled to the control and management thereof for one year from this date or until further order of the Court. Liberty to apply. There will be no order as to costs.

Mya Bu, J.—I agree.

P.N./R.K. *Order accordingly.*

(22) [1915] 42 Cal. 1135=32 I. C. 801.

(23) A. I. R. 1927 Mad. 710=102 I. C. 74.

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

** A. I. R. 1932 Rangoon 137

PAGE, C. J. AND SEN, J.

U Nyo—Applicant.

v.

Ma Pwa Thin and *others*—Opposite Parties.

Civil Misc. Appln. No. 35 of 1932, Decided on 25th April 1932, against order of High Court on appellate side in First Appeal No. 138 of 1930, D/- 12th January 1932.

(a) Civil P. C. (1908), O. 41, R. 25—Remand order does not take away appellate Court's seisin of case.

Where the appellate Court remands the proceedings under O. 41, R. 25, in order that the trial Court should determine certain issues of fact, and then return the proceedings with a report of its findings upon those issues of fact, the appellate Court does not lose seisin of the case. [P 137 C 1, 2]

(b) Civil P. C. (1908), S. 109 (a)—Final order explained — Remand order under O. 41, R. 25, without determining whether plaintiff has cause of action for determining issues of fact, is not final order.

Whether an order is a final order or not within S. 109 (a) depends upon the effect of the order as made. Each case turns upon its own facts. An order is final if it finally disposes of the rights of the parties: *A. I. R.* 1920 *P. C.* 86; *Salaman* v. *Warner*, 1 *Q. B.* 734; *Bozson* v. *Altrincham Urban District Council*, (1903) 1 *K. B.* 547; *Issacs & Sons.* v. *Salbstein*, (1916) 2 *K. B.* 139 and 38 *All.* 150, *Ref.* [P 137 C 2, P 138 C 1]

But in a case where the appellate Court has finally determined that the plaintiff has a good and subsisting cause of action, and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order, because the order as made has finally determined the rights of the parties, and all that remains is to ascertain the quantum of those rights: 18 *I. A.* 6 and 22 *I. A.* 3, *Ref.* [P 138 C 2]

Where therefore the High Court without determining whether the plaintiff has good cause of action remands a case under O. 41, R. 25 to determine certain issues of fact and report the case to the High Court for final determination of the case, the order of remand is not a final order. [P 138 C 1]

Thein Maung—for Applicant.

F. S. Doctor, *Eunoose* and *Tun Tin*—for Opposite Parties.

Page, C. J.—In my opinion this application for a certificate granting leave to appeal to His Majesty in Council is misconceived.

The High Court at the hearing of the appeal remanded the proceedings to the trial Court in order that the trial Court should determine certain issues of fact, and then return the proceedings to the High Court with a report as to what its findings upon those issues of fact were. The remand order was made pursuant to O. 41, R. 25 and the High Court never lost seisin of the case. It is true that in passing the remand order the Divisional Court stated its view upon certain issues raised in the case. It was, I think somewhat unfortunate, (and I can say so more freely as I was a party to the remand order), that the Divisional Court should have stated its opinion in the remand order upon any of the issues raised in the case. But the Divisional Court in the remand order did not finally determine whether the plaintiff had a good cause of action or not, or purport to decide the rights of the parties Indeed, in order that the plaintiff should succeed the first step in her case was to prove that she was entitled to her deceased husband's share in the inheritance. If she was not the heir of her alleged husband Mg. Nyun, her suit must fail. That issue was not determined at the trial and the proceedings were remanded inter alia in order that that issue might be tried and determined by the trial Court before the Divisional Court finally decided the appeal. In the order of remand the Divisional Court remitted "the undetermined facts to the lower Court again for a decision on the two points that I have mentioned, when a further report will be made to us on which we can come to a final determination of the case."

It is unnecessary for the purpose of disposing of this application to decide whether at the further hearing before the Divisional Court it would be open to the Divisional Court, (constituted as it was in the first instance or it may be manned by different Judges), to reconsider the questions upon which the Divisional Court had expressed an opinion in the remand order, for, judged by any test which the Court in entitled to apply to the facts of this case, in my opinion, the order of remand from which it is sought to appeal to His Majesty in Council was not a "final order" within S. 109 (a), Civil P. C. Whether an order is a final order or not within S. 109 (a) depends upon the effect of the order as made. Each case turns upon its own facts.

In *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand* (1) (at p. 127 of 47 *I. A.*) Lord Cave, who de-

(1) A. I. R. 1920 P. C. 86=56 I. C. 302=47 I. A. 124=47 Cal. 918=14 S. L. R. 191 (P. C.).

livered the judgment of the Privy Council, observed:

"The question as to what is a final order was considered by the Court of appeal in the cases of *Salaman* v. *Warner* (2), *Bozson* v. *Altrincham Urban District Council* (3) and *Issacs* v. *Salbstein* (4). The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties."

Judged by this test, the order now under consideration, in my opinion, is not a final order. In *Bozson* v. *Altrincham Urban District Council* (3), Lord Alverstone, C. J., observed:

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made finally, dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order:" see also *Issacs & Sons* v. *Salbstein* (4) and *Nuri Miah* v. *The Ganges Sugar Works Ltd. Cawnpore* (5).

The learned advocate for the applicant referred to two earlier cases decided by the Privy Council in support of the view for which he was contending. In *Rahimbhoy Hibibhoy* v. *Turner* (6) what had been decided by the Court of appeal was that the appellant was bound to render an account to the respondent and the Court remanded the case to the Court of first instance in order that the quantum of the accountability of the appellant should be ascertained. Lord Hobhouse, in delivering the judgment of the Board, having regard to the nature of the order that had been made observed that "the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now, that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree against the defendant in such a way that in this suit it is final."

In *Muzhar Husein* v. *Bodha Bibi* (7), the Court of appeal in India held that the alleged will of the testator was valid, and remanded the proceedings to the trial Court in order that certain subsidiary issues should be decided. Lord Hobhouse observed:

"In this case the will of Ibn Ali is the cardinal point of the suit; and as after the decision of the High Court that can never be disputed again, their order is final, notwithstanding that there may be subordinate inquiries to make."

No doubt, in a case where the appellate Court has finally determined that the plaintiff has a good and subsisting cause of action, and all that remains is to work out subsidiary questions consequent upon the final determination of the defendants's liability, the order is in substance and effect a final order, because the order as made has finally determined the rights of the parties, and all that remains is to ascertain the quantum of those rights.

In the present case however "non constat" that the Divisional Court, when it finally determines the appeal, will hold that the plaintiff has any cause of action; on the other hand it may be held that she is entitled to succeed in the suit. Whether in the event the plaintiff succeeds or not however it is obvious that the order from which it is sought to appeal to His Majesty in Council has not determined whether the plaintiff has a good cause of action against the defendants, and has not finally disposed of the rights of the parties. Now, assuming for the purpose in hand that in the remand order the Divisional Court decided certain important issues in the case, inasmuch as the remand order did not purport finally to dispose of the rights of the parties, it would be intolerable that the order should be treated as a final order. The result of so holding would be that a case might be taken on appeal to the Privy Council piecemeal for the purpose of determining any number of important but not conclusive issues as they arose. That is not to be permitted.

For these reasons, in my opinion, the order in respect of which a certificate for leave to appeal to His Majesty in Council is sought is not a "final order" within S. 109 (a), Civil P. C. The learned advocate for the applicant further urged that even if the order under consideration was not a final order, under S. 109 (c) the Court ought to certify that the case is "a fit one for appeal to His Majesty in Council." At this stage of the proceedings I decline to answer that question. When the appeal is finally determined it may be that the case will

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(2) [1891] 1 Q. B. 734=60 L. J. Q. B. 624=39 W. R. 547.
(3) [1903] 1 K. B. 547=72 L. J. K. B. 271=51 W. R. 337=67 J. P. 397=19 T. L. R. 266.
(4) [1916] 2 K. B. 139 = 85 L. J. K. B. 1433=114 L. T. 924=32 T. L. R. 370=60 S. J. 444.
(5) [1916] 38 All. 150=32 I. C. 360.
(6) [1891] 15 Bom. 155=18 I. A. 6 (P. C.).
(7) [1895] 17 All. 112=22 I. A. 1 (P. C.).

be found to turn solely on the facts, and that the plaintiff has no cause of action, because she has not proved that she is the heir of Mg. Nyun. On the other hand it may be that in the event the order which is ultimately passed by the Court of appeal will depend upon some question of general importance, in which case it would be incumbent upon the Court to consider whether it is brought within the ambit of S. 109 (c). In my opinion however it is premature at this stage of the proceeding for the Court to consider or determine that question. The result is that the application fails, and must be dismissed with costs, ten gold mohurs.

Sen, J.—I agree.

B.R./R.K. *Application dismissed.*

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* A. I. R. 1932 Rangoon 139

BROWN, J.

Maung Po Thin—Applicant.

v.

Ma Ma—Opposite Party.

Criminal Revn. No. 520-B of 1931, Decided on 23rd March 1932, against order of Sess. Judge, Amherst and Salween, D/- 1st December 1931.

*** Criminal P. C. (1898), S. 195—Criminal Courts are in absence of complaint by Court, barred from taking cognizance of forgery committed in relation to proceedings in Court by a party to proceeding — Forgery in relation to proceedings illustrated.**

In an execution proceeding judgment-debtor filed a receipt which purported to be signed by decree-holder but bore a date on which there was no actual proceeding pending between the parties. The decree-holder alleged that it was forgery and applied to the Execution Court to make a complaint against the judgment-debtor for forgery under S. 476, Criminal P. C. He was not successful, and hence made a direct complaint against the judgment-debtor for forgery which was dismissed :

Held : that although the receipt may have actually been signed before the final execution proceedings were instituted, the litigation between the parties had begun long before It could only have been with reference to that litigation that the receipt was drawn up. The forgery was therefore committed in or in relation to the proceeding in Court and by aparty to the proceeding, and the criminal Courts were barred from taking cognizance of such offence under S. 195 : *A. I. R.* 1931 *All.* 443, *Expl.* and *Dist.* ; *A I. R.* 1926 *All.* 30 and *A. I. R.* 1925 *Rang.* 28, *Ref.* [P 140 C 2 ; P 141 C 1]

A. A. Darwood—for Applicant.

Judgment.—The parties to this revision case were parties in a certain civil litigation Suit No. 23 of 1929 of the Township Court of Choungzon. The respondent Ma Ma obtained a decree against the applicant Maung Po Thin. In 1931 Ma Ma, who had previously unsuccessfully attempted to execute the decree made a further application in execution and Maung Po Thin on appearing before the Court presented a petition stating that Ma Ma had accepted a sum of Rs. 100 in full satisfaction of her decree. He attached to this petition a receipt purporting to be signed by Ma Ma and dated 26th April 1930. On the date on which this receipt is purported to have been signed there was no actual civil proceeding pending between the parties.

After the completion of the execution case Ma Ma applied to the Township Court asking that a complaint should be made under the provisions of S. 476, Criminal P. C., against Po Thin of offences under Ss. 467 and 471, I. P. C., on the ground that this receipt had never been signed and that it was a forgery. The Township Court refused to file a complaint and this order was upheld by the District Judge on appeal. Both the Courts proceeded on the merits of the case before them and appear to have assumed that they had jurisdiction to lay a complaint if the interests of justice demanded it. Ma Ma then made a direct complaint against the respondent of forgery. Her complaint was dismissed on the ground that no Court could take cognizance of the offence complained of except on a complaint of the Township Court. Ma Ma applied to the Sessions Judge in revision and the Sessions Judge directed that further inquiry should be held. His view was that as at the time the receipt was alleged to have been executed there was no actual proceeding pending between the parties, the provisions of S. 195 (1) (c), Criminal P. C., did not apply. Against this decision Po Thin has come to this Court in revision.

The learned Sessions Judge relied on the case of *Emperor* v. *Khushal Pal Singh* (1). In that case certain documents were alleged to have been forged in about the year 1898. Some 25 years later a suit was instituted by one Jogendra Pal Singh. An attempt was made on behalf of the plaintiff at a later stage to have the documents admitted in evidence

(1) A.I.R. 1931 All. 443=1931 Cr. C. 715=134 I. C. 225=32 Cr. L. J. 1105=53 All. 804 (F.B.).

but they were rejected by the trial Judge. They were subsequently in appeal admitted in evidence though not actually relied on for the purpose of deciding the appeal. Rajah Khushal Pal Singh was a party to this civil litigation. It was admitted on his behalf that he had written the document and the question arose whether the Court would order the prosecution of Rajah Kushal Pal Singh for forgery of these documents under the provisions of S. 195 (1) (c), Criminal P. C. It was held that the provisions of S. 476 and S. 195 should be read together and that it was not open to a Court to lay a complaint except in the circumstances provided by S. 476. Mukerji, J., who delivered the judgment of the Court suggested that in Cl. (c), S. 195, the word "party" should be read as meaning "party as such" and he was of opinion that it was impossible in the circumstances of the case to hold that the documents in question were forged by a party to the proceedings as such. It seems to me that the circumstances in that case were very different from the circumstances of the present case. The documents in question in *Kushal Pal Singh's* case (1) were alleged to have been executed in 1898. The litigation which was subsequently commenced 25 years later could not possibly have been in the mind of the person who executed the documents at the time he executed them although they were executed by a party to the subsequent proceeding. The documents were quite clearly not executed by the party as a party to the proceeding. I cannot look on this decision therefore as a final decision that in no case do the provisions of S. 195 (1) (c) apply if the documents in question were executed before the proceedings in Court were opened. It is true that one part of Mukerji, J's., judgment does suggest that that is the view he took of the law. At p. 810 of the judgment he states :

> "coming to the language of Cl. (c), sub S. 1, S. 195, it may be interpreted in two ways. It may be read that when an offence which is described in S. 463 (we are concerned with that section alone, here) is alleged to have been committed by a person, who has, subsequently to the commisson of the offence, become a party to any proceeding in any Court, a complaint would be necessary in order to prosecute him. Another way of reading it is to say that the offence would be cognizable without a complaint, except when it is committed by a person who is already a party to a proceeding in Court in respect of a document produced or given in evidence in such proceeding."

It would appear, although he does not expressly say so in the judgment, that he has adopted the latter alternative view. It was not however necessary to adopt that view for the purposes of deciding the case ; nor can I see anything in the judgment to show that the learned Judges were prepared to lay down the law in such very rigid terms. In a previous case decided by a single Judge of the same Court it was held that when a document was given in evidence in a Court, it was not open to a private person to lodge a complaint that an offence had been committed in respect of it by a party to the case in which it was produced. *Kanhaiya Lal* v. *Bhagwan Das* (2). This case was not referred to in the judgment of *Kushal Pal Singh's* case (1). I respectfully agree with the view taken by the Full Bench of the High Court of Allahabad that the provisions of S. 476 and S. 195, Criminal P. C., must be read together and although the actual point for decision was of a somewhat different nature, that view of the law was taken by a Bench of this Court of which I was a member in the case of *C. T. Guruswamy* v. *D. K. S. Ebrahim* (3). In the circumstances of the present case however I am not satisfied that that view of the law necessarily involves a decision in favour of the respondent. As I have already remarked the civil Courts in this case assumed that they had power to direct the prosecution of the petitioner and it seems to me that the wording of S. 476 would be wide enough to cover such a case. It may be that the document in this case was actually signed before the final execution proceedings were instituted, but the litigation between them had begun long before.

It can only have been with reference to that litigation that the document was drawn up and it is not suggested that it could have been drawn up for any other purpose. It seems to me therefore that in this case if there were forgery, the forgery was committed in or in relation to a proceeding in Court and that it must be held that it was alleged to have been

(2) A.I.R. 1926 All. 30=89 I. C. 1053=26 Cr. L. J. 1485=48 All. 60.
(3) A.I.R. 1925 Rang. 28=84 I. C. 439=26 Cr. L. J. 295=2 Rang. 374.

committed by a party to a proceeding in Court. I am therefore of opinion that in the present case the criminal Courts were barred from taking cognizance of the offence under S. 195, Criminal P. C. I therefore set aside the order of the Sessions Judge and restore that of the Magistrate dismissing the complaint. I would add that when this case came on for hearing before me, there was no appearance on behalf of the respondent to contest the application.

B.R./R.K. *Revision allowed.*

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*A. I. R. 1932 Rangoon 141

BAGULEY AND MAUNG BA, JJ.

Bengal, Burma Steam Navigation Co., Ltd.—Appellant.

v.

Ramana—Respondent.

Civil Misc. Appeal No. 94 of 1931, Decided on 22nd September 1931, against order of Commr's. Court of Workmen's Compensation in Workmen's Compensation Case No. 12 of 1931.

*** (a) Workmen's Compensation Act (1923), S. 5 (1) (b) — Workman casually employed for various periods—Breaks in service for less than 14 days—Work with another employer during intervals—He cannot be held to be in permanent and continuous service.**

Section (5) (1) (b) applies to all cases in which the employment has not been continuous for not less than one year. When a workman is casually employed he cannot be held to be in permanent service and when there are breaks in his service for various periods, though each period in itself is not more than 14 days he cannot be held to be in continuous service, where the workman has worked during the intervals under another employer. [P 142 C 1]

(b) Civil P. C. (1908), S. 33—Decree for more than what is claimed in plaint cannot be granted without amending plaint.

It is not a provision of the Code that a man cannot get a decree for more than the amount which he has claimed in his plaint, without the plaint being amended. [P 142 C 1]

*** (c) Workmen's Compensation Act (1923), S. 5—Commissioner has no jurisdiction to award less compensation than what is provided for in the Act merely because workman has asked for less.**

Under the Act the Commissioner has a duty to see that the injured party, usually a cooly ignorant of the law, gets fair play. The provisions of the Act so far as the calculation of compensation is concerned are mandatory. The Commissioner has no jurisdiction to give less compensation than that laid down in the Act, and the Commissioner is in no way fettered by what an ignorant cooly helped perhaps by advisers only less ignorant than himself may enter in his original application to the Commissioner, [P 142 C 2]

J. C. De—for Appellant.

Robertson and *Krishnaswamy* — for Respondent.

Baguley, J.—The respondent was a cooly employed in handling cargo in the holds of ships belonging to the appellant's firm, and whilst so employed an iron beam fell on him with the result that he lost sight of both his eyes. He is in consequence entitled to compensation for total disablement as defined under the Workmen's Compensation Act. The appellants not having made a satisfactory offer to compensate him, he applied to the Commissioner for an order. The only point in dispute was the amount of compensation. In the original application the respondent stated that his monthly wages were Rs. 28, and he was therefore entitled to receive a lump sum of Rupees 1,260. The appellants, who, it may be noted, began by asserting that the respondent was under the influence of drink when he received the injury and he disobeyed the orders, which allegations were subsequently withdrawn, asked that the claim might be dismissed. The appellant having denied that the respondent's monthly wages was Rs. 28 the Commissioner went into the question as to the basis upon which the compensation was to be assessed. He found as a fact that the respondent was a casual labourer, and that he did a day's work or shift's work whenever he got a chance, and for each shift he got Re. 1-12-0. He was so employed on the occasion when the accident occurred. The accident occurred during his first shift on this particular steamer, and the Commissioner held that the compensation must be assessed under S. 5 (1) (b), Workmen's Compensation Act. The last continuous period of service immediately preceding the accident, he held to be one for which the wages to be earned was Re. 1-12-0 and has therefore held the monthly wages must be 30 times Re. 1-12-0 which weighted in the way provided for in Sch. 4, came to Rs. 55 a month. It is contended that the steamers of the company made 29 visits to Rangoon during the 12 months before the accident and as the respondent had worked for the appellants on each occasion as the steamers were in port for the last two years he had been in their em-

ployment for a continuous period of more than 12 months. The claim is based on Expln. (1) :

"A period of service shall, for the purposes of this subsection be deemed to be continuous which has not been interrupted by a period of absence from work exceeding 14 days."

The argument is that the respondent had never been without a job from them for more than 14 days at a time, and therefore his employment was continuous. It is perfectly obvious that the respondent was not in the permanent employ of the appellants. He picked up a job any time he could from any maistry. He was merely a casual labourer. It is quite manifest that when he was working for any other employer he had ceased to be in the employ of the appellants. They had no permanent call upon his services and he was under no contract which would have compelled him to leave any other ship in which he was working and work for appellants had one of their ships come in. When the appellants' ships were not in harbour he did work for any other ship on which he could get employment and I agree with the Commissioner in the way, in which he has assessed the compensation as S. 5 (1) (b) applies to all cases in which the employment has not been continuous for not less than one year. If, to be strictly and meticulously accurate, it were held that he had only been employed for two hours when the accident happened then his last continuous period immediately preceding the accident would be one sixth of a day. As he stopped work for no fault of his own he would be entitled to a quantum meruit of one-sixth of a day's pay, and the result would be exactly the same as that worked out by the learned Commissioner. I agree that the amount of compensation awardable under the Act is Rs. 2,310. The next point that arises is whether the Commissioner had power to make an award of this amount when the original claim was only for Rs. 1,260.

For the appellants it is argued that so far as they are applicable the provisions of the Civil Procedure Code apply to proceedings under this Act; but it is not a provision of the Civil Procedure Code that a man cannot get a decree for more than the amount which he has claimed in his plaint, without the plaint being amended. In any case, in my opinion, a claim of the nature is not essential in a proceeding under this Act. I have had experience as a Commissioner myself both in Mandalay and in Hanthawaddy and, in my experience the majority, I may say, the vast majority of cases under this Act comes before the Commissioner in one of the three ways : either on a report from the Inspector of Factories, upon receipt of which proceedings are opened ; or upon receipt of a letter from the employer concerned stating that an accident has occurred and that the amount of compensation which they had to pay is so much, enclosing a cheque for the amount ; or by receipt of a letter usually from some people in India stating that the husband, father or the bread-winner had been killed in an accident, and asking in a vague way for help. Under this Act, in my opinion, there is no doubt that the Commissioner has a duty to see that the injured party, usually a cooly ignorant of the law, gets fair play, and it may be mentioned that the provisions of the Act so far as the calculation of compensation is concerned are mandatory. Once the basis upon which the claim is to be granted is fixed, that is with regard to the wages earned, the disability resulting from the accident, and so on the assessment of compensation is a simple matter of arithmetic, and I would hold that the Commissioner has no jurisdiction to give less compensation than that laid down in the Act, and that the Commissioner is in no way fettered by what an ignorant cooly helped perhaps by advisers only less ignorant than himself may enter in his original application to the Commissioner, and I would therefore dismiss this appeal. In view of the way in which this matter has been fought out by the appellants and the way in which they delayed paying the respondent any compensation for nine months I would award the respondent the costs of this appeal : advocate's fee three gold mohurs.

Maung Ba, J.—I agree.

B.V./R.K. *Appeal dismissed.*

* A. I. R. 1932 Rangoon 143

BAGULEY, J.

A. D. Raj—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 2022 of 1931, Decided on 3rd February 1932, against order of Addl. Dist. Magistrate, Rangoon, in Criminal Trial No. 33 of 1931.

(a) Penal Code (1860), S. 294-A—Accused held to have committed offence under S. 294.

The accused invited the public to buy his bonds by making a proposal in an advertisement. No subscriber was ever to get his capital back. The whole of the capital was to be invested for feeding disabled poor and nourishing the sick. The whole of the bonuses to be distributed every three months were to come out of interest. The bonuses were to be of various amounts to be distributed according to lots:

Held: that the accused has committed an offence under S. 294-A. The transaction was an arrangement for distribution of prizes by chance among persons purchasing tickets: 17 *P. R.* 1910 *Cr., Ref.*; *Case law discussed.*

[P 146 C 2]

*** (b) Penal Code (1860), S. 294-A—Intention of person acting in pursuance of proposal is immaterial.**

The guilt or innocence of the man who publishes the proposal cannot depend upon the intention of those who purchase certain bonds from him in pursuance of the proposal.

[P 146 C 1]

Menon—for Appellant.

Gaunt—for the Crown.

Judgment.—The appellant has been convicted under S. 294-A, I. P. C., and sentenced to pay a fine of Rs. 51. S. 294-A, para. 2, under which he has been convicted, runs as follows:

"Whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees."

The words "such lottery" referring to the first portion of the section speak of any lottery not authorized by Government. The appellant admits having published certain proposals which involved the drawing of lots. It is admitted that his action whether it amounted to a lottery or not was not sanctioned by Government and therefore the only question before the Court is whether he was holding a lottery.

The particular publication which appeared in the *Rangoon Daily News* of Sunday, 23rd November 1930, consists of a display of advertisement with large headlines "Lose not money in lotteries and horse races"; "Without losing anything benefit yourself and your country"; "Have your luck without risk"; "You will get Rs. 10,000 in the luckiest event or Rs. 20 in the unluckiest event." The advertisement contains a definite proposal:

"The Association issues, in all, 1,000,000 Donation Bonds of Rs. 10 each and the Donation Bond amount of Rs. 1,00,00,000 collected from the bond-holders will be utilized for granting loans to the Donation Certificate and Bond-holders of the Association on the security of their immovable properties at 6 per cent interest per aunum under the Property Investment Scheme. Out of Rs. 6,00,000 interest the Association gets every year on the said donation amount Rupees 5,00,000 will be utilized for granting Cash Bonuses as abovesaid, i. e., at Rs. 1,25,000 every three months, and the remaining Rs. 1,00,000 will be utilized for maintaining charitable institutions started or aided by the Association for feeding the disabled poor and nourishing the sickly and disabled cattle and other domestic animals, and meeting the working expenses of the Association. After all the bonds draw Cash Bonuses, the entire donation amount will be invested in Government securities and the whole of the interest, Rs. 6,00,000, will be exclusively utilized for the perpetual maintenance of the abovesaid charitable institutions. So the bond-holders will have not only benefited themselves but also afforded relief to those in debt and distress."

It is also stated that Rs. 1,25,000 to be distributed every three months will be divided into one cash bonus of Rs. 10,000, one of Rs. 5,000, ten of Rs. 1,000 each, one hundred of Rs. 500 each, and two thousand five hundred of Rs. 20 each. The bonuses are admittedly to be distributed by lot. It is perfectly clear from the headlines that for the sake of selling bonds the gambling element takes precedence over the charitable element.

Lottery has apparently not been defined in any law, so in the first place, one has to turn to the standard dictionaries. According to some of the older judgments, Webster's Dictionary defines "lottery" as "the distribution of prizes by lot or chance", and Johnson's Dictionary is said to have the same definition. Taking a more modern standard in the Oxford Dictionary "lottery" is defined as follows:

"An arrangement for the distribution of prizes by chance among persons purchasing tickets."

If we look no further than this the case is decided at once, and the appellant must be found guilty, for he undoubtedly did propose to distribute prizes by chance among persons purchasing tickets. In Halsbury's Laws of England, Vol. 15,

p. 299, a passage occurs in connexion with the definition of the word "lottery." "A lottery has been described as a scheme for distributing prizes by lot or chance."

I have only had one case quoted before me in which a conviction under S. 294-A, I. P. C., was dealt with and that is *Madan Gopal* v. *Emperor* (1). In this case every subscriber paid Rs. 10 8 0 and got a bond for Rs. 10 which could be cashed at the bank for Rs. 10 at any time. As soon as 2,000 tickets had been sold draws for prizes were to begin and were to be repeated until everyone had got prizes or had their money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution until they got a prize or decided to withdraw their money. At the first drawing there were to be 81 prizes varying from Rs. 1,000 to Rs. 12 and of an aggregate total value of Rupees 3,000. It was held that this amounted to a lottery, and the appeal against a conviction under part 2, S. 294-A, I. P. C., was dismissed.

On behalf of the appellant however it has been strongly urged that this is a "chit fund" and chit funds have been declared legal by the Madras High Court. It is worthy of note that in the advertisement concerned the words "chit fund" are not used nor does it appear on the receipt given for money paid, Ex. F, nor on the bonds which were filed as Ex. H-1, etc. The words "chit fund" appear to be English words used in the Madras Presidency in a broad sense to cover, so far as decided cases show, anything up to a pure lottery. If they are used the lottery appears to be regarded as legal though on what principle I am unable to understand. In its simplest form a chit fund appears in *Kamakshi Achari* v. *Appavu Pillai* (2). In this case twenty people entered into an agreement that each should contribute Rs. 10 per month for 20 months. At the end of each month the subscribers drew lots and one person took the whole Rs. 200 but after drawing his prize he had to go on contributing to the end of 20 months. It would appear from the judgment that the Rs. 200 which was drawn bore interest for the common benefit though this is not quite clear. That case was a civil case, and the question was whether the transaction was a lottery barred by Act 5 of 1844 which declared all lotteries not authorized by Government as common nuisances. A similar fund was before the Court in *Vasudevan Nambudri* v. *Mammod* (3). In this case it is clear that the money went to each person in turn without his having to pay interest.

The judgment, which is only four lines, no doubt because the respondent, who claimed as a creditor, was not represented before the Court, merely states that the law as laid down in *Kamakshi Achari* v. *Appavu Pillai* (2) has been followed without question for 35 years. This also was a civil case. After this there seems to have been considerable difference of opinion among the Judges in the Madras High Court as to whether "chit funds" were legal or not, and in *Narayana Ayyangar* v. *K. Vellachami Ambalam* (4), another civil case, on a reference to a Full Bench it was decided that the chit fund then before the Court was legal. The chit fund in this case had developed far beyond the ones dealt with in the previous cases. Five hundred people became subscribers, each subscribing Re. 1 a month. The affair was to run for 50 months, and, at the end of each month, Rs. 50 was to be given to one person, decided by drawing lots. Any person who thus got Rs. 50 left the fund and had no further interest in it, nor did he make any further payments. The remaining money was lent out at interest and at the end of the 50 months the idea was that the remaining 450 members should each get back their Rs. 50, but with no interest ; the profits were to go to the promoters of the fund. There was no question of a conviction under part 2, S. 294-A, I. P. C., but in the judgment it was held that there were two conceivable grounds on which Courts could refuse to enforce the terms of a chit fund (1) :

"that it is an unlawful transaction as it involves the commission of an offence under S. 294-A, I. P. C , and (2) that it amounts to a wagering contract and is therefore void under S. 30, Contract Act."

It was found that no offence had been committed under S. 294-A as no office or place for the purpose of drawing any lottery was kept, and, presumably, there

(1) [1910] 17 P. R. 1910 Cr.=11 Cr. L. J. 382 =6 I. C. 620.
(2) [1862] 1 M. H. C. 448.
(3) [1899] 22 Mad. 212.
(4) A. I. R. 1927 Mad. 583 = 103 I. C. 318=50 Mad. 696 (F.B.).

had been no publication which would have been an offence under part 2, S. 294 A. After this the judgment leaves the question of lottery entirely aside and only goes into the question of whether the contract was a wager or not ; but Ramesam, J., who wrote the judgment, mentions that he adheres to the opinion expressed by him in *Shanmuga Mudali* v. *Kumaraswami Mudali* (5), that these are perfectly valid transactions. It will be noticed that this judgment does not hold that it was not a lottery. So far as S. 294-A, I. P. C., is concerned it merely holds that there had been no office kept for the drawing of a lottery. Turning now to *Shanmuga Mudali's* case (5) it must first be noted that this also was a civil case. The conditions of the fund seem to have been exactly the same as those in *Narayana Ayyangar's* case (4). The leading judgment was written by Venkatasubba Rao, J., in which he says :

"Let me now examine what the essential features of this transaction are : (1) There is no uncertainty in regard to the sum which each subscriber receives. It is clearly understood from the start that every member will be paid Rs. 50. He receives neither more nor less. The sum which each subscriber gets is thus fixed ; (2) No subscriber takes the risk of losing any portion of the amount subscribed. The utmost that any subscriber may be required to contribute is Rs. 50 and each subscriber gets the same back ; (3) The element therefore that is generally present in a lottery or a wagering transaction, namely, that loss is occasioned to one or more, does not exist in this transaction."

All the members got back Rs. 50 and none paid more than Rs. 50 while some paid in less. It will be seen at once that wealth had been created by means of interest ; for some of the subscribers made a profit and it can quite well be understood that the promoters of the fund intended to make profit for themselves. Therefore the remaining members must have lost interest on their money. It is true that in *Narayana Ayyangar's* case (4) the passage occurs "in my opinion the loss of interest is not loss strictly so called," but with due respect though this may be an opinion I certainly cannot regard it as correct. To the modern business man and financier it is impossible to divorce the idea of money from the idea of earning interest. Money which is not earning interest is regarded as sterile, and for the moment scarcely as money at all ; and to say that losing interest is not losing anything is directly contradictory to modern business principles. It may be correct in a state of society in which people instead of using banks, hoard coins buried in the earth, but that idea now belongs to a past age. In *Shanmuga Mudali's* case (5) it is laid down that there is nothing to distinguish the chit fund described there from the chit fund mentioned in the old cases where every man paid in the same amount, but some got back their money earlier and some later. If one omits entirely from one's ideas all questions of interest there may perhaps be nothing in it; but there is one great distinction to be seen between the two classes of cases, viz., that in the old cases nobody drew out more than he paid in. In this particular case some men made a profit, which might amount to as much as Rs. 49 in one month. The present case cannot be regarded from a point of view entirely divorced from the idea of interest. The advertisement, as I have shown, distinctly states that no man will ever get his capital back, the whole of the capital will be invested for "feeding the disabled poor and nourishing the sickly and disabled cattle," and the whole of the bonuses, so called, are to come out of interest. The entire basis of the scheme is founded upon the earning of interest and therefore it is impossible to regard this fund from the point of view that interest does not really matter, but is merely an opportunity of making a profit.

It is, I think, unnecessary to deal further with the Madras cases. They are civil cases and not criminal cases, and in none of them is a conviction under S. 294-A, I. P. C., dealt with. The recent ones, in my opinion, are based on fallacious reasoning. The learned Additional District Magistrate who has written a very careful judgment winds up as follows:

"If, as I have been led to conclude by a study of the cases the intention with which the purchasers of these bonds purchased them affords the ultimate test whether they were partaking in a lottery within the meaning of S. 294-A. I. P. C. or not, then I see no defference in principle between this case and *Madan Gopal's* case (1). *Taylor* v. *Smetten* (6) or *Reg* v. *Harris* (7)"

(5) A. I. R. 1925 Mad. 870=90 I. C. 420 = 48 Mad. 661.

(6) [1883] 11 Q. B. D. 207=52 L. J. M. C. 101 =48 J. P. 36.

(7) 2 H. & C. 912.

This statement is not entirely accurate because the guilt or innocence of the man who publishes the propcsal cannot depend on the intention of those who purchase bonds from him. I agree with him that there is no difference in principle between this case and *Madan Gopal's* case (1). I do not think that a study of the English cases is really of very much assistance. This case is to be decided under the Penal Code and it must be remembered that the basis of the Lottery Acts in England was not that lotteries were undesirable, but private lotteries were stopped because they interfered with the success of Government lotteries, and in those days Government held regular lotteries as an important source of revenue, and could not afford to regard them as inherently immoral. Reference was made in argument, and also in the Madras cases, to *Wallingford* v. *Mutual Society* (8). This was a case in which the question of what constituted a lottery was only incidentally touched upon. The principal judgment, which covers nine pages, only devotes one paragraph of 12 lines to the question of whether the transaction came under the Lottery Acts. The transaction in question, which seems to have been considerably more complicated than is shown in the reference to it in the Madras cases, and included some form of tontine was held not to be an illegal transaction under the Lottery Acts. It was obviously a mixed lottery, business, and savings association, together with some element of life insurance, and it is quite clear that a transaction of this kind would not come under 42 Geo. 3, c. 119, S. 2, which runs as follows:

"No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little *goe*, or any other lottery whatsoever not authorized by Parliament, or shall knowingly suffer to be exercised kept open, shown, or exposed to be played, drawn or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place, upon pain of forfeiting for every such offence the sum of £500, to be recovered in the Court of Exchequer at the suit of His Majesty's Attorney-General, and to be to the use of His Majesty, his heirs and successors and every person so offending shall be deemed a rogue and vagabond within the true intent and meaning of an Act passed in the 17th year of the reign of his late Majesty King George the second. intituled "An Act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons and to houses of correction" and shall be punishable as such rogue and vagabond accordingly."

To sum up, in the present case the appellant tried to get the public to subscribe and that money they would never see again. The interest of that money was intended to be distributed in sums large or small by lots. He invited the public to buy his bonds, and I fail to see how this transaction could be differentiated from

"an arrangement for the distribution of prizes by chance among persons purchasing tickets"—

the Oxford Dictionary definition of lottery. The appellant was fined Rs. 51 with a view to making the sentence appealable, and he seems to have been regarded as misguided because there were respectable people on the board of this affair in Madras. I find on the file what appears to be a revenue account of this concern for a period of 14 months ending 31st December 1929. In the statement the income side of the account shows Rs. 52,820 as received for Donation Certificate admission fees. On the expenditure side, in addition to the allowance to agents and establishment charges, there is one item of commission and salary to agents, etc., of Rupees 49,026-5-3. It seems scarcely necessary to say more. Any man who has been engaged in selling certificates of this nature in which practically the whole of the receipts go in agents' commission is getting off very lightly if he is fined only Rs. 51. For these reasons I dismiss the appeal.

R.M./R.K. *Appeal dismissed.*

(8) [1880] 5 A. C. 685=50 L. J. Q. B. 49=43 L. T. 258=29 W. R. 81.

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* A. I. R. 1932 Rangoon 146

PAGE, C. J. AND MYA BU, J.

Emperor

v.

U San Win

Criminal Appeal No. 878 of 1932, Decided on 7th April 1932, against order of acquittal passed by Sess. Judge, Myaungmya.

*** (a) Criminal P. C. (1898), S. 417—Appeal against acquittal should be brought as early**

as possible though limitation for it is six months.

It is true that a period of six months is the limitation allowed by law for appeals from acquittals, but it is recommended to the Government that such appeals, when made, should be preferred with all reasonable expedition possible not only in the public interest, but in justice to the persons whose acquittal it is sought to reverse : 5 *All.* 253, *Foll.* [P 147 C 1]

(b) Criminal P. C. (1898), S. 417—Acquittal—Interference should be made only if there is miscarriage of justice.

Interference with judgments of acquittal should take place only in cases where there has been a miscarriage of justice of a grave nature : 22 *Cal.* 164, *Foll.* [P 147 C 1]

Gaunt—for the Crown.

Page, C. J.—This is an appeal by the Local Government presented by the learned Government Advocate, against an order of acquittal passed by the learned Sessions Judge of Myaungmya. On 28th August 1931, the respondent was convicted of defamation under S. 500, I. P. C., and was sentenced to pay a fine of Rs. 100 or in default two months' simple imprisonment, by the 2nd Additional Special Power Magistrate, Myaungmya. On 6th October 1931 the conviction and sentence were set aside, and an order acquitting the respondent was passed by the learned Sessions Judge, Myaungmya. Five and a half months elapsed before the present appeal was filed on behalf of the Local Government, and I desire to repeat what was said by Stuart, C. J., and Straight, J. in *Empress of India* v. *Yakub Khan* (1), where their Lordships observed that :

> " it is true that a period of six months is the limitation allowed by law for appeals from acquittals, but we would earnestly commend to the attention of Government the policy of, and necessity for, such appeals, when made, being preferred with all reasonable expedition possible, not only in the public interest, but in justice to the persons whose acquittal it is sought to reverse."

Now, the intention of the legislature in enacting S. 417, Criminal P. C., was pointed out by the learned Judges in *Deputy Legal Remembrancer* v. *Karuna Baistobi* (2). In that case Banerjee and Sale, JJ., observed that ;

> " the law, by limiting the right of appeal against judgments of acquittal to the Local Government prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal, and evidently intends that such interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter. We think it is a most salutary principle, quite as necessary for the well-being of society as the repression and punishment of crime, that interference with judgments of acquittal should take place only in cases where there has been a miscarriage of justice of a grave nature."

The present appeal is based solely on the allegation that the learned Sessions Judge did not rightly appraise the evidence adduced at the trial. No question of law is involved in the appeal, which turns on the facts. An appeal against an acquittal in such circumstances would only succeed where the order of acquittal was clearly wrong, and involved a miscarriage of justice. We have had the advantage of hearing Mr. Gaunt, the learned Assistant Government Advocate, in support of the appeal but, notwithstanding his argument, after perusing the record, I am bound to say that I am at a loss to understand the ground upon which it was thought that the filing of this appeal was necessary or justifiable in the public interest. I have studied the proceedings in this case with care, and, in my opinion, there was ample evidence to support the order of acquittal that was passed ; and, upon the evidence adduced at the trial the order of acquittal was plainly right. With all due respect I do not think that the trying Magistrate appreciated the significance of the evidence at the trial. To illustrate the view I take it is enough that no reference was made by the trying Magistrate in his judgment to Ex. 1, which was a most important document, and threw a flood of light upon the problem under consideration. In my opinion, there is no substance in this appeal, which is summarily dismissed.

Mya Bu, J.—I agree.

B.V./R K. *Appeal dismissed.*

(1) [1883] 5 All. 253=(1883) A.W.N. 25.
(2) [1898] 22 Cal. 164.

A. I. R. 1932 Rangoon 147

PAGE, C. J. AND MYA BU, J.

Emperor

v.

U San Win—Accused.

Criminal Revn. No. 118-B of 1932, Decided on 7th April 1932, against order of Sess. Judge, Myaungmya, in Criminal Appeal No. 450 of 1931.

Criminal P. C. (1898), S. 439—Charge framed against accused and accused convicted after being called upon to enter evidence—Order setting aside conviction am-

ounts to order of acquittal—Revision against order does not lie.

Where a charge is framed against the accused at his trial, and he is convicted after having been called upon to enter his defence, an order in appeal whereby the conviction and sentence of the accused are set aside is in reality an order of acquittal and not an order of discharge. From such an order therefore an appeal would lie, and an application in revision is incompetent. [P 148 C 1]

Gaunt—for the Crown.

Page, C. J.—This is an application for revision against what is stated to be an order of discharge passed on appeal by the learned Sessions Judge of Myaungmya, and the proceedings are akin to, and arise out of, the same matter in respect of which the appeal, No. 878 of 1932, *Emperor* v. *U San Win* (1), has been filed. The respondent was convicted of an offence under S. 385, I. P. C., and sentenced to pay a fine of Rs. 100 or in default to undergo two months' rigorous imprisonment, by the 2nd Additional Special Powers Magistrate, Myaungmya. He appealed to the Sessions Judge of Myaungmya, and on 13th October 1931, the conviction and sentence were set aside, and the learned Sessions Judge ordered the discharge of the accused. On 19th March 1932, an application for revision of what is alleged to be the order of discharge by the learned Session Judge was filed on behalf of the Local Government by the learned Government Advocate.

In my opinion this application for revision is both groundless and misconceived. It is groundless because there was ample evidence to justify the order of acquittal which, in my opinion, was the correct order to make, having regard to the facts and circumstances disclosed in the evidence. It is misconceived because, although the order purports to be an order discharging the accused, it was in substance and in fact an order of acquittal. At the trial a charge was framed against the accused, and he was convicted after having been called on to enter upon his defence. In such circumstances the order against which the present application was filed was in truth and in fact an order acquitting the respondent. From such an order an appeal would lie, and an application in revision would not be entertained. Treating the present application in revision as an appeal however for the reasons that I have stated there is no substance in it, and whether the present application is regarded as an application in revision or an appeal it is summarily dismissed.

Mya Bu, J.—I agree.

R.M./R.K. *Application dismissed.*

(1) A. I. R. 1932 Rang. 146=10 Rang. 312.

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* A. I. R. 1932 Rangoon 148

PAGE, C. J. AND CUNLIFFE, J.

Darwood Hashim Esoof and *another*—Appellants.

v.

Tuck Shein—Respondent.

First Appeal No. 23 of 1932, Decided on 1st June 1932, against order of High Court in Civil Regular No. 565 of 1925, D/- 1st February 1932.

*** (a) Civil P. C. (1908), S. 144—Order for restitution cannot be granted against person receiving no benefit in favour of one losing nothing.**

A claim under S. 144 is governed by the same principles that apply to a claim for money had and received, and where pursuant to a decree or order of the Court one party has been compelled to pay money or transfer of property in invitum to another party, it would be unconscionable upon the reversal of the decree or order that the party who had received the money or property through the wrongful act of the Court should be held entitled to retain such money or property as against the party who had wrongfully been ordered to pay it, and who was claiming restitution. An order for restitution against the respondent who has never received the money or obtained any benefit from it in favour of the appellants who never possessed the money and never lost it would offend as well against the dictates of conscience and reason as against the express provisions of S. 144. [P 149 C 2; P 150 C 2]

On the reversal of the trial Court's decree by the High Court, the defendant had to pay a certain sum of money by way of restitution to the plaintiff. During the pendency of the appeal to the Privy Council against the decree of the High Court, the applicants who were the assignees of the property of the defendant company, which had in the meanwhile gone into liquidation, were substituted in place of the original defendant and the non-applicant was substituted in place of the original plaintiff who was the mortgagee of the Mill in respect of which the suit had been brought and who had subsequently transferred his interest to the non-applicant. The decree of the High Court was reversed and the applicant sued to recover from the non-applicant restitution of money paid by the original defendant to the original plaintiff.

Held: that the applicants could not claim to recover the money by way of restitution. [P 150 C 2]

(b) Civil P. C. (1908), S. 144—"The act of the Court," meaning of, explained.

The expression 'the act of the Court' does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of a Court as a whole from the lowest Court which entertains jurisdiction over the matter up

to the highest Court which finally disposes of the cases. [P 149 C 2, P 150 C 1]

Foucar—for Appellants.

Kyaw Zan—for Respondent.

Page, C. J.—This is an application for restitution under S. 144, Civil P. C. It is an ingenious application but it fails.

The appellants seek to have restored to them by the respondent a sum of money which the appellants never lost, and which the respondent never received. The application arises in this way. A suit for an injunction was brought in the High Court. It was dismissed with costs, and the defendants received from the plaintiff their costs of the suit. An appeal was filed and it was allowed with costs, the plaintiff-appellant receiving a sum of Rs. 2,708-13-0 as the taxed costs of the suit and of the appeal. This sum was paid by the defendants-respondents. The plaintiff also obtained restitution under S. 144 of the sum which he had paid to the defendants as the costs of the trial. A further appeal was lodged by the defendants to the Privy Council in 1925. In 1928 the present applicants were substituted as appellants in lieu of the original defendants, and the respondent was substituted in invitum as respondent in lieu of the original plaintiffs Leong Shain Sway. There orders for the substitution of the parties were made by the Judicial Committee of the Privy Council because it appeared that the original plaintiff Leong Shain Sway was the mortgagor of the mill in respect of which the suit had been brought and the mortgagee had sold his interest in the mill to the present respondent ; and the applicants were the assignees of the property of the defendant company which had gone in liquidation. The appeal of the applicants to the Privy Council was allowed with costs and the respondent paid to the appellants the whole of the appellants' costs of the trial, and of the appeal to this Court and of the appeal to His Majesty in Council. The present application is for an order upon the respondent that he do make restitution to the appellants of the sum of Rupees 2,708-13-0 which had been paid by the original defendants to the original plaintiff as costs pursuant to the decree of this Court on appeal from the trial Court. It is not contended that the appellants are entitled to recover this sum from the respondent under the decree of His Majesty in Council, but it was strenuously argued by Mr. Foucar on behalf of the appellants that, inasmuch as the appellants and the respondent had been substituted for the original parties to the suit an order ought to be passed that the respondent do make restitution of these costs under S. 144, Civil P. C. S. 144 (1), Civil P. C , runs as follows :

" Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and, for this purpose, the Court may make any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

Now, it is quite clear that a claim under S. 144 is governed by the same principles that apply to a claim for money had and received, and that where pursuant to a decree or order of the Court one party has been compelled to pay money or transfer property in invitum to another party, it would be unconscionable upon the reversal of the decree or order that the party who had received the money or property through the wrongful act of the Court should be held entitled to retain such money or property as against the party who had wrongfully been ordered to pay it, and who was claiming restitution.

In *Jai Berham* v. *Kedar Nath Marwari* (1), Lord Carson, delivering the judgment of the Judicial Committee, p. 16 (of 2 *Pat*):

" It is the duty of the Court, under S. 144, Civil P. C., to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed."

Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns, L. C., in *Rodger* v. *Comptoird's Escompte de Paris* (2,:

"One of the first and hightest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of Court,' is used it does

(1) A. I. R. 1922 P. C. 269=69 I. C. 278=49 I. A. 351=2 Pat. 10 (P. C.).

(2) [1871] 3 P. C. 465=40 L. J. P. C. 1 =24 L. T. 111=19 W. R. 449=7 Moo. P. C. (n. s.) 314.

not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of a Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case."

In *Dorasami Ayyar* v. *Annasami Ayyar* (3) at p. 310, Subramania Ayyar, J., laid down that :

" it is not true as was in a manner suggested on behalf of the respondents, that the granting of restitution is discretionary. The principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost .....That obligation it is the duty of the Courts to enforce unless it is shown that restitution would be clearly contrary to the real justice of the case : see also *Rajjabali Khan Talukdar* v. *Faku Bibi* (4).

It is observed however that in *Raj Raghubar Singh* v. *Jai Indar Bahadur Singh* (5), at p. 166 (of 42 *All.*):

Lord Phillmore, delivering the judgment of the Judicial Committee, added:

" But these sections apply only to the parties or the representatives of the original parties."

Now, applying the provisions of S. 144, as explained in these rulings to the facts of the present case, in my opinion it becomes manifest that the appeal must fail, because the object of an application under S. 144 at the instance of a "party entitled to any benefit by way of restitution or otherwise" is to

" cause such restitution to be made as will, so far may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

The position of the parties to the present application however was exactly the same both before and after the appellate decree of this Court had been passed. The effect of the appellate decree was neither to deprive the appellants of a single anna, nor to benefit the respondent to the extent of a single anna. The appellants did not pay and the respondent did not receive this sum of Rupees 2,708-13-0 or any part thereof by reason of the appellate order of this Court or otherwise, or at all. Can it be said in such circumstances that the appellants are "entitled to any benefit by way of restitution" or that an order for restitution is necessary in order to

" place the parties in the position which they would have ocuppied but for such decree or such part thereof as has been varied or reversed. "

Clearly not. For the purpose of disposing of the present application it is not necessary to consider what the legal position would have been if an application had been made under S. 144 by the original defendants against the original plaintiff, or the transferee, or representatives of the original plaintiff. That is not the present case. An order for restitution against the respondent who has never received the money or obtained any benefit from it in favour of the appellants who never possessed the money and never lost it would offend as well against the dictates of conscience and reason as against the express provisions of S. 144. In my opinion, neither on principle nor on authority can this appeal be sustained. The application was dismissed by my brother Das, J. In my opinion, the appeal fails, and must be dismissed with costs, five gold mohurs.

Cunliffe, J.—I agree and have nothing to add.

K.N./R.K. *Appeal dismissed.*

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(3) [1900] 23 Mad. 306=10 M. L. J. 307.
(4) A. I. R. 1932 Cal. 29=1932 Cr. C. 66=134 I. C. 906=58 Cal. 1070.
(5) A. I. R. 1919 P. C. 55=55 I. C. 550=46 I. A. 228=22 O. C. 212=42 All. 158 (P.C.).

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* A. I. R. 1932 Rangoon 150

BROWN AND HEALD, JJ.

Emperor

v.

Nga Aung Myat

Criminal Revn. No. 200-A of 1932, Decided on 8th April 1932, against order of Third Addl. Special Power Magistrate, Twante, D/- 19th December 1931.

*** Criminal P. C. (1898), S. 423 (1) (b)—Sentence of imprisonment can be altered into sentence of whipping—Period of imprisonment already undergone should be considered by appellate Court in inflicting sentence of whipping.**

There is no provision of the Code of Criminal Procedure, or any other Act, which prevents an appellate Court from altering a sentence of imprisonment into a sentence of whipping. Provided the effect of the change is not to enhance the sentence it is open to an appellate Court under S. 423 (1) (b) to alter a sentence of imprisonment into one of whipping where the accused person has been found guilty of an offence which is punishable with whipping in lieu of any other punishment. The effect of such orders passed by the appellate Court is to set aside the sentence of imprisonment altogether, and the only sentence remaining is that of whipping. But in considering what sentence it should itself inflict, the appellate Court should, of course, bear in mind the part of the original sentence which before its order the accused person has, in fact, undergone, and this part of the original sentence

together with the sentence that the appellate Court inflicts should not in effect be more severe than the sentence passed by the trial Court. Ordinarily the substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more, or the substitution of a sentence of 25 stripes for a sentence of nine months' imprisonment or more, or the substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more would not amount to enhancement of the sentence within the meaning of S. 423 (1). The minium sentence of whipping which is likely to be effective in the case of an adult is 20 stripes and consequently where the accused who is sentenced to rigorous imprisonment for nine months has already undergone three and half months of his original sentence, the Court should not alter the sentence passed by the trial Court: 8 *L. B. R.* 466, *not Foll.*; *A. I. R.* 1929 *Rang.* 177 (*F.B.*), *Rel. on.* [P 151 C 2, P 152 C 1]

Brown, J.—The respondent Nga Aung Myat was convicted under the provision of the second part of S. 457, I. P. C., and sentenced to suffer nine months' rigorous imprisonment. He appealed to the Sessions Court and one of the grounds in his memorandum of appeal was that a sentence of whipping would have been more appropriate. The Sessions Judge with regard to this prayer remarked that the sentence could not be altered as the respondent had already undergone a portion of the term of imprisonment. The offence of which the respondent has been found guilty is punishable with whipping in lieu of any other punishment.

In the case of *Emperor* v. *Po Wun* (1) an accused person had been sentenced to six months' rigorous imprisonment for theft under S. 379, I. P. C. On appeal the Sessions Judge altered the sentence to one of whipping. On the date of the Sessions Judge's order the accused had already served 14 days of the sentence of imprisonment. It was held that as for the particular offence whipping could only be imposed in lieu of any other punishment the intention of the law was infringed by ordering a man to be whipped after he had already served part of the sentence of imprisonment. This case was followed in Upper Burma in the case of *Emperor* v. *Nga Tun Sein* (2), and the Sessions Judge was bound to follow those rulings. It has been suggested however that the law was not correctly laid down in these cases and the proceedings in this case have been called in revision to consider the point. Under the provisions of S. 423, Criminal P. C., an appellate Court has power, without altering the finding to alter the nature of the sentence passed but not so as to enhance the same. I know of no provision of the Code of Criminal Procedure, or any other Act, which would prevent an appellate Court from altering a sentence of imprisonment into a sentence of whipping. It seems to me that provided the effect of the change is not to enhance the sentence it is open to an appellate Court to alter a sentence of imprisonment into one of whipping where the accused person has been found guilty of an offence which is punishable with whipping in lieu of any other punishment. The effect of such orders passed by the appellate Court is to set aside the sentence of imprisonment altogether, and the only sentence remaining is that of whipping.

In considering what sentence it should itself inflict, the appellate Court should, of course, bear in mind the part of the original sentence which before its order the accused person has, in fact, undergone and this part of the original sentence together with the sentence that the appellate Court inflicts should not in effect be more severe than the sentence passed by the trial Court. The question whether, and in what circumstances, the substitution of a sentence of whipping for a sentence of imprisonment would amount to enhancement of the sentence was considered by a Full Bench of this Court in the case of *Emperor* v. *Chit Pon* (3). In the judgment in that case reference was made to the case of *Empress* v. *Banda Ali* (4) in which case it was held that the substitution of a sentence of imprisonment for a sentence of whipping should always be regarded as an enhancement of the original sentence. This view of the law was not accepted by the Full Bench which suggested that ordinarily the substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more, or the substitution of a sentence of 25 stripes for a sentence of nine months' imprisonment or more, or the substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more would not amount to enhancement of the sen-

(1) [1917] 8 L. B. R. 466=18 Cr. L. J. 773=41 I. C. 149.
(2) [1919] 3 U. B. R. 32.
(3) A. I. R. 1929 Rang. 177=1929 Cr. C. 169=119 I. C. 209=30 Cr. L. J. 986=7 Rang. 319 (F.B.).
(4) [1871] 15 W. R. Cr. 7=6 B. L. R. App. 95.

tence within the meaning of S. 423 (1) (b), Criminal P. C. In the present case the appellant was sentenced by the Magistrate to nine months' rigorous imprisonment and the substitution of a sentence of 25 lashes by the appellate Court would not, by itself have been an enhancement of the sentence but in deciding what sentence to pass the Sessions Court would be bound to consider the imprisonment already undergone. At the time orders were passed by the Sessions Judge in this case the appellant had undergone more than a month of his original sentence, and I do not think the passing by the Sessions Judge of a sentence of more than 20 lashes would have been justified. By now the appellant has undergone three and half months of his original sentence and has less than six months of that sentence still to serve. I do not therefore think that we should now alter the sentence into a sentence of whipping and I would refuse to interfere with the orders passed by the lower Courts.

Heald, J.—I have had the advantage of reading my learned brother's order and I accept his view that *Po Wun's* case (1) was wrongly decided in so far as it laid down that in a case where whipping can be imposed only in lieu of any other punishment and where the accused has already served any part of a sentence of imprisonment passed by the lower Court the appellate Court has no power to alter the sentence of imprisonment passed by the trial Court into a sentence of whipping. As was said in *Chit Pon's* case (3), there is nothing in the Whipping Acts, or in the Code of Criminal Procedure, apart from the provision of S. 423 (1) (b) against enhancement of the original sentence, which prohibits an appellate Court from passing a sentence of whipping. The question which arose for decision in *Po Wun's* case (1) was not a question of enhancement. It was a question of the intention of S. 3, Whipping Act, 1909, which says that on a conviction for certain offences an accused person "may be punished with whipping in lieu of any punishment to which he may for such offence be liable" under the Penal Code. I accept my learned brother's view that when under S. 423 (1) (b), Criminal P. C., an appellate Court alters a sentence of imprisonment to a sentence of whipping the sentence of imprisonment ceases in law to exist, and that the sentence of whipping which is in law the only sentence, is a sentence in lieu of and not in addition to the punishment to which the accused was originally sentenced. But although in law the original sentence ceases to exist, the fact remains that the accused person has suffered a part of it, and in my view that fact should be taken into consideration by the appellate Court in deciding what sentence should be substituted for the sentence originally passed.

The difficulty of comparing the severity of sentences of imprisonment with sentences of whipping was considered in *Chit Pon's* case (3) and with a view to overcoming that difficulty a Full Bench of this Court said in effect that as a matter of practice this Court does not in the case of adult accused persons regard the substitution of a sentence of 30 stripes for a sentence of one year's imprisonment or more, or the substitution of a sentence of 25 stripes for a sentence of nine months' imprisonment or more, or the substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more as being ordinarily an enhancement of sentence within the meaning of S. 423 (1) (b), Criminal P. C. That scale seems to have been laid down as a rule of practice not of law, but I think that we ought to follow it. If that rule and the suggestion that an appellate Court should take into consideration the part of the original sentence which the accused person has in fact already suffered be accepted, then it seems clear that the accused person in this case, who has already served more than three months of his original sentence of nine months, should not be sentenced to whipping of even 20 stripes, and, since it was suggested in *Chit Pon's* case (3), that the minium sentence of whipping which is likely to be effective in the case of an adult is 20 stripes, I agree that we should not alter the sentence passed by the trial Court in this case.

P.N./R.K. *Order accordingly.*

A. I. R. 1932 Rangoon 153

PAGE, C. J. AND MYA BU, J.

R. M A. R. M. Chettyar Firm—Appellants.

v.

N. S. P. R. M. Chettyar Firm—Respondents.

First Appeal No. 199 of 1931, Decided on 31st March 1932, against order of Dist. Judge, Myaungmya, in Civil Regular No. 8 of 1930.

Mortgage—Suit on—Costs—Puisne mortgagee is not normally liable for costs—To make him so liable plaintiff should see that order against him to pay costs is passed and inserted in decree—Civil P. C. S. 35.

Normally a puisne mortgagee is not ordered to pay the costs of the suit. It may be that the puisne mortgagee has so conducted himself that it is right and proper that he should be ordered to pay the costs of the suit. However if it is sought to make such mortgagee liable for the costs of the suit the prior mortgagee should take care that an order against the puisne mortgagee to pay the costs is passed by the Court and inserted in the decree. [P 153 C 2]

Where the material words in the order for preliminary decree were: "There will be a preliminary decree in the usual form for Rs. 12,000 with costs, against the two defendants, the decree against defendant 2 as subsequent mortgagee, and costs against defendant 1 on the uncontested scale." There was no direction in the preliminary decree that the puisne mortgagee was to pay the costs of the suit, and no reference to such an order was made in the final decree

Held: that it was not clear from the terms of the decree that the defendant mortgagee was ordered to pay the costs of the suit personally. [P 153 C 2]

K. C. Bose—for Appellants.

N. N. Burjorjee—for Respondents.

Page, C. J.—This appeal must be allowed. This proceeding arises out of a petition by the decree-holder in a mortgage suit for the purpose of amending the preliminary decree so that it should conform with the judgment of the Court. The object with which this amendment is sought is that the plaintiff decree-holder should be in a position to execute the decree for the costs of the suit against a puisne mortgagee, who was impleaded as a defendant. Now, it is common ground that in a suit brought by a mortgagee against the mortgagor and a puisne mortgagee, the costs of the suit will be added to the mortgage debt and form part of the sum in respect of which the final decree for the sale of the mortgaged property will be passed, and if the proceeds of sale are not sufficient to liquidate the amount decreed to the mortgagee a personal decree will be passed against the mortgagor. Normally, a puisne mortgagee is not ordered to pay the costs of the suit. The puisne mortgagee is impleaded as defendant because in a mortgage suit it is incumbent upon the mortgagee to make defendants all persons who would be entitled to redeem the property by paying the mortgage debt. But whether the puisne mortgagee is a party to the suit or not the court-fee would have to be defrayed in the first instance by the plaintiff, and it is to the advantage of the plaintiff to implead the puisne mortgagee so that there can be no question thereafter as to which of the two mortgagees takes priority. It may be however that the defendant mortgagee has so conducted himself that it is right and proper that he should be ordered to pay the costs of the suit. Each case turns on its own facts. In my opinion, however, if it is sought to make a defendant mortgagee liable for the costs of the suit the plaintiff should take care that an order against the defendant mortgagee to pay the costs is passed by the Court, and inserted in the decree.

Now, in the present case the question turns on whether the judgment of the Court, ordering that a preliminary mortgage decree should issue, indicated with sufficient clearness that the Court also ordered that the defendant mortgagee should pay the costs of the suit. The material words in the order are:

"There will be a preliminary decree in the usual form for Rs. 12,000 with costs, against the two defendants, the decree against defendant 2 as subsequent mortgagee, and costs against defendant 1 on the uncontested scale."

In the preliminary decree no order or direction is found to the effect that the appellant, who was a puisne mortgagee defendant, was to pay the costs of the trial, and no reference to such an order is found in the final decree. The proceeds of the sale being insufficient to satisfy the sum decreed to the first mortgagee the present petition was filed for an order that the preliminary decree should be amended, so that it should clearly indicate that an order had been passed that the appellant should pay the costs of the suit. In my opinion the amendment ought not to be allowed. I am not satisfied upon a true construction of the language used in the judgment that it amounts to an order that the appellant should pay the costs of the

suit. As I apprehend the meaning of the relevant passage in the judgment what was intended was that there should be a preliminary mortgage decree in the usual form for Rs. 12,000 and costs against the two defendants. A preliminary decree in the usual form with costs would be a decree against defendant 1 who was the mortgagor for the amount due under the mortgage and the costs, and against defendant 2 that his mortgage is postponed to the mortgage of the plaintiff, and that if he wishes to redeem he must do so by paying the amount due in respect of the plaintiff's mortgage. It would be unusual that a preliminary moatgage decree should include a direction that the puisne mortgagee should pay the costs of the suit.

The learned District Judge I think has made the meaning of the passage clear by adding that the decree is to be against the defendant mortgagee as subsequent mortgagee, that is to say, that the mortgage of the plaintiff is to have precedence to the mortgage of the defendant mortgagee, and that the plaintiff is to have "costs against defendant 1 on the uncontested scale" which means that the plaintiff is to be paid his costs by defendant 1 not on the contested scale but on the uncontested scale inasmuch as defendant 1 did not contest the suit. In my opinion it is not clear from the terms of the decree that the defendant mortgagee was ordered to pay the costs of the trial personally.

In those circumstances, in my opinion, the appeal succeeds, the order of the learned District Judge of Myaungmya is set aside, and the petition dismissed. We make no order as to costs.

Mya Bu, J.—I agree.

R.M./R.K. *Appeal allowed.*

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* * A. I. R. 1932 Rangoon 154

PAGE, C. J. AND CUNLIFFE, J.

Lawrence Dawson and *another*—Appellants.

v.

J. Hormasji and *others*—Respondents.

Civil Misc. Appeals Nos. 135 and 136 of 1932, Decided on 20th July 1932, against judgment and decree in C. M. No. 180 of 1931 of High Court on Original Side, D/- 24th June 1932.

*** (a) Companies Act (1913), S. 202—Appeal lies against order rejecting scheme under S. 153.**

An appeal lies from an order under S. 153 rejecting a scheme both under S. 202 and Cl. 13, Letters Patent: *A. I. R.* 1932 *Rang.* 96 and *A. I. R.* 1925 *Bom.* 442, *Ref.* [P 155 C 1]

*** (b) Companies Act (1913), S. 153—Court can prescribe and settle terms of proxy form.**

A Court possesses jurisdiction to prescribe and settle the terms of the proxy form by which proxies are to be appointed and any rule of the Court in so far as it purports to fetter or restrict the Court's jurisdiction in that behalf is inoperative and ultra vires: *A. I. R.* 1928 *Bom.* 80 and *In re, English, Scottish and Australian Chartered Bank*, (1893) 3 *Ch.* 385, *Ref.* [P 156 C 1, 2]

*** * (c) Companies Act (1913), S. 153—Duty and function of Court in sanctioning scheme presented to it, stated.**

It is not the function of the Court to substitute its own scheme for the scheme presented to it for sanction and if the Court is of opinion that unless some radical amendment is effected, or the scheme is fundamentally altered, it ought not to be sanctioned it is the duty of the Court to reject the scheme. The Court must look at the scheme and see whether the Act has been complied with, whether the majority are acting bona fide and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it. The Court must be satisfied that the scheme is not only reasonable but also practicable. It is neither the duty nor the business of the members of the Court to express their own opinion as to whether, if they happened to be creditors of the bank, they would or would not have voted in favour of the scheme. It is enough that the Court should hold that the view taken by the creditors as to the feasibility of the scheme is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. [P 158 C 1; P 159 C 1]

Per *Cunliffe, J.*—The Court should always prefer a living scheme to a compulsory liquidation bringing about an end of a company and usually without any hope of payment in full. [P 162 C 1]

(d) Companies Act (1913), S. 153—Scheme unreasonable—Onus is on objectors.

The onus of showing that any scheme is unreasonable is on the objectors. [P 162 C 1]

Lambert, Cowasjee, Anklesaria and *Jeejeebhoy*—for Appellants.

Wisham, McDonnell, Clifton and *Hartnoll*—for Respondents.

Page, C. J.—This is a petition by the liquidators of Dawsons Bank Ltd., under S. 153, Companies Act (7 of 1913), praying for the sanction of the Court to a scheme for the reorganization of the capital of the company. But for the

fact that Das, J., has taken a different view from that which commends itself to me I should have thought that the case was free from difficulty. S. 153 runs as follows:

"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up, of the liquidator, order a meeting of of the creditors or class of creditors, or of the members, of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

"(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting agree to any compromise or arrangement, sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members as the case may, be and also on the company, or in the case of a company being wound up, on the liquidators and contributories of the company."

The scheme is supported by Mr. Baldwin, the Chairman of a committee of creditors appointed at a meeting of the creditors on 22nd July.1931. Mr. Baldwin appears in person. The scheme is opposed by Mr. and Mrs. Hormasji, Mrs. Matilda Brown and Mr. C. F. Brown, who are represented by Mr. McDonnell and also by Mr. Henry Pratt, for whom Mr. Wisham appears. A preliminary objection was raised by Mr. McDonnell upon the ground that no appeal lay from the order of Das, J. In my opinion an appeal lies from an order rejecting a scheme both under S. 202, Companies Act and Cl. 13, Letters Patent: *L. Dawson* v. *J. Hormasji* (1) and *Viramgam Spinning and Manufacturing Co. Ltd.* v. *Industrial Bank of Western India Ltd.* (2). On 6th May 1932 the scheme now presented to the Court for sanction was unanimously approved by the preference share-holders and by the ordinary share-holders of the company at meetings duly convened in that behalf.

On 11th December 1931 a meeting of the creditors of the company was held under S. 153 and it is contended on behalf of the liquidators that at that meeting the scheme was approved by the requisite majority of the creditors. The scheme is now opposed on two grounds: (1) that the statutory majority under S. 153 (2) of three-fourths in value of the creditors present either in person or by proxy at the meeting of 11th December 1931, did not agree to the scheme; and (2) that on the merits the scheme ought not to be sanctioned. Whether or not the first objection can be sustained depends upon whether the proxy form approved by Sen, J., was valid. The votes cast at the meeting were as follows: Including Mrs. Saigol, total, 54,52,826; three-fourths, 40,89,619; in favour of the scheme 41,32,479; excluding Mrs. Saigol, total, 53,76,092; three-fourths, 40,32,069; in favour of the scheme, 40,55,745.

It will be seen therefore that whether Mrs. Saigol is treated as being present at the meeting or not, in either event the statutory majority of three-fourths in value of the creditors present either in person or by proxy approved of the scheme. Mrs. Saigol is a depositor with the bank to an amount of Rs. 76,734 and her proxy was present at the meeting and voted in favour of the scheme. The learned Judge in the course of his judgment stated:

"In my opinion it is safer not to consider Mrs. Saigol as voting in favour of the scheme."

Now the reason why the learned Judge expressed this opinion with regard to the vote cast by the proxy of Mrs. Saigol was that on 16th December 1931, a letter from Mrs. Saigol was received by the company in Rangoon purporting to cancel the proxy form empowering her proxy to vote at the meeting of 11th December 1931, in favour of the scheme. I confess with all due deference to Das, J., that I do not appreciate what the learned Judge meant by the passage in his judgment that I have cited; for with respect to the vote cast at the meeting on behalf of Mrs. Saigol the question to be determined is not whether it is safe or unsafe to allow that vote to count, but whether Mrs. Saigol's vote cast at the meeting in favour of the scheme by her proxy was valid or not. Mr. McDonnell admitted that if Mrs. Saigol's proxy was duly appointed Mrs. Saigol voted in favour of the scheme; thus the question to be determined in connexion with the proxies who voted in favour of the scheme is whether the proxy form approved by Sen, J., was valid or not. Mr. McDonnell frankly and in my opinion inevit-

(1) A. I. R. 1932 Rang. 96=137 I. C. 444=10 Rang. 189.
(2) A. I. R. 1925 Bom. 442=89 I. C. 108.

ably further conceded that Sen, J., had jurisdiction to prescribe and settle the terms of the proxy from by which proxies were to be appointed. There can be no doubt, in my opinion on the construction of S. 153 that the Court possesses jurisdiction in that behalf, and it has been so held both in India and in England: *In re, Tata Iron and Steel Co.* (3) and *In re, English, Scottish and Australian Chartered Bank* (4). The proxy form approved by Sen, J,, is as follows:

Proxy.

" I the undersigned, an unsecured creditor of the abovenamed company, hereby appoint Mr. A. C. J. Baldwin, I. E. S., of Rangoon whom failing Mr. Lawrence Dawson, Liquidator . . . . . as my proxy to act for me at the meeting of unsecured creditors to be held at the office of Dawsons Bank Ltd., 548, Merchant Street, Rangoon on Friday the eleventh day of December 1931, at 11 o'clock in the forenoon, for the purpose of considering, and, if thought fit, approving with or without modification, a scheme of arrangement proposed to be made, between the said company and its unsecured creditors, and at such meeting and any adjournment thereof, to vote for me and in my name . . . . . the said scheme, either with or without such modification, as my proxy may approve. Dated this . . . . . day of . . . . . 1931. Signature . . . . . Address. . . . . ."

Now under S. 246, Companies Act, the "High Court may from time to time make rules consistent with this Act," and pursuant to the powers which the Court possesses under S. 246 the High Court at Rangoon passed Rr. 144 and 145 which run as follows:

" *Rule* 144.—Every instrument of proxy shall be in accordance with the form in the Appendix and every written part thereof shall be in the handwriting of the person giving the proxy or of any manager or clerk or other person in his regular employment or of a commissioner to administer oaths."

" *Rule* 145.—General and special forms of proxy shall be sent to the creditors and contributories; with the notice summoning the meeting either the name or description of the Official Liquidator or any other person shall be printed or inserted in the body of any instrument of proxy before it is so sent."

The form of proxy prescribed under under R. 144, so far as material, is in the following terms:

"I . . . . . of . . . . . a creditor (or contributory) hereby appoint . . . . . to be . . . . . general proxy to vote at the meeting of creditors (or contributories) to be held in the above matter on the . . . . day of . . . . 19 . . . or at any adjournment thereof. Dated this . . . . day of . . . . . 19 . Signature of witness . . . . . Signed. Address."

(3) A. I. R. 1928 Bom. 80=108 I. C. 465.
(4) [1893] 3 Ch. 385=62 L. J. Ch. 825=69 L. T. 268=42 W. R. 4.

The learned advocate for respondents 1 to 4 contended, notwithstanding that the Court possessed jurisdiction under S. 153 to settle the proxy form which was to be used at the meeting, that all proxy forms were invalid unless they were in the terms of the proxy form prescribed under R. 144; and it was urged that inasmuch as in the proxy form approved by Sen, J., there were inserted before the proxy form was sent out the words:

"Mr. A. C. J. Baldwin, I. E. S., of Rangoon, whom failing Mr. Lawrence Dawson, Liquidator,"

the votes cast by each and every proxy appointed under the form approved by Sen, J., were invalid as contravening Rr. 144 and 145. That argument has found favour with Das, J., who in his judgment observed:

"It seems to me that the attention of the learned Judge who approved of the proxy form was not drawn to this rule framed by this Court regarding proxies. I therefore think that the learned Judge acted ultra vires and without jurisdiction in approving of the form submitted to him for approval."

With great respect I am unable to accept either this ruling of the learned Judge, or the reasoning by which it is supported. It seems to me that the learned Judge reversed the true position in law, for in effect he has held that the Act has to be consistent with the rules, whereas S. 246 provides that the rules must be consistent with the Act. It is common ground in the present case, and I hold, that under S. 153, Sen, J., had jurisdiction to settle the terms of the instrument of proxy to be used at the meeting of the creditors on 11th December 1931, in any form that he thought fit to prescribe; and it follows that in so far as any rule of the Court purports to fetter or restrict the learned Judge's jurisdiction in that behalf it is inconsistent with S. 153 and pro tanto inoperative and ultra vires. That this is so appears to me to be plain, and not to be open to doubt or controversy. I hold therefore that all votes duly cast by proxies appointed under the proxy form approved by Sen, J., were valid and must be accepted. The result is that the scheme received the approval of the statutory majority of creditors present either in person or by proxy at the meeting of 11th December 1931, and the first objection to the scheme fails. In these circumstances it becomes unnecessary to

refer to the proxy form issued on behalf of the respondents, except to observe that the proxy forms as issued by the respondents were consistent neither with the rules nor with the form approved by Sen, J. It would seem that in connexion with the proxy forms by reason of the beam in their own eye the respondents failed to discern that no mote lay in the appellants' eye.

As regards the second objection, namely, that the scheme should be rejected on the merits, I desire to repeat what I said with regard to the genesis of the scheme in *F. G. Robson* v. *Dawsons Bank* (5). Dawsons Bank was formed for a laudable object, which must have the sympathy of all persons who have regard to the welfare of a country like Burma. No one can live for any length of time in a province of the Indian Empire without being aware that one of the great difficulties that stand in the way of the cultivator is that he has not enough credit or capital to work as a free man should. Any bank such as Dawsons Bank which has for its object the financing of cultivators on honest and reasonable terms in order to enable them to cultivate the land without undue harassment and anxiety, is performing a public service. But the success of such a bank depends upon, largely, the proceeds of the paddy crop from year to year. A number of persons have deposited money with the bank for fixed periods, and the money so deposited has mainly been invested by way of loan upon petty agricultural adventures. Of course, so long as there is agricultural prosperity in Burma, Dawsons Bank will be in a flourishing condition, and the normal variation in the crop from year to year will not seriously affect its stability. But in an agricultural country like Burma some temporary disaster, coincident perhaps with other transitory difficulties, may occur which for the time being will render the collection of the debts due by the cultivators to an agricultural bank a matter of great difficulty, and if such a period of depression is unduly prolonged the stability of the bank may grievously be diminished. The position of the bank however at any particular time must depend upon the circumstances then prevailing.

Now, it so happens that Burma recently has been passing through a period of deep depression owing to the partial collapse of the paddy market. Such a situation necessarily would cause anxiety to those responsible for the management of an undertaking like Dawsons Bank. In April 1931, however the problem became further complicated by reason of the rebellion which it was feared might seriously affect the volume of the paddy grown in Burma in the ensuing year. It was incumbent upon the management of Dawsons Bank in such circumstances to consider what steps they ought to take to meet the emergency that had arisen, and the directors of the bank made known to the general public how they appraised the situation. The directors took the view that for a prolonged period of depression the system of obtaining money by fixed deposits was inconvenient, and might be dangerous if it so happened that capital was required for the business of the bank at a time when a number of fixed deposits became payable. In that event the bank might temporarily become embarrassed, although the management of the company expressly stated that Dawsons Bank was in a position to pay its debts as and when they become due, and that if the condition of the paddy market improved and the rebellion was speedily crushed matters would right themselves. On the other hand they pointed out that if the period of depression was abnormally prolonged the result might be that whereas on the one hand the depositors might not be prepared to renew their deposits, on the other hand it would become increasingly difficult for the bank to collect the loans which it had made to the cultivators in the districts. They suggested therefore that the best scheme for ensuring the success of the bank in the future would be to change the system of raising capital by way of fixed deposits, and to substitute for it a system of long term debentures thereby guaranteeing fixed capital for the company, and, in their opinion, rendering the stability of the company and the position of the depositors more secure.

Now, the substance of the scheme under consideration is that in lieu of liquid capital in the form of deposits the depositors have been given the option of taking either debentures or pre-preference shares, thus enabling the company to obtain fixed and more or less permanent capital

(5) A. I. R. 1932 Rang. 75=137 I. C. 638=10 Rang. 143.

with which to carry on its business. This scheme has received the unanimous support of the present preference shareholders and ordinary shareholders, and also of an overwhelming majority of the creditors, and the liquidators now petition the Court to sanction the scheme with such modification (if any) as the Court may think it right to impose.

Now, what is the duty of the Court in such circumstances? It is certainly not the function of the Court to substitute its own scheme for the scheme presented to it for sanction and if the Court is of opinion that unless some radical amendment is effected, or the scheme is fundamentally altered, it ought not to be sanctioned, it is the duty of the Court to reject the scheme. As to the manner in which the Court ought to approach the consideration of a scheme presented to it for sanction under S. 153 after it has been approved by the statutory majority of the creditors I desire to cite, and make my own, certain observations of Lindley, L. J., *In re English Scottish and Australian Chartered Bk.* (4) In that case Lindley, L.J.,explained that:

"what the Court has to do is to see, first of all that the provisions of that statute have been complied with ; and secondly, that the majority have been acting bona fide. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme and see whether the Act has been complied with, whether the majority are acting bona fide and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it" Ibid 409 :

Lindley, L. J., added that

"if the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later. While therefore I protest that we are not to register their decisions, but to see that they had been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong ; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to show that there has been some material oversight or miscarriage."

Lopes, L. J., in the same case, observed that :

"with regard to the word 'reasonably' it must always be borne in mind that the word 'reasonably' is a relative term : it means reasonably with regard to the particular circumstances of the case. What is reasonable in one case might be unreasonable in another. The reasonableness must be always regarded with reference to other alternatives. For instance, an arrangement giving a very small benefit to creditors, if the alternative were absolute ruin to the company and no benefit to the creditors, would I think be reasonable."

Now, the alternative to this scheme is the winding up of the company and the closing down of the business of the bank, and if it is not common ground, in my opinion it is not a matter capable of dispute or open to challenge that any sudden realization of the assets, or anything like a forced sale would be ruinous to the creditors. In these circumstances it is not unnatural that certain desultory and fantastic suggesticns should from time to time have been made which (so far as I find them intelligible) are to the effect that it might be to the benefit of the creditors if the period for the liquidation of the bank's assets was extended by means of a moratorium and the company in that way subjected to a lingering rather than a sudden death. I do not pause to examine these suggestions for as Lindley, L J., pointed out in *In re English, Scottish and Australian Chartered Bank* (4) :

"If you lay before creditors a scheme which they think is sufficient, I do not think it is the province of the Court to say that every conceivable scheme which the ingenuity of man can suggest was not laid before them and submitted to them. They are business men ; they have looked at it ; they know their own interest: they have approved the scheme by a vast majority in favour of it."

I am the less inclined to burden this judgment with a further discussion of these proposals because no argument based on a moratorium was presented to the Court on behalf of the respondents at the hearing of the appeal, and the suggestions to which I have referred have all been considered, and in my opinion, properly rejected, by the committee of creditors that was unanimously elected at the creditors' meeting, on 22nd July

1931. Now, the scheme which has been presented to the Court for sanction appears to me prima facie to be a reasonable and legitimate method that has been adopted by the bank for the purpose of surmounting the difficulties which it has been called upon to face through the recent partial capital collapse of the paddy market in Burma. But before the Court sanctions a scheme it must be satisfied that it is not only reasonable but practicable, and with a view to establishing that the scheme is a feasible proposition a number of figures and statements have been placed before us by the appellants, (the correctness of which has not been challenged by the respondents), which satisfy us that the scheme is one that an intelligent and honest creditor might reasonably regard as capable of realization. It is unnecessary to embark upon a consideration of the facts and circumstances which have led us to this conclusion, at which we have arrived only after an exhaustive argument and anxious consideration of the materials that have been placed before us. The shareholders unanimously and the creditors by a vast majority, are of opinion that the scheme ought to be supported, and that sanction should be given to it. It is neither the duty nor the business of the members of the Court to express their own opinion as to whether, if they happened to be creditors of the bank, they would or would not have voted in favour of the scheme. It is enough that the Court should hold as we are prepared to hold that the view taken by the creditors as to the feasibility of the scheme is one

"as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men."

In one respect however we are of opinion, that the scheme requires modification. We observe that the substratum of the scheme is that the price of paddy should not fall unduly below the rate of Rs. 100 for 100 baskets. The present price is stated to be Rs. 110 for 100 baskets, and the scheme is based upon an estimated price of Rs. 100 for 100 baskets. Upon that hypothesis it would not be unreasonable to surmise that the scheme can and will be carried through. Moreover the view taken by the statutory majority of the creditors has been strengthened by the events that have happened, for in 1931-32 a year of unprecedented depression, 5 per cent interest on the deposits has been paid out of revenue. We think in such circumstances that it is not unreasonable the rate of the debenture interest should have been fixed for the first year at 5 per cent. But what of the future? Why should the debenture holders, who as depositors were unsecured creditors receiving on an average about 6 per cent interest on their deposits, receive as secured debenture holders more than 5 per cent? The company during the prevailing period of depression has felt bound to forgo some portion of the interest due to it from its debtors and in such circumstances it is incumbent upon the Court to consider whether there is any justification for an undertaking by the company to pay the debenture holders interest on their debentures at the rate of 6 per cent for a period of 21 years out of the 23 years during which the debenture issue may remain outstanding. Can anyone prognosticate with anything approaching accuracy when the prevailing depression will pass away? In February 1932, it was suggested in a letter to the liquidators that a certain gentleman should be asked to undertake a thorough survey of the position of the bank, and I am disposed to think that the reply of 21st February 1932 contained a shrewd appreciation of the situation by the liquidators when they observed:

"It cannot be assumed, as you have apparently assumed, that the value of the products of agricultural land in Burma has now become stabilized; much less can we assume that land values have become stabilized. Moreover, the profit derived from agriculture will depend upon whether the price of rice rises or falls relatively to the rise or fall of other commodities necessary to agriculturists and agriculture." . . .

We think for the reasons given above that any competent person holding a survey such as you suggest must come to the conclusion that time alone can determine at what prices stabilization is likely to be effected, and that in the present confused economic conditions which prevail the qualification that is required for such a surveyor is a gift of prophecy. However impartial such a surveyor may be his personal views of the future must necessarily colour his report, and there can be no kind of assurance that these

views would be verified or falsified by the event. Mr. Baldwin in his address to the Court stated that the committee of creditors had fixed the rates of interest set out in the scheme both because they thought that the company could afford to pay the progressive rates of interest on the debentures therein referred to, and also because the members of the committee were anxious so far as possible to compensate those depositors who might have wished to realize the capital that they had invested in the bank within a short period. But that is not the outlook of the business man, but of the utilitarian. In our opinion, having regard to the uncertainty in which the future of the agricultural industry of Burma is shrouded and the instability of paddy prices, the bank would not be justified in undertaking to pay interest on the debentures at a higher rate than 5 per cent during the period in which the issue remains outstanding. This modification of the debenture interest will to some extent affect the rate of interest payable to the pre-preference shareholders, which we think ought to be 7 per cent and not 7 1/2 per cent.

The objections that have been raised to this scheme, in my opinion, are inconsistent, irrational, and unreal. The respondent Sir Henry Pratt has expressed the opinion that the financial position of the bank is not unsatisfactory, and has made certain suggestions which he thinks, if followed would enable the creditors to realize their capital or a substantial portion of it within a few years. Sir Henry Pratt, however refused to meet the committee of creditors who had been appointed on 22nd May 1931 at the creditor's meeting to investigate the affairs of the bank, for the purpose of discussing with them any relevant proposal that he might have to make. At the hearing of the appeal also the learned advocate who appeared for Sir Henry Pratt declined to present any argument to the Court on his behalf, although I understood the learned advocate to state that he adopted the argument presented to the Court by Mr. McDonnell. The respondents for whom Mr. McDonnell appears are Mr. and Mrs. Hormasji, Mrs. Matilda Brown and Mr. C. F. Brown. Mrs. Matilda Brown is a depositor to a large amount and the attorney for Mrs. Brown was appointed a member of the committee of creditors, and as representing Mrs. Brown approved of the scheme that was passed unanimously by the committee of creditors on 1st September 1931. It appears that Mrs. Brown (who, we are informed is an aged lady) afterwards changed her opinion, and she is now opposing the scheme. On behalf of respondents 1 to 4 the only criticizm of the scheme that Mr. McDonnell was instructed to present to the Court was that the bank was capable of redeeming the whole of the debenture issue in ten years and the learned advocate stated that if a provision to that effect was embodied in the scheme his clients would not object to the scheme being sanctioned by the Court. Of course, the argument which Mr. McDonnell presented to the Court on behalf of respondents 1 to 4, so far from providing a ground that would justify the Court in refusing to sanction the scheme, was a cogent argument in its favour, for if the financial position of the bank is so satisfactory that it is able out of revenue to redeem the whole of the debenture issue in ten years, a fortiori it will be in a position to do so in 23 years. Mr. and Mrs. Hormasji on the other hand have consistently stated that in their opinion the bank is insolvent, and on 22nd June 1931 these respondents filed a petition for the compulsory winding up of the bank upon the ground inter alia that the bank was "unable to pay its debts."

I asked Mr. McDonnell if his argument was presented on behalf of Mr. and Mrs. Hormasji as well as of Mrs. Matilda Brown and Mr. C F. Brown, and the learned advocate replied that it was presented on behalf of all his clients, and that Mr. Hormasji has now changed his view as to the inability of the bank to meet its liabilities. It is a volte face on the part of Mr. Hormasji as complete as it is sudden. In my opinion the objection of the respondents to this scheme comes to nothing, and so far from satisfying the Court that the scheme is not a feasible arrangement that the Court ought to sanction, the argument presented on behalf of the respondents, for what it was worth, tells in favour of the practicability of the scheme. For these reasons the appeal must be allowed, and the order of Das, J., set aside and the scheme modified in the sense that I have indi-

cated is sanctioned. As regards the costs in the Court below the only order that we make is that the costs of the liquidators be borne by the company. As regards the costs of the appeal the costs of the liquidators will be paid by the respondents—20 gold mohurs.

Cunliffe, J.—I am of the same opinion, and on the technical point relating to the forms of proxy required I have nothing to add to what has been stated by my Lord. On the merits of the scheme however and on the attitude to be adopted by the Court towards the reconstruction of a company, I desire to make certain observations: The present position, or, I should say, the recent position of the bank, is conveniently shown in the tables and statements attached to a circular letter entitled "The scheme as a Commercial Proposition" which was distributed to those interested by the committee of depositors. From these tables and statements it will be seen that the proposals of the committee who are supported by the liquidators are broadly as follows: They calculated that the future gross annual earnings of the bank will be Rs. 5,60,000. This figure is based on the assumption that there will be a steady market price for paddy at Rs. 100 per 100 baskets, and that the amount of interest payable by agricultural debtors of the bank may be fairly computed at about 8 per cent, this figure, of course, being very much below the rate at which the original capital was put out at loan.

To this amount of the gross income must be added Rs. 60,000 revenue from bank property and also a net interest on certain Government stock owned by the bank after deduction of interest on an overdraft payable by the bank for which this Government scrip has been deposited as security. To arrive at the estimated total net annual income of the bank, expenses of management were deducted—various annual items such as interest on the provident fund of employees of the bank, depreciation of buildings, the property of the bank, and provision for income-tax, were also taken into account. This calculation produces a net income of Rupees four lakhs.

The actual proposal of the committee is that all depositors should convert their cash holdings either into debenture bearer bonds as stock in the form of preference shares. The debentures to be redeemed over a term of 23 years by an annual system of drawings on a small premium to be paid on each redemption. The committee suggested that debentures should bear interest at 5 per cent for the first year, 5½ per cent for the second year and 6 per cent to be maintained for the remaining years. The preference shares to bear interest at 7½ per cent per annum. Various other figures and calculations were taken into account by the committee of depositors. It was recorded that applications for the preference shares would probably be in the neighbourhood of over Rupees ten lakhs nearly 58 lakhs of debentures already being applied for. It was pointed out that immediately on issue the debentures would have some market value and also that on the voluntary liquidation being determined and reconstruction being completed, the company would be at liberty to resume its ordinary business and obtain fresh capital if necessary. Such then is the scheme regularly put forward by the elected majority of the depositors; and it may be noted that it has always been stated throughout the record that a qualified chartered accountant was advising the committee throughout. It is interesting also to note that while a complaint on the part of the objectors was that no signed statements of either the chartered accountant or an expert in banking were before the learned Judge on the original side, yet when it was suggested by counsel for liquidators that such statements were available, counsel for the objectors at once took strong exception to their being produced.

The objectors represented before us by Mr. McDonnell and Mr. Wisham had however no settled scheme of reconstruction to put forward as an alternative to the one above described. Originally the Brown family, who are now objectors, represented by Mr. McDonnell had formed part of the majority of satisfied depositors. I still do not know what these objectors tangibly propose. A scheme of care and maintenance was adumbrated on their behalf based on the policy said to have been adopted by those responsible for the rubber industry; but the details have never in fact materialized; and also such a scheme was certainly never before the Judge on the original side. A sugges-

tion that the debentures should be redeemed in ten years was also put forward; but such a proposal would place even the most flourishing concern in difficulties. Mr. McDonnell was in a difficult position too, because right up to the hearing in this Court he was representing not only the Brown family who took this optimistic view of the company's financial position but he was representing Mr. and Mrs. Hormasji, and they supported the compulsory winding up in which case only a fraction of the assets of the company would go to those who are creditors. What then should be the attitude of the Court towards the proposals such as these ? I desire to quote and to adopt a passage in the judgment of Bowen, L. J., *In re Alamba, New Orleans Texas and Pacific Junction Ry. Co.* (6) and it will be remembered that this particular case was referred to in *In re English, Scottish and Australian Chartered Bank* (4) to which my Lord has already made reference. Bowen, L. J. said this:

"A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it.. Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his rights Its object is to enable compromises to be made which are for the common benefit of some class of creditors as such."

That passage is at p. 243 of the report. The Court is of course not a mere machine for registration. It will look into the proposed scheme much as a Court of appeal will canvass, if asked to do so, the decision of a jury, to ascertain if there was reasonable evidence to support their verdict; but it will, I think, always also prefer a living scheme to a compulsory liquidation bringing about an end to a company, and usually without any hope of payment in full. I incline also to think that the onus of showing that any scheme is unreasonable would prima pacie fall on the objectors.

I approve of the substantial reduction in debentures interest mentioned by my Lord and also of the slight reduction in the rate of interest on the new preference shares. Such a reduction will, in my opinion, give a greater freedom to the committee and to the liquidators in the furtherance of their new arrangement and an increased power to deal with unforeseen eventualities because the margin of liquid annual finance would be substantially enlarged. There are objections to every scheme and I can see objections in this one here, but they are not insuperable or fundamental objections; and I therefore prefer this constructive compromise to the compulsory liquidation put forward by those who raise their objections in such a half-hearted way. For these reasons I agree with the modified sanction proposed by the learned Chief Justice and that the appeal should be allowed.

K.N./R.K. *Appeal allowed.*

(6) [1891] 1 Ch. 213=60 L.J. Ch. 221=64 L.T 127=2 Meg. 377.

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PAGE, C. J. AND MYA BU, J.

Steel Brothers & Co. Ltd.—Appellants.

v.

Tokersee Mooljee—Respondent.

First Appeal No. 214 of 1931, Decided on 9th May 1932, against decree of High Court in Civil Regular No. 22 of 1931, D/- 27th November 1931.

Deed—Construction—Contracts are to be construed according to real intention of parties to be collected from language used—Effect is to be given to every word used and every word is to be interpreted according to ordinary and natural meaning.

Contracts are to be construed according to the real intention of the parties to be collected from the language they have used. Effect is to be given if possible to every word used and every word is to be interpreted according to its ordinary and natural meaning unless such construction would be contrary to the manifest intention of the parties or would necessarily lead to some contradiction or absurdity. [P 163 C 2]

A suit was brought for damages for failure to take delivery by vendee of certain rice under an agreement. Under Cl. 8 of the agreement delivery was to be taken ex-Hopper in November 1930 and the sellers had the option of fixing any date in the month of November on which delivery was to take place. Under Cl. 19 the sellers had the right to select any mill from among certain mills as the place where delivery was to be made and in order that buyers might know when and where they are to take delivery, the sellers had to give timely notice to the buyers of the date on which and the place where the sellers had fixed that delivery was to be effected. Upon receipt of the notice fixing the date and place of delivery the buyers came under an obligation to provide gunnies and twine and cash at the date and place so fixed, and to send a representative to accept delivery or reject the rice as per deli.

very made ex-Hopper. Milling notice was issued on 4th November, but the sellers were not ready or willing or in a position to give delivery of rice pursuant to notice, but claimed that they were at liberty to postpone the milling and delivery *de die in diem* until the last day of November if it was to the seller's interest to do so.

Held : that having regard to the form of the contract when the sellers had exercised the option of fixing the date and the place of delivery they were not entitled to alter the date or place so fixed for delivery without the buyer's consent and the construction sought to be placed on the contract by the sellers would be neither good sense nor good law and that the sellers were not entitled to any damages for not taking delivery on the postponed date. [P 166 C 1]

Held further : that if the buyers had rejected the rice tendered for delivery at the date and place fixed by the sellers for delivery, the sellers would be entitled at a later date within the period named in the contract to make another tender of the rice under the contract : *Coddington* v. *Paleologo*, (1848) 2 *Ex.* 193 ; *Gath* v. *Lees*, (1864) 3 *H. & C.* 558 ; 6 *Cal.* 681 ; *Brown* v. *Royal Insurance Co.*, (1859) 1 *El. & El.* 853 ; *Honck* v. *Muller*, (1881) 7 *Q. B. D.* 92 ; *Reuter Hufeland & Co.* v. *Sala & Co.*, (1879) 4 *C. P. D.* 239 and *Borrowman* v. *Free*, (1879) 4 *Q. B. D.* 500, *Rel. on.* [P 164 C 1]

Clifton—for Appellants.

Rafi and *Ispahany*—for Respondent.

Page, C. J.—This is an appeal from a decree of Das, J., dismissing a suit by the appellants to recover damages for failure to take delivery of 200 tons of rice. The contract is set out in the bought note, Ex. P, of which the material clauses run as follows :

"Rangoon, 18th September 1930. (1) We have this day bought from Steel Brothers & Co. Ltd., the undernoted rice of the description and on terms and conditions as follows : 400 tons bags at 355 per 100 baskets of 75 lbs. each, Kanaungtoe Small Mills Quality. (4) Gunnies and twine to be supplied by buyers or if sellers' gunnies are used, owing to late arrival at mill of buyers' gunnies, or other causes, Rs. 75 per 100 gunnies, and if sellers' twine is used Rs. 2 per 100 bags for the same will be charged. (7) The rice is to be milled by day or night at sellers' option. (8) Delivery to be taken ex-Hopper November 1930, date at sellers' option and payment to be made in cash, before any rice is removed, but not in any case later than immediately after milling. Payment in cash on completion of the milling of each 1,000 bags if required. (9) If the market price of the abovementioned rice declines prior to milling, sellers shall have the right of requiring buyers to deposit with sellers the margin between contract price and market price of the day on which such milling notice is issued for the rice deliverable under this contract. Failing the deposit of such margin as stated prior to time fixed for commencement of milling sellers shall have the right of cancelling this contract, and of claiming on buyers for any difference between the sale price and market price of the day on which milling notice is issued for rice deliverable under this contract. (10) Sellers have the right of disposing of any rice milled against this contract by private or public sale on buyers' account should they fail to pay within 24 hours of presentation of bill. Where gunnies have been sent by the original buyers sellers shall have the right of appropriating the proceeds of the gunnies and twine towards any loss sustained on the resale. (11) All risk of fire, damage by rats, and other contingencies to be borne by buyers from the time the rice is milled. (16) Accidents to machinery, strikes or sickness of mill hands or coolies, always excepted. (17) No claim whatever to be made by buyers after delivery of the rice has been taken ex-Hopper. (19) Sellers to have the right of delivering under the contract the milling of Messrs. Bulloch Bros. & Co. Ltd., and/or Steel Bros. & Co. Ltd., and/or the Burma Co. Ltd., and/or Ellerman's Arracan Rice & Trading Co Ltd., and/or The Anglo Burma Rice Co. Ltd., and/or Joseph Heap & Sons. Ltd.

Broker Messrs. R. Korsi & Co.
Signed Tokarsee Mooljee & Co."

The first question that arises is, What is the meaning and effect of these clauses in the contract, and, in particular of Cls. 8 and 19 ?

"The rule of construction applicable in general to all written contracts is, that they are to be construed according to the real intention of the parties to be collected from the language they have used : that effect is to be given, if possible to every word used, and that every word is to be interpreted according to its natural and ordinary meaning, unless such construction would be contrary to the manifest intention of the parties, or would necessarily lead to some contradiction or absurdity : Per *Kelly, C. B.*, in *Coddington* v. *Paleologo* (1) at p. 200."

In my opinion, the construction of this contract is free from difficulty. Under Cl. 8 delivery is to be taken in November 1930 and the sellers have the option of fixing any date in the month of November on which delivery is to take place. Under Cl. 19 the sellers have the right to select any mill from among the mills referred in Cl. 19 as the place where delivery is to be made, and in order that the buyers may know when and where they are to take delivery the sellers must give timely notice to the buyers of the date on which and the place where the sellers have fixed that delivery is to be effected. *Gath* v. *Lees* (2), *Juggernath Khan* v. *J.E. Maclachlan* (3), *Brown* v. *Royal Insurance Co.* (4), *Honck* v. *Muller* (5) and *Reuter Hueland & Co.* v. *Sala & Co.* (6). I am

(1) [1848] 2 Ex. 193=36 L. J. Ex. 73=15 L. T. 581=15 W. R. 961.
(2) [1864] 3 H. C. 558.
(3) [1881] 6 Cal. 681=8 C L. R. 225.
(4) [1859] 1 El. & El. 853=28 L. J. Q. B. 275 5 Jur. (ns) 1255=7 W. R. 479.
(5) [1881] 7 Q. B. D. 92=50 L. J. Q. B. 529= 45 L. T. 202=29 W. R. 830
(6) [1879] 4 C. P. D 239=48 L. J. C. P. 492= 40 L. T. 476=27 W. R. 631.

further of opinion, having regard to the form of the contract, that when the sellers have exercised the option of fixing the date and the place of delivery they are not entitled to alter the date or the place so fixed for delivery without the buyers' consent ; and the reason is that upon receipt of a notice fixing the date and place of delivery the buyers come under an obligation to provide gunnies and twine at the date and place so fixed, and must send a representative to accept delivery or reject the rice as delivery is made ex-Hopper (Cl. 17). Further the buyers may be required :

"to deposit with sellers the margin between contract price and market price of the day on which such milling notice is issued for the rice deliverable under this contract."

And under Cl. 8 the buyers must also be ready to pay the purchase price in cash :

"before any rice is removed, but not in any case later than immediately after milling. Payment in cash on completion of the milling of each 1,000 bags if required."

On behalf of the appellants it was urged that upon a true construction of the contract the sellers were at liberty to alter the date and place fixed for delivery as often as they chose, so long as delivery was given during the month of November, and that, although the buyers would be bound to take delivery on any day for which the sellers had sent a notice fixing the date and place of delivery, and must be ready with gunnies, twine, cash and a representative at the mill on that day, the sellers were at liberty to postpone the milling and delivery *de die in diem* until the last day of November, if it was to the seller's interest to no so. Such a construction, in my opinion, would be neither good sense, nor having regard to the terms of the contract, good law. It may be that if the buyers rejected the rice tendered for delivery at the date and place fixed by the sellers for delivery the sellers would be entitled at a later date within the period named in the contract to make another tender of the rice under the contract, *Borrowman* v. *Free* (7); but that is not the question that arises in the present case. In my opinion, the meaning and effect of the contract is clear and unambiguous, and the only substantial issue that falls for determination in the present case is whether the appellants in fact fixed the date and place when and where delivery was to be effected, and gave timely notice on that behalf to the respondents. If the appellants did not fix the date and place of delivery under the contract and/or failed to give notice thereof to the respondents, the suit must fail, for it is clear that if the appellants did not inform the respondents of the date when and the place where delivery was to be taken, they cannot recover damages from the respondents upon the ground that the respondents committed a breach of the contract in failing to take delivery of the rice. On the other hand, if the sellers exercised their option of fixing the date and place of delivery and gave timely notice in that behalf to the respondents, the further question will arise whether on the date and at the place fixed for delivery the appellants were ready and willing to make delivery of the rice.

Now, it is common ground that the delivery of rice ex Hopper is the last stage in the process of milling, for as the rice is milled it is passed down a shoot out of the hopper and projected into the buyers' gunnies. It follows therefore—indeed, it was not a matter in dispute—that in a contract in which delivery is to be ex-Hopper the date fixed for milling is the date fixed for delivery. It is also common ground that in the rice milling trade in Rangoon the only notice that is given of the date and place that has been fixed for delivery is by the sellers sending to the buyers what is called a milling notice. Milling notices in essential respects are in common form as used by rice millers in Rangoon, and it is an agreed fact that in the present case the only notice which the appellants as sellers gave to the respondents as buyers that they had exercised their option of fixing the date and place of delivery was by two milling notices Nos. 380 and 381 (Exs. Q-1 and Q-2). These milling notices are identical in form, and run as follows:

"Steel Bros. & Co., Ltd., Rangoon, 1st November 1930. Messrs. Tokursee Mooljee & Co. Sale Note No. W-460. Dear Sir, This is to give you notice that we shall commence milling for you at our lower mill, Kanaungtoe, on 4th November at 5 a.m. against above sale 100 tons S.M.S. Nov. Please arrange that gunnies and twine are at our mill in good time and that you have representative to pass the rice during milling. If gunnies are not sent to our mill we will charge 75 per cent. This notice must be presented at our mill by the person appointed by you to pass

(7) [1879] 4 Q. B. D. 500=48 L. J. Q. B. 65.

the rice. Yours faithfully, per pro. Steel Bros. & Co., Ltd. . . . . ."

Now, it is the practice of the rice millers under a contract in the form of Ex. P to issue a milling notice for not more than 100 tons, or 1,000 bags and this notice is usually sent a day or two before the date fixed for milling. Having regard to the course of trade, in my opinion, under the contract in suit, the sellers were not bound to deliver the whole bulk of the 400 tons on the same date or at the same mill and might deliver the rice on such dates under Cl. 8 and at such mills under Cl. 19 as they choose to fix. With regard to 200 tons of the 400 tons referred to in the bought note no question arises in this case, and the matter in dispute in the present suit relates to the 200 tons referred to in the milling notices Nos. 380 and 381. Now, having regard to the form of the contract and the milling notices I am of opinion that prima facie each milling notice was a notice that the sellers had fixed the date and place of delivery of 100 tons of rice under the contract, and if that was the object and effect of these notices the suit must fail, for it is conceded by the appellants that neither on 4th November 1930 nor on 10th November 1930 (to which date the appellants purported to postpone the milling notices) were the appellants ready or willing or in a position to deliver 100 tons of rice or any part thereof pursuant to milling notices Nos. 380 and 381, or either of them. Now, it cannot be doubted, I think, that on the face of it a milling notice purports to fix the date and place of delivery, and the opinion that I have formed that this is the effect of a milling notice is strengthened when it is borne in mind that a contract in the form of Ex. P not only imposes serious obligations on the buyers but that according to evidence adduced at the trial which I am prepared to accept, a milling notice is treated in the rice market as a tender of delivery of the amount of rice therein referred to. Moreover under Cl. 9 of the contract the milling notice is expressly stated to fix the time for commencement of milling, and, although in the present case where the terms of the contract are clear and unambiguous it is not necessary (if, indeed, it is permissible) to have recourse to 'contemporanea expositio' it is not uninteresting to observe that the applicants' broker, Korsi, in the course of his evidence stated that:

"if it is a contract for delivery in all January, if the purchaser has no right to fix the date of delivery and if the miller has the right to fix the date of delivery ex-Hopper, and does so, the miller would be bound to make delivery ex-Hopper on the date thus fixed according to the terms of the contract."

And Mr. Ady, a rice broker who gave evidence on behalf of the appellants stated that :

" In a contract in which the buyer gives the seller the option to fix a date for the delivery of rice and the seller does so in writing, the date thus fixed becomes a fixed date for delivery and the seller is bound to deliver on that day and is not entitled to postpone the milling."

On13th November1930 the respondents claimed the right quoad the rice referred to in the two milling notices to cancel the contract of 18th September 1930. On 26th November 1930 the appellants wrote to the respondents :

" Re Cont. W 460 M/N, 380/100 tons S. M. S. November. Please note that our lower Kanaungtoe Mill will commence milling the above at 5 a. m. on 27th instant. Kindly send your representative without fail. Yours faithfully, Per Pro. Steel Bros. & Co. Ltd., (Sd.) J. Kirkwood."

And on the same date the appellants sent a similar letter in respect of the milling notice No. 381. Mr. Lorimer, the Manager of the appellants' lower mill at Kanungtoe, stated that :

" We started milling against milling notices 380 and 381 on 27th November 1930 and continued on 28th November 1930. We completed 1,900 bags on 28th November 1930 this was for the whole of No. 380 and 900 bags of No. 381. The last 100 bags of No. 380 were completed on 29th November 1930 at Ellerman's, Kanaungtoe. The whole 2,000 bags were in our own gunnies; the 2,000 bags left my mill after the sale which was arranged by the office through Morrison & Co."

Now, in para. 4 of the appellants' reply to the respondents' written statement the appellants pleaded :

" (4) Plaintiff company admits postponement of the time for milling, and alleges that by an established custom of the Rangoon rice trade millers are entitled to postpone the time of milling stated in a milling notice to any later hour or date within the contract time."

And in para. 3 they pleaded : " (3) Plaintiff company denies that the issue of a milling notice is the exercise of an option to deliver rice." (Here the judgment after discussing the evidence in regard to usage to the effect that the sellers in the contract in the form of Ex. P were entitled to cancel or postpone the milling notices once given as a matter of

right, the judgment proceeded:) Although, in my opinion, it may happen that the date or place set out in a milling notice sometimes is altered, I am not satisfied that it has been proved that whereas the buyers are bound by a milling notice the sellers are not in any way bound thereby, and can if they elect to do so, without the consent of the buyers give a fresh milling notice for any day in the period within which delivery is to be made under the contract. It becomes unnecessary in these circumstances, as I have stated, to consider whether the Court would be prepared to give effect to such an usage if it were to be proved.

It is sufficient to hold that whether the case presented on behalf of the appellants or that presented on behalf of the respondents is accepted, in either case the suit must fail, because if as the respondents contend, the milling notices, Nos. 380 and 381 fixed the date and place when and where delivery was to be effected under the contract, it is common ground that at the date and place named in these two milling notices the appellants were neither ready nor willing nor in a position to make delivery of rice pursuant to the contract of 18th September 1930. On the other hand, if the milling notices did not operate as notices that the sellers had exercised their option of fixing the date and place of delivery under the contract, as it is common ground that no other notice in that behalf was given by the sellers to the buyers, the suit in that event also must fail, because in such circumstances the sellers would not be entitled to recover damages from the buyers for breach of contract in failing to take delivery of the rice. For these reasons in my opinion the appeal fails, and it is dismissed with costs.

Mya Bu, J.—I agree. The appellants are in my opinion in a dilemma. The case turns upon a short point as to the effect of the milling notices, Exs. Q-1 and Q 2, in this case. The appellants contend that although by those milling notices they fixed the date for the milling of the quantity of rice mentioned in the notices, they were not bound to mill the rice on the date so fixed but had an option to refuse to make delivery ex-Hopper on the date mentioned in the milling notices. If this proposition holds good—but the evidence in my opinion is insufficient to establish the alleged usage in support of the proposition —then the appellants had not fixed the date of delivery or in other words had not notified to the respondents the date of delivery, as they were bound to do under the contract, before complaining of a breach of the contract on the part of the defendants. That a notice fixing the date of delivery as contemplated by the contract was essential there can be no doubt, because the sellers had the option of choosing not only the date but also the place at which delivery was to be given. The appellants' letter to the respondents of 26th November 1930. is in the same form as the other milling notices in terms of which the appellants had failed to act. Therefore, by their letter of 26th November 1930 the appellants are not placed in a better position than by the earlier milling notices. Then if as the appellants contend, the milling notices carried no guarantee on their part that delivery would be made on the date mentioned neither the milling notices nor the letter of 26th November 1930 would have amounted to a notice calling upon the respondents to take delivery of the rice which they had contracted to buy; and in that case the result will be that .there would be no basis for the claim for damages for breach of the contract on the part of the defendants. If however the milling notices are given the importance that they are shown upon the evidence to deserve, viz., that they are notices fixing the date of delivery, milling and delivery being inseparable processes in the making of ex-Hopper delivery of rice, then the appellants failed to act up to the terms of their own notices by falling to mill the rice on 4th November 1930. Having thus failed to make commencement of delivery upon the date which the appellants had the option and were under an obligation to fix, they had no right to exercise the option again after the faiture without the consent of the buyer: *Gath* v. *Lees* (2).

I do not think that there is anything which I can usefully add to the discussion of my Lord the Chief Justice with reference to the evidence of usage in this case. I entirely agree that the evidence failed to establish the allegation that sellers can postpone milling, and thus postpone delivery from the date mentioned

in the milling notices entirely in their discretion and without regard to the wishes of the buyers.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Rangoon 167

PAGE, C. J.

Tan Waing and *another*—Appellant.

v.

Bo Hein—Respondent.

Civil Misc. Appeal No. 69 of 1932, Decided on 9th June 1932, against decree of Dist. Judge, Tavoy, in Civil Appeal No. 5 of 1932.

*** (a) Companies Act (1913), S. 4—Society consisting of more than twenty persons formed to help the poor—Society doing money lending business and out of the gain subscription to be returned to members—Society falls under S. 4.**

An unregistered society of 124 members was formed with the primary object of aiding the Chinese indigent or in temporary financial embarrassments. Every earning member was required to pay Re. 1 as monthly subscription. Subsequently by a resolution the society required that its members should pay one or more annas per day, and form a fund out of which any Chinese person could get a loan at 2 per cent per mensem in his difficulty; that such contribution was to continue for three years after which period the amount contributed was to be returned to the members and the interest accrued thereon by lending was to be spent in charity.

Held: that the society was formed inter alia for the purpose of carrying on a money lending business that had for its object the acquisition of gain by individual members of the society and therefore the society fell within S. 4.

[P 168 C 2]

(b) Companies Act (1913), S. 4 (2)—Meaning of "gain."

The word "gain" means acquisition. It has no other meaning. Gain is something obtained or acquired. It is not limited to pecuniary gain. The word "pecuniary" will have to be added to limit it so. And still less is it limited to commercial profits. Commercial profits, no doubt, are gain, but there is nothing limiting gain simply to a commercial profit. The words may be taken as referring to a company which is formed to acquire something, or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything. [P 168 C 1]

P. B. Sen—for Appellant.

R. P. Pandit—for Respondent.

Judgment.— This appeal must be allowed. The suit is a representative suit brought by the President of the Sun Main Society, Tavoy for the recovery of Rs. 1,568, money lent to the defendant. In the original plaint the plaintiff is described as the Sun Main Society, a Chinese firm carrying on money lending business, by their President Bo Hein. An objection having been taken to the maintainability of the suit the plaint was amended. In the amended plaint the plaintiff was described as Bo Hein, President of the Sun Main Society, on behalf of himself and all the other members of the Society, Zayit Quarter, Tavoy. The learned Subdivisional Judge of Tavoy dismissed the suit upon the ground that it fell within the ambit of S. 4, Companies Act, and that the society being unregistered the suit could not be maintained. On appeal the learned District Judge reversed the decision of the Subdivisional Court, and remanded the case to be heard and determined on the merits holding that the society did not fall within the ambit of S. 4, Companies Act. The question is whether the society offends against S. 4, sub-S. (2), which runs as follows:

"No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business (that is other than banking) that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor General in Council or of Royal Charter or Letters Patent."

The objects of the society were set out in an application by the plaintiff for leave to sue under O. 1, R. 8, Civil P. C. Paras. 1 to 3 of the application run as follows:

That at Tavoy, on 1st January 1925, a society named Sun Meinsociety was formed with the object of providing a shelter for Chinese new arrivals until they secure some work, rendering assistance to them in time of privation and arranging funerals of any that die destitute. (2) That every earning member is required to pay Re. 1 as monthly subscription. (3) That on 29th April 1928, at a general meeting of the society it was resolved that members should pay one or more annas per day, and form a fund out of which any Chinese person whether, member or not, could get a loan at 2 per

cent per mensem in time of his difficulty, that such contribution should continue for three years, that at the end of three years, the amount contributed should be returned to the members and the interest accrued thereon by lending in the above manner should be spent in charity."

Now, Sir George Jessel, M. R., in *In re, Arthur Average Association for British, Foreign and Colonial Ships* (1) observed, at p. 546:

"If you come to the meaning of the word "gain" it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. It is not limited to pecuniary gain. We should have to add the word "pecuniary" so to limit it. And still less is it limited to commercial profits. The word used, it must be observed, is not "gains" but "gain," in the singular. Commercial profits, no doubt. are gain, but I cannot find anything limiting gain simply to a commercial profit. I take the words as referring to a company which is formed to acquire something or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything.

Now, there is no doubt that the primary object of this society is not to confer any benefit upon the association as a body or its individual members, the society having been formed for the purpose of aiding the Chinese who are indigent or in temporary financial embarrassments. On the other hand there is no doubt that the society carries on a money lending business and there is no doubt that the object of carrying on this business is the acquisition of gain. The question is: Is the object the acquisition of gain by the company, association or partnership or by the individual members thereof? I do not think that the object of the society in carrying on its money lending business was the acquisition of gain by the company, because the company as such gained no benefit over which it had any disposing power at all. But was the money lending business carried on with the object of the acquisition of gain by the individual members or some of the individual members of the society? I am bound to say that, I think it was. In *W.H. Kraal* v. *H. Whymper* (2) the individual subscribers to the company never were entitled, however great the reserve fund in the possession of the society might be, to recover back the subscriptions paid by them. The members of the society as such would not receive any part of the funds in the possession of the company.

In the present case however the facts are different. The members of the society under the resolution of 25th April 1928 became under an obligation to pay one or more annas a day as a permanent contribution to the funds of the society for three years. It was with the proceeds of these contributions that the society carried on its business of money lending. What was the object for which the gains resulting from the money lending business were acquired? In my opinion partly to recoup the sums which the members had contributed to the society for three years, and partly in order that the society should be in a position to expend the surplus of the gains from the business of money lending upon charitable projects. Suppose the business of money lending was carried on by the society at a loss, what would be the result? Clearly the members would lose the amount of their contributions. Suppose the business was carried on at a profit, what would be the result? The members would receive back the contributions that they had made for three years. Unless the business was carried on at a profit the members would lose all the money that they had contributed for the purposes of the society. In these circumstances it appears to me that this association was formed inter alia for the purpose of carrying on a money lending business that had for its object the acquisition of gain by individual members of the society. If that be so, it follows that the society falls within S. 4, Companies Act, and as it is admitted that the number of its members is 124, and that it is not registered as provided by law, the suit must fail.

The result is that the appeal is allowed, the decree of the District Court set aside, and the decree of the Subdivisional Court restored. No order for costs.

B.R./R.K. *Appeal allowed.*

(1) [1875] 10 Ch. 542=44 L. J. Ch. 569=32 L T. 713=23 W. R. 939.
(2) [1890] 17 Cal. 786.

A. I. R. 1932 Rangoon 169

PAGE, C. J. AND MYA BU, J.

Secretary of State, Burma Rys.—Appellant.

v.

Rangoon Corporation—Respondent.

Special First Appeal No. 83 of 1932, Decided on 2nd August 1932, against decision of Small Cause Court Judge, Rangoon.

(a) Rangoon City Municipal Act (1922), S. 80 (2)—In assessing Burma Railways to Municipal taxation "profit basis" system should be followed.

The correct method of ascertaining the annual value of the Burma Railways under S. 80 (2) is to find out the annual assessable value of the Burma Railways undertaking as a whole, and after deducting the annual assessable value of the indirectly productive portion of the whole undertaking, to multiply the resultant figure representing the annual assessable value of the directly productive portion, that is, the running lines, by the gross receipts earned in the municipal area of the City of Rangoon, and to divide the said sum by the gross receipts earned by the Burma Railways undertaking as a whole. By adopting this system a simple, fair and reasonable assessment of the "annual value" of the hereditament within the taxable area of the city of Rangoon will be obtained and such a system will conform to the two fundamental principles of the law of rating, viz., (1) that the aggregate of the rates payable by the railway in the various municipal area through which it runs must not exceed the rates payable by the undertaking as a whole, and (2) that the assessment of the hereditament in each area must be based upon the profits earned in the locality in which the hereditament is situate. (*Case law referred*) [P 171 C 1]

(b) Rangoon City Municipal Act (1922), S. 92 (1)—S. 92 does not apply to buildings of Burma Railways undertaking.

Notwithstanding the enactment of S. 92 and the transfer of the Burma Railways undertaking to Government, the assessment of the Burma Railways continues to be regulated by S. 135, Railways Act, and S. 92 (1) does not apply to the buildings of the Burma Railways undertaking. [P 172 C 1]

A. H. L. Leach—for Appellants.

N. M. Cowasjee and *Jeejeebhoy*—for Respondent.

Page, C. J.—This is an appeal under S. 91 (3), City of Rangoon Municipal Act of 1922, against 'the basis or principle of assessment,' which the learned Chief Judge of the Rangoon Small Cause Court has held must be applied in assessing the Burma Railways to Municipal taxation in Rangoon.

In S. 80 (2) it is provided that:

"property taxes shall be levied upon the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let, from year to year, and in the case of houses, may be expected to let unfurnished."

Now the term "gross value" means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenants' rates and taxes and title commutation rent charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent:

"This standard of value can be readily applied to ordinary house property, or indeed, to any undertaking entirely contained within the boundaries of one rating authority; but when the subject of consideration is the property of a railway company, whose lines tread through numbers of parishes, its application is far from simple. Nevertheless it must be remembered that the sole standard is the standard of rent payable for the use and occupation of the particular property by a tenant from year to year: per Lord Buckmaster, L.G. in *Great Western and Metropolitan Ry. Cos.* v. *Kensington Assessment Committee* (1) at p. 35,"

and

"the rent must be fixed in accordance with the real value of the section to the company concerned, because that is the footing on which a tenant would base his offer of rent if he be not exposed to extortion: per Lord Loreburn, L.C., in *Great Central Railways* v. *Banbury Union* (2) at p. 85."

Now the difficulty of laying down any principle of assessment pursuant to which a railway can be made amenable to taxation upon a fair and reasonable basis was foreseen long ago. It is this:

"A railway is an undertaking extended through a multitude of rating areas. Generally no section of it situated in any rating area would be rented by any tenant except as a component part of the system. Yet the governing statute requires the rateable value of every such section to be 'the rent at which the same might reasonably be expected to let from year to yeare after making the prescribed deductions. Obviously a natural way of ascertaining the rateable value of such a section in obedience to the statute is to consider at what rent it would be hired by the railway company to which the entire system belongs; usually no other tenant is conceivable. In such a state of things the railway company might be willing to pay almost any rent for a section of the main line without poesession of which its whole business might be dislocated and half ruined. But the statute speaks of a rent which might "reasonably" be expected, and this excludes the idea of an oppressive demand fixed upon imagined neces-

(1) [1916] A. C. 23=85 L.J.K.B. 63=113 L. T. 1074=80 J. P. 81=14 L. G. R. 1=59 S.J. 744=31 T.L.R. 608.

(2) [1909] A.C. 78=78 L.J.K.B. 225=100 L.T. 89=7 L. J. R. 227=73 J. P. 59=53 S. J. 177=25 T.L.R. 143.

sities: per Lord Loreburn in *Great Central Rys.* v. *Banbury Union* (2) at p. 81."

In these circumstances from time to time various formulas or hypotheses have been enunciated as supplying a reasonable test for ascertaining the annual rent that a hypothetical tenant might be expected to pay for the use and occupation of the section of the railway comprising the hereditament to be assessed. As I had occasion to point out in *Narayan Chandra Das* v. *Municipal Commissioners, Panhati* (3) at p. 167 (of 57 *Cal.*):

"In exceptional cases where the rent that a hypothetical tenant might reasonably be expected to pay for the holding cannot be ascertained by methods which would be efficacious in normal and ordinary cases, for example, where the holding consists of a land upon which a railway, a gaswork, a catchment area, or a building such as the Bodleian Library at Oxford is situate, rough and ready tests alone may be available for ascertaining the annual rent that a hypothetical tenant of the holding might reasonably be expected to pay, but in every case the annual rental value is the basis of the assessment."

I am clearly of opinion that any formula or test for ascertaining the annual value of a hereditament, whatever its nature may be, that does not take into account and is not based upon the actual or estimated profit-earning capacity of the hereditament in the locality in which it is situate must ex necessitat rei be fallacious, and will offend against a fundamental principle of rating law.

Now, in England from time immemorial until the enactment of the Railways (Valuation for Rating) Act 1930, 20 and 21 Geo. 5, Chap. 24 railways were assessed under the "parochial system." But inasmuch as that system has never been adopted for rating purposes in Burma, and it has been abandoned in Great Britain and Ireland in favour of the "whole undertaking" or "profit basis" system it is unnecessary, and I do not pause to consider the principle upon which the "parochial system" of assessment is based.

In Burma, until the present assessment was made, the "annual value" of the Burma Railways undertaking for the purposes of Municipal taxation was ascertained by applying what is commonly called "the contractors' test," that is, the interest on cost which a contractor might reasonably expect to obtain if he provided the land and buildings for the person in occupation of the hereditament. In my opinion an assessment based upon 'the contractors' test' in the case of a railway is open to grave objection; it does not provide even an approximate estimate of the profit-earning capacity of the particular hereditament under assessment; and it might well result in the aggregate of the rates paid by the railway in the several areas in which the line was situate exceeding the rates reasonably payable upon an assessment of the annual value of the railway undertaking as a whole.

In order to meet objections such as those inherent in the "the contractors' test" system the "whole undertaking" or 'profit, basis' principle of assessment was devised, under which assessees who owned hereditaments in several taxing areas, such as canals, gas works or water works were assessed upon the basis of the profits earned by the whole undertaking.

In *Kingston Union* v. *Metropolitan Water Board* (4), Lord Atkinson observed at p. 346.

"The method followed in the case of water works which run through and supply several parishes is apparently this: the rateable value of the whole undertaking is estimated by the method prescribed, as I shall presently show, in the Parochial Assessment Act of 1836. Then from this sum, in order to ascertain the rateable value of the portion of these works situated in a given parish, the rateable value of the indirectly productive parochial portion of the whole undertaking is deducted. The remainder is the ascertained rateable value of the productive works of the whole undertaking, which sum is then apportioned among the several parishes through which the works of the undertaking run and which they apply. The method of apportionment is apparently this: the sum to be apportioned is divided amongst the different parishes according to the proportion which the amount of the gross or net receipts earned in each parish bears to the receipts of the same character, like to like, earned by the whole undertaking. The rateable value of the indirectly productive portion of the undertaking situated in each parish is then separately ascertained and added to the value of the directly productive works so ascertained. The rateable value however, if ascertained by this method, for all the parishes which the undertaking supplies, and in which portion of its works are situated, must never in the aggregate exceed the amounts of the rateable value assessed upon the undertaking as a whole."

The "profits basis" principle of assessment thus explained by Lord Atkinson,

(3) A. I. R. 1930 Cal. 38=124 I. C. 483=57 Cal. 162.

(4) [1926] A. C. 331=95 L. J. K. B. 605=134 L. T. 483=90 J. P. 69=42 T. L. R. 275=24 L. J. R. 105.

in my opinion, should now be adopted in Burma for the purpose of assessing the Burma Railways undertaking under S. 80, Rangoon Municipal Act. This "profits basis" principle of assessment has been accepted in England, Scotland and Ireland, as providing the most fair and accurate test for ascertaining the annual sum that hypothetical tenants of the several sections of the railway would be prepared to pay as rent for each hereditament respectively, and both parties to the present litigation accept this principle of assessment as being the best available system to follow in assessing the Burma Railways. In Burma, where there is only one railway undertaking, the ascertainment of the profits of the railway in any particular taxing area is not complicated as it is in Great Britain by the intersection and the overlapping of several railway undertakings operating over the same lines. In my opinion the correct method of ascertaining the annual value of the Burma Railways under S. 80 (2), is to find out the annual assessable value of the Burma Railways undertaking as a whole in the manner set out in statement (B) and after deducting the annual assessable value of the indirectly productive portion of the whole undertaking, to multiply the resultant figure representing the annual assessable value of the directly productive portion, that is, the running lines by the gross receipts earned in the Municipal area of the city of Rangoon, and to divide the said sum by the gross receipts earned by the Burma Railways undertaking as a whole. By adopting this system I am of opinion that a simple, fair and reasonable assessment of the "annual value" of the hereditament within the taxable area of the City of Rangoon will be obtained and I apprehend that the system that I have enunciated will conform to the two fundamental principles of the law of rating to which I have referred (1) that the aggregate of the rates payable by the railway in the various municipal areas through which it runs must not exceed the rates payable by the undertaking as a whole and (2) that the assessment of the hereditament in each area must be based upon the profits earned in the locality in which the hereditament is situate. The assessment in respect of which this appeal arises may conform to the first of these fundamental principles but it certainly offends against the second. It appears from statement (B) that the assessor has multiplied the annual assessable value of the running lines of the whole undertaking by the train miles run within the Rangoon Municipal limit, and has divided the same by the train miles run throughout the whole system. The fallacy, as it seems to me, that lies in this method of apportionment is that all train miles are not of equal value and it has been proved—indeed it is obvious—that the exigencies of the suburban traffic in Rangoon necessitate the running of many trains at a loss during the "slack hours" of the day, although no doubt, during the "rush" hours the situation is different. In *Reg.* v. *London, Brighton and South Coast Ry. Co.*(5), Coleridge, J., observed that at p. 359:

"against the mileage principle is to be used that, although, as regards the railway company, an entire body with an entire interest, it is a matter of indifference how you divide a rate, assumed to be entire, for the whole line, yet as the parishes are bodies with separate interests, there is a manifest injustice in attributing to the same space of land the same proportionable share of the whole rate everywhere (the land in the several parishes notoriously earning the profits, and occasioning the outgoings in very different proportions); because you cannot do this without depriving some parishes of what they should receive, in order to give to others what they should not. . . . The value which the land occupied in each parish produces, after the due allowances, is that upon which the occupier is to be rated in each."

The fallacy that appears to me to underlie the "train mileage" method of apportionment, as followed by the assessor in the present case is inherent also in the "route mileage" system which the appellant urges the Court to sanction and uphold. For the value of the route miles also is not uniform, but varies more or less in every municipal area through which the railway system runs. It follows therefore that whether the apportionment of the annual assessable value of the running lines throughout the whole system between the several taxing areas is made by means of the "train mileage" or of the "route mileage" method, it cannot be sustained either on grounds of law or of good sense. The result is that the "profits basis" principle of assessment, the nature of which I have indicated, must be followed, in assessing the Burma

(5) [1885] 15 Q. B. 313=6 Ry. Cas. 440=20 L. J. M. C. 124=15 Jur. 372.

Railway undertaking within the Rangoon Municipal Act. It was further contended on behalf of the appellant, that, inasmuch as the Burma Railways are now an undertaking belonging to Government, S. 92 (1), Municipal Act, applies to railway property occupied for residential purposes and the occupants of which pay rent to Government. In my opinion, there is no substance in this contention. I agree with the opinion expressed by the learned Chief Judge of the Small Cause Court upon this question, and the reasoning upon which it is based. S. 92 must be read as a whole, and S. 92 (1) does not purport and in my opinion cannot reasonably be held, to refer to the buildings and lands of tne Burma railways. At the time when the Rangoon Municipal Act of 1922 was enacted the levy of taxes by local authorities upon the Burma railways undertaking was governed and controlled by S. 135, Railways Act (9 of 1890). Now, S. 92 is a general section relating to "buildings and lands" belonging to Government and no mention is made in the section of the Burma railways. In these circumstances, in my opinion, the principle of *generalia specialibus non derogant* applies, and for this among other sufficient reasons I hold that, notwithstanding the enactment of S. 92 and the transfer of the undertaking to Government, the assessment of the Burma railways by local authorities continues to be regulated by S. 135, Railways Act and that S. 92 (1) does not apply to the buildings of the Burma railways undertaking.

It was also contended by Mr. Leach on behalf of the appellant that the proceedings be remanded to the Chief Judge of the Small Cause Court for the rehearing of the issue whether 4 per cent on the capital value of land and 8 per cent on the capital value of buildings as set out in statement C is not unreasonably high assessment in respect of the indirectly productive portion of the undertaking. This however is a question of fact, and the decision of the learned Chief Judge of the Small Cause Court on this question of fact is not open to review under S. 91 (3). It is not disputed that the buildings and lands in question are liable to assessment, but the learned advocate contended that the learned Chief Judge did not purport to base his decision upon any evidence or upon the merits. I do not so read his judgment. There were materials before the learned Chief Judge upon which his finding could have been based, and this Court has no jurisdiction to interfere with it. For these reasons, the order of the learned Chief Judge of the Small Cause Court is varied in the sense that I have indicated. There will be no order for costs in either Court.

Mya Bu, J.—I concur.

K.N /R.K. *Order accordingly.*

A. I. R. 1932 Rangoon 172

PAGE, C. J. AND MYA BU, J.

Mrs. Lilly Joan Swaine—Appellant.

v.

Mr. Dennis Harold Swaine and *another*—Respondents.

First Appeal No. 213 of 1931, Decided on 23rd March 1932, against order of High Court of Judicature, Rangoon, reported in *A. I. R.* 1932 *Rang.* 73.

(a) Civil P. C. (1908), S. 96—Finding of fact depending on credence to be given to witnesses—High Court does not interfere with such finding in appeal.

The High Court would be slow to interfere with a finding of fact fundamentally depending upon the credence to be given to the witnesses who deposed to the facts, unless the Court is satisfied that the finding at which the learned Judge arrived is clearly wrong. [P 173 C 2]

(b) Divorce Act (1869), S. 14—Petitioner committing adultery and concealing that fact from Court—Court has discretion to grant or refuse decree for dissolution of marriage—Discretion how to be used stated.

If a husband or a wife seeks to be released by the Court from the tie of marriage the petitioner ought to come to the Court with clean hands; but human nature being what it is, the Court has been invested with a discretion, where the petitioner has been guilty of adultery during the marriage, to grant or refuse a decree for dissolution of the marriage as it deems fit having regard to the circumstances of the particular case. The discretion conferred by the Act is intended to be unfettered; though it should, no doubt, be exercised not capriciously but cautiously and carefully and as far as possible consistently, not only in regard to the parties themselves, but also with reference to the interests of pulic morality and of decent society, which is a consideration that must not be forgotten. The discretion of the Court in such cases should be unfettered and no hard and fast rules can be laid down as to how it should be used; (*Case law discussed*). [P 174 C 1, 2]

M. A. Gregory—for Appellant.

Paw Tun—for Respondent 2.

Page, C. J.—On 7th September 1920 the appellant married Dennis Swaine, the son of respondent 2 by a former marriage. At the time of her marriage the appellant was 22 years of age, and in 1925 a girl was born to Dennis Swaine

and Lilly Swaine. On 30th January 1931 the appellant obtained a decree nisi for dissolution of her marriage with Dennis Swaine on the ground of his adultery and desertion. During the period that intervened between the passing of the decree nisi for dissolution of the marriage and the appellant's application for a decree absolute respondent 2 on 27th July 1931, intervened in the divorce proceedings by a petition presented under S. 16, Divorce Act. In the petition she prayed that the decree nisi should not be made absolute upon the ground that the appellant during her marriage with Dennis Swaine had committed adultery with the intervenor's present husband, and that her adultery had not been brought to the notice of the Court during the divorce proceedings. The learned Judge after hearing the witnesses and the arguments presented on behalf of the contending parties, found as a fact that during her marriage with Dennis Swaine the appellant had been guilty of adultery with her mother-in-law's second husband one Keith Sharrock. Notwithstanding the appellant's adultery, and her persistent denial that she had been guilty of misconduct, and the fact that she had concealed her adultery from the Court during the hearing of the divorce proceedings, it was strenuously urged at the trial that the learned Judge ought to exercise his discretion in favour of the appellant, and to make the decree dissolving her marriage with Dennis Swaine absolute. The learned Judge however refused to exercise his discretion in the appellant's favour, rescinded the decree nisi and dismissed the appellant's petition for the dissolution of her marriage : [see *A. I. R.* 1932 *Rang.* 73.]

At the hearing of the appeal it was contended (1) that the learned Judge had not arrived at the right conclusion upon the evidence when he found that the petitioner had been guilty of adultery and (2) that in refusing to make the decree absolute and dismissing the petition the learned Judge had not properly exercised the discretion with which he was invested. It cannot be doubted that there was abundant evidence before the learned Judge, if he accepted it, to justify the finding that the petitioner had been guilty of adultery with Keith Sharrock during her marriage with Dennis Swaine. On appeal however the learned advocate for the appellant urged that the evidence adduced on behalf of the intervenor was unworthy of credence, and ought not to have been believed. Now, the only direct evidence to prove adultery was that of the intervenor's husband Keith Sharrock; and it was contended that his moral character was such that no reliance could be placed on his testimony. Keith Sharrock is the only person concerned in the case who is in a good financial position, and he occupies a responsible and well paid post in Mandalay as an electrical engineer. I think that if Keith Sharrock had not been possessed of money, it is probable that he would not have been able to persuade Lilly Swaine to commit adultery with him. Certain it is that Keith Sharrock on his own admission has proved himself in his relations with Mrs. Swaine senior and Mrs. Swaine junior to be a thoroughly untrustworthy and contemptible person. (His Lordship then criticized Keith Sharrock and after discussing evidence proceeded). Now, it is strange, I think, that Mrs. Sharrock should have allowed any opportunity for Mr. Sharrack to have intimate relationship with Mrs. Swaine after what had taken place in June 1928. She was not much pressed in cross-examination about this matter, and she stated that the reason why she did not catch them was that the stairs were creaky, and that she would probably have been heard if she had attempted go upstairs while Keith Sharrock and Lilly Swaine were together.

The learned Judge fully realized that in these circumstances considerable suspicion attached to the evidence of Keith Sharrock and Mrs. Sharrock; but he saw these witnesses; he observed the manner in which they gave their evidence, and he has accepted their testimony as being true. Sitting in appeal this Court would be slow to interfere with a finding of fact fundamentally depending upon the credence to be given to the witnesses who deposed to the facts, unless the Court was satisfied that the finding at which the learned Judge arrived was clearly wrong. Certain letters however written by the appellant to Keith Sharrock were adduced in evidence and the learned Judge held that those letters strongly corroborated the evidence of adultery that had been given by Mr. and Mrs. Sharrock. I respectfully agree. I do not propose to read these letters or to discuss them in

detail. No one with any knowledge of men and women could read these letters without coming to the irresistible conclusion that they were written by a woman to a man with whom she had had intimate sexual intercourse. In my opinion these letters are consistent with adultery having been committed between Keith Sharrock and the petitioner, and no other conclusion could reasonably be drawn from them. The result is that the finding of the learned Judge that during her marriage with Dennis Swaine the appellant had been guilty of adultery must be upheld. Indeed in my opinion, it was the only reasonable inference that could have been drawn from the evidence by the learned trial Judge.

The second question is whether, notwithstanding her adultery, the Court in the exercise of its discretion ought to grant the petitioner a divorce. If a husband or a wife seeks to be released by the Court from the tie of marriage the petitioner ought to come to the Court with clean hands; but human nature being what it is, the Court has been invested with a discretion, where the petitioner has been guilty of adultery during the marriage, to grant or refuse a decree for dissolution of the marriage as it deems fit having regard to the circumstances of the particular case before it. In this respect S. 14, Divorce Act, corresponds to Section 178 (3), English Judicature (Consolidation) Act 1925, which reproduced S. 31, Matrimonial Causes Act 1857, and in exercising the discretion with which they have been entrusted the Courts in India, as nearly as may be, will be guided by the principles and rules upon which the Divorce Division of the High Court in England acts and gives relief. But what are those principles and rules and how do the authorities in England stand? In my opinion, the correct, and if I may venture to say so, the common sense view of the way in which the Court should approach the consideration of a problem of this nature was stated as follows by Evans, P. in *Brooke* v. *Brooke* (1):

"The discretion conferred by the Act was in my opinion, intended to be unfettered; though it should, no doubt, be exercised not capriciously but cautiously and carefully and as far as possible consistently, not only in regard to the parties themselves, but also with reference to the interests of public morality and of decent society, which is a consideration that must not be forgotten."

In *Wickins* v. *Wickins* (2) at p. 272 the Court of Appeal (Swinfen Eady, M. R. Bankes, L. J., and Eve, J.), observed:

"From time to time the Court has referred to particular circumstances as justifying it in exercising its discretion in favour of granting a decree in cases where, having regard to S. 31, the Court was not bound to pronounce such decree. We agree with the view expressed by the president in *Brooke* v. *Brooke* (1) that where Parliament has invested the Court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the Judge of the Divorce Division than the legislature has thought fit to impose: see also *Holland* v. *Holland* (3)."

No doubt the social conventions of today differ widely from those which obtained when Lord Penzance decided *Morgan* v. *Morgan* (4) and post-war Judges are wont to treat matrimonial laxity with greater leniency than it would have received at the hands of the Judges who lived in the mid-Victorian era. *tempora mutantur nos et muta mur in lis.* It is only natural therefore that from time to time the Judges who administer divorce jurisdiction should refer to various matters which in their opinion ought to be borne in mind when the Court is considering whether it should exercise its discretion in favour of a petitioner who has been guilty of adultery during the subsistence of the marriage. But I decline to regard these dicta as laying down principles or rules of practice by which the discretion of a Judge in any other case is fettered or limited. In my opinion, they are merely illustrations of matters to which the Court will have regard in coming to a judicial determination on the matter: *Wickins* v. *Wickins* (2) and the dicta of Judges explaining the tests which they respectively are disposed to apply for the purpose of determining whether the Court ought to exercise its discretion in favour of the petitioner, although entitled to consideration and respect (*Wilkinson* v. *Wilkinson* 37 *Times L. R.* 835) do not free or prevent the

(1) [1912] P. 205n=81 L. J. P. 147n=107 L. T. 202=28 T. L. R. 577.

(2) [1918] P. 265=87 L. J. P. 155=119 L. T. 268=34 T. L. R. 447=62 S. J. 583.

(3) [1918] P. 273=87 L. J. P. 142=119 L. T. 266=34 T. L. R. 450.

(4) [1869] 1 P. & D. 644.

Court which is bound to follow and apply the general principles laid down by the Court of Appeal in *Wickins* v. *Wickins* (2) and *Holland* v. *Holland* (3) from exercising its own discretion in the way that it deems best in the circumstances of the case that is before it. Indeed the test referred to from time to time by the Judges sitting in the Divorce Division for determining how in England the Court should exercise its discretion in this matter are various and not always consistent. For instance in *Stuart* v. *Stuart and Holden* (5), Hill, J., observed that :

"this is a case where the husband not only did not make a disclosure of his own adultery at the time he was seeking a decree *nisi* against his wife, but when the charge was made against him he strenuously denied it, fought it throughout, and gave evidence upon oath and was disbelieved by the Court. If in those circumstances the Court is still to exercise its discretion on behalf of a man who is not only an adulterer but a perjurer, it would be to encourage people to perjury, first of all, to concealment and then to perjury and every one who is guilty and himself seeking relief from the other spouse would be encouraged to run the risk of first of all making no disclosures, in the hope that the Court would be hoodwinked, and secondly, of successfully perjuring himself. I think that that would be making a most mischievous use of the Court's power to use its discretion on behalf of a spouse who has been guilty of adultery."

"It is the condition upon which the Court can properly exercise its discretionary power that there should be complete frankness on the part of those who are asking for its discretion. Therefore even assuming that if all the facts had been disclosed by the petitioner on the hearing when asking for a decree nisi the Court would have exercised its discretion in his favour, after the course he has chosen to pursue I am satisfied it is not a case in which the Court ought to exercise its discretion."

On the other hand in *Apted* v. *Apted* (6) at p. 264, Lord Merrivale, P. stated that

"as to the admitted falsehood of the petitioner it has been said on various occasions when falsehoods of petitioners have been exposed that in such cases the Court may properly consider whether on a true statement of the facts in the first instances the discretion would have been exercised. I do not dissent from this view subject to the provision that it presupposes the Court to have at length learned the true facts."

Thus the oracle has spoken both at Delphi and at Dodona but to which voice am I to hearken: see *Wain* v. *Wain* (7), *Pretty* v. *Pretty* (8), *Hampson* v. *Hampson* (9), *Wilson* v. *Wilson* (10), *Elliott* v. *Elliott* (11), *Wilkinson* v. *Wilkinson* (12) and *Tickner* v. *Tickner* (13). The correct view as I apprehend the matter is that the Court, for the purpose of determining whether it ought to exercise its discretion in favour of a petitioner who has been guilty of adultery, is bound to follow the general principles and rules laid down by the Court of appeal in *Wickins* v. *Wickins* (2) and *Holland* v. *Holland* (3) and also should bear in mind so far as possible the various matters which other Judges have thought well to take into consideration but that it would be neither expedient nor in accordance with law—indeed, it would be running counter to the statute—that the Court should be compelled to search among the various authorities for subsidiary tests by which the unfettered judicial discretion entrusted to it is to be limited and controlled. I confess, with all respect, that I am unable to subscribe to the view upon this subject that was expressed by McCardie, J., in *Hines* v. *Hines and Burdett* (14). It appears from the judgment in that case that McCardie, J., was strongly of opinion that he ought to exercise his discretion in favour of the petitioner, and the learned Judge further stated that the Court of appeal had laid down in *Wickins* v. *Wickins* (2) and *Holland* v. *Holland* (3) that his discretion was wholly unfettered. His Lordship then proceeded to add:

"But the exercise of a discretion though unfettered is not to be the mere exercise of caprice."

Of course not; but is the considered and reasonable exercise of an unfettered discretion capricious merely because other Judges taking into account the same considerations but appraising them differently might have come to a different conclusion? In my opinion, a Judge administering divorce jurisdiction in

(5) [1930] P. 77=99 L. J. P. 17=142 L. T. 359=46 T. L. R. 132.
(6) [1930] P. 246=99 L. J. P. 73 = 143 L. T. 353=46 T. L. R. 456.
(7) [1910] 101 L. T. 815=54 S. J. 119=26 T. L. R. 131.
(8) [1911] P. 83=80 L. J. P. 19=104 L. T. 79=27 T. L. R. 169.
(9) [1914] P. 704=83 L. J. P. 53=110 L, T. 992=58 S. J. 474=30 T. L. R. 392.
(10) [1920] P. 20=89 L. J. P. 17=122 L. T. 223=36 T. L. R. 91=64 S. J. 133.
(11) [1921] 37 T. L. R. 834=(1921) W. N. 215 =126 L. T. 28.
(12) [1921] 37 T. L. R. 835 n=126 L. T. 29.
(13) [1924] P. 118=93 L. J. P. 39=131 L. T. 159=40 T. L. R. 367=22 L. G. R. 692.
(14) [1918] P. 364=87 L. J. P. 220=120 L. T. 126=34 T. L. R. 480.

India must follow the principles laid down in *Wickins* v. *Wickins* (2) and *Holland* v. *Holland* (3) and take into consideration the various dicta in the decided cases, but bearing in mind as Lord Merrivale pointed out in *Apted* v. *Apted* 1930 *P.* at p. 285, that

"to formulate and limit with precision the grounds on which discretion is to be exercised is a practical impossibility,"

it is the duty of the Judge to exercise his own discretion in the matter, and to decide as he deems fit, having regard to the facts and circumstances of the case whether he ought or ought not to grant the petitioner a divorce notwithstanding that during the marriage the petitioner had committed adultery. Now the petitioner in the present case, not only concealed from the Court the fact that she had committed adultery in the proceedings in which she prayed the Court to grant her a decree for dissolution of her marriage, but during the intervention proceeding has persistently, deliberately and foolishly denied that adultery ever took place. In my opinion, in circumstances such as those obtaining in the present case when the learned Judge, after hearing the parties and their witnesses in the exercise of his discretion has refused to grant a decree for dissolution of marriage to a petitioner who has been guilty of adultery the Court on appeal should be slow to interfere with the order that has been passed by the learned Judge:

"The question for consideration by this Court is whether his judgment is erroneous, and not whether we should have exercised the discretion in the same manner as the Judge below did. There is no appeal from his discretion to our discretion, and the appellant is not entitled to succeed unless the judgment is erroneous: per *Swinfen Eady, M. R.*, in *Holland* v. *Holland* (3) *at p.* 280."

Having regard to the circumstances disclosed in the evidence it cannot be held that the judgment of Otter, J., was erroneous, or that the learned Judge was judicially bound to exercise his discretion in favour of the petitioner, and I am not prepared to interfere with the order that he passed. The appeal therefore fails and must be dismissed. I desire to add that I am not disposed as at present advised, to accept the judgment of the Calcutta High Court in *Ramsay* v. *Boyle* (15) as correctly laying down the law, and if and when the occasion arises the decision in that case may require to be reconsidered.

(15) [1903] 30 Cal. 489.

B.V./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Rangoon 176

BROWN, J.

Zulaing—Applicant.

v.

Yamethin District Council—Opposi Party.

Civil Revn. No. 44 of 1932, Decided on 14th July 1932, against decision of Dist. Judge, Yamethin, in Civil Appeal No. 10-A of 1931.

*** (a) Contract Act (1872), S. 70 — S. 70 applies to Corporations making contracts.**

Section 70 must be interpreted in accordance with its clear and explicit terms. The terms of S. 70 are sufficiently clear and explicit and the balance of authority is in favour of the view that its provisions may be applied when one of the persons concerned is a corporation or other public body: *Case law referred.* [P 178 C 2]

(b) Burma Rural Self-Government Act (1921), S. 56—President of Corporation having authority, ordering work to be done—Corporation receiving benefit of work done—Plaintiff is entitled to compensation for work done in absence of written contract—Contract Act (1872), S. 70.

Where the President of the District Council, who had authority to give contracts ordered certain work to be done by the plaintiff but the contract was not reduced to the form of a document, though being for over Rs. 100 it ought to have been in writing, plaintiff is entitled under S. 70, Contract Act, to be compensated for the work done on the principle of quantum meruit, though he could not sue on the contract and the absence of a contract in writing is no answer to the action brought by the plaintiff in respect of the work done by him for the Council. [P 178 C 2]

Guha—for Applicant.

Bose—for Opposite Party

Judgment.—The petitioner filed a suit against the respondent for the sum of Rs. 351-4-0 being the amount claimed to be due for work done on a contract with the District Council of Yamethin. In defence the District Council pleaded that they did not know whether the work had been done and, that if in fact, it had been done the suit was not maintainable owing to the absence of a written contract. The trial Court gave the petitioner a decree. On appeal, the District Court set this decree aside on the ground that as the terms of the contract were not reduced to writing the contract could not be enforced. The petitioner has now come to this Court in revision. The main question for decision is whether the want of a written

contract is fatal to the petitioner's claim. It has not been suggested on behalf of the respondent that this Court is not competent to deal with the point in revision. The case for the petitioner is that the work was undertaken under the direction of the then Chairman of the District Council, U Yaw That. Under S. 56, Burma Rural Self-Government Act, the Chairman was competent to execute the contract, but under R. 3, Ch. 8 of the rules appearing at p. 209 of the "Burma Hand-book of Rural Self-Government," the contract, being for over Rs. 100 was bound to be in writing. In this case a report was made to U Yaw That that the work required doing, and he wrote on this report "Give the work to Zulaing," but the terms of the contract between Zulaing and the Council were never reduced to the form of a document. It is contended on behalf of the District Council that the result of this is that Zulaing could make no claim against the Council either on his contract or on the principles of quantum meruit. For the petitioner it is claimed that, although the petitioner is not entitled to relief directly on the contract, he can claim to be compensated for work actually done.

The question as to the validity of claims against Corporations for work done for them under contracts entered into under the seal of the Corporation has frequently been discussed in English cases. The two leading cases on the point now seem to be the case of *Lawford* v. *Billericay Rural Council* (1) and the case of *H. Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (2). In the case of *Lawford* v. *Billericay Rural District Council* (1) it was held that where the purposes for which a Corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect and orders are given by the Corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the Corporation and the whole consideration for payment is executed there is a contract to pay implied from the acts of the Corporation and the absence of a contract under the seal of the Corporation is no answer to an action brought in respect of the work done or the goods supplied. The decision in that case was based on the Common law and it does not appear that there was any statutory provision of law requiring the contract to be under the seal of the Corporation.

In the case of *H. Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (2) a claim was made against the Mayor and Corporation for work done under a contract, which was not in writing and sealed with the common seal of the corporation. Under sub-S. 1, S. 174, Public Health Act 1875, the contract being over the value of £ 50 was required to be in writing and sealed with the Common seal of the Corporation. It was held that the provisions of the statute were clear and that the plaintiff could not claim for work done by him in accordance with the contract not in writing and sealed with the common seal.

The contention on behalf of the respondent is that the provisions of S. 70, Contract Act, cannot apply against a Corporation such as a District Council.

A number of Indian cases have been cited before me, but I think it will be sufficient if I refer to four of them. In the case of *Radha Krishna Das* v. *Municipal Board of Benares* (3) the principles laid down in *H. Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (2) were followed, but in that case the Municipality, who were the defendants had already paid for what they had actually received in accordance with the contract from the plaintiffs and S. 70 was held to have no application because as regards the rest of the balance for which they claimed the Municipality had not enjoyed the benefit. In the case of the *Municipal Committee Gujranwala* v. *Fazal Din* (4) the Municipal Committee held an auction to sell to the highest bidder a contract entitling him to take for one year all the sweepings of the town. The contract was knocked down for Rs. 14,900 to the defendant who paid a part only of the purchase money. In a suit by

(1) [1903] 1 K. B. 772=72 L. J. K. B. 554=88 L. T. 317=51 W. R. 630=67 J. P. 245=1 L. J. R. 535=19 T. L. R. 322.
(2) [1833] 8 A. C. 517.
(3) [1905] 27 All. 592=2 A. L. J. 321=(1905) A. W. N. 111.
(4) A. I. R. 1929 Lah. 742=121 I. C. 187=11 Lah. 121.

the committee against the purchaser for the balance of the purchase money it was held that the committee was entitled to recover as the defendant was bound to pay for what he had actually received and enjoyed as if there had been an implied contract between the parties and this notwithstanding that the imperative provisions of S. 47, Punjab Municipal Act, 1911, which required the contract to be reduced to writing were not being complied with. The principles laid down in *Lawford* v. *Billericay Rural Council* (1) were followed. The case of *H. Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (2) does not appear to have been considered. The same question was dealt with by the same Court in the case of *Secy. of State* v. *G. T. Sorin & Co.* (5). In that case a contract was entered into by the officer commanding a depot at Jullundur on behalf of the Secretary of State for the supply of fodder for horses. The officer in question was not empowered to act on behalf of the Secretary of State. It was held that nevertheless the plaintiff was entitled to recover under S. 70, Contract Act, for such fodder as was lawfully supplied. It was pointed out that the provisions of S. 70, Contract Act, were much wider than the English law and went far beyond it.

The same principle has been followed in the case of *Mohamed Ebrahim Moolla* v. *Commissioners for the Port of Chittagong* (6). In that case the Commissioners for the Port of Chittagong brought a suit for the recovery of money due as hire of a towing vessel lent to the defendant. By S. 29, Chittagong Port Act, the contract was required to be in writing and signed by the Chairman or Vice-Chairman and by two other Commissioners and to be sealed with the common seal of the Commissioners. The provisions of this section had not been followed, and, after considering the English cases on the point, the Court held that the plaintiffs could not recover on their contract. It was however held that the plaintiffs were entitled to recover quantum meruit for the services rendered by them to the defendant. S. 70, Contract Act, reads as follows :

" Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

The wording of this section is, on the face of it, quite wide enough to cover the circumstances of the present case, and none of the cases that have been cited before me are authority for the view that the section cannot be applied. As pointed out in the case of *Secy. of State* v. *G. T. Sarin & Co.* (5) whatever the law may be in England, the parties to this case are bound by S. 70, Contract Act, which must be interpreted in accordance with its clear and explicit terms. The terms of this section appear to me to be sufficiently clear and explicit, and the balance of authority to be in favour of the view that its provisions may be applied when one of the persons concerned is a Corporation or other public body. Although therefore the plaintiff in the present case could not sue on his contract, he could claim against the District Council compensation for work done for them, the benefits of which have been accepted by them. The work in the present case consisted of clearing a jungle and in filling up lowlying places in a certain market. It is not suggested that such a work is not within the ordinary scope of the District Council. The work was actually undertaken at the end of 1928. The evidence of U Yaw That, the Vice Chairman, U Ba San, and the then Overseer, Maung Kyu Hein, shows that the work was actually done in accordance with the orders of U Yaw That ; but by the time the suit was brought it was difficult to check what could be looked on as a reasonable value of the work done.

The claim of the petitioner is for Rs. 100 for the jungle clearing and Rs. 100 for dressing and Rs. 151-4-0 for filling up sand. Kyu Hein inspected the work whilst it was being done, and says that the rates claimed were not high. A. Hoosein, the present District Council Overseer, says that he had to verify the work under the orders of the Commissioner, and that he did this in March 1930. He estimated that the sum of Rs. 100 for jungle clearing was excessive,

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(5) A. I. R. 1930 Lah. 364=120 I. C. 615=11 Lah. 375.

(6) A. I. R. 1927 Cal. 465=103 I. C. 2=54 Cal. 189.

and that Rs. 50 was ample for that ; otherwise he was unable to say that the amount claimed was in any way exorbitant. It is of course for the petitioner to prove what would be a reasonable compensation for the work done by him. In the circumstances I think his claim may be accepted except as to the jungle clearing, and, for that, I would allow only Rs. 50, estimated by the present overseer. The result is that I set aside the decree of the District Court and pass a decree in favour of the plaintiff petitioner for Rs. 301-4-0 with costs on that amount in all three Courts.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Rangoon 179

DAS, J.

Aisha Bee Bee—Plaintiff.

v.

Noor Mohamed and *others*—Defendants.

Civil Regular Suit No. 271 of 1930, Decided on 4th February 1932.

Hindu Law—Applicability—Halai Memons of Gondal Kathiawar.

Hindu law of succession applies to Halai Memons of Kathiawar and especially to a Halai Memon of Gondal and he is entitled to dispose of his property by will: *A. I. R.* 1922 *P.C.* 414, *Rel. on.* [P 180 C 1]

Lambert—for Plaintiff.

Rauf and *Anklesaria*—for Defendants.

Judgment.—This is a suit for the administration of the estate of one Haji Saleh Mohamed Abdul Gani Gaziani, a Halai Memon of Gondal, who died at Gondal on 11th November 1927, leaving a will and leaving him surviving a widow, four sons and three daughters. The present suit is filed by one of the daughters.

It is admitted by all the parties that the deceased was a resident of Gondal in Kathiawar and that the law regarding the succession to his property would be the law prevailing in Gondal.

The plaintiff's case is that the deceased was governed by Mahomedan law and that the Mahomedan law of succession applies to his estate and the deceased could not make a will which was not in accordance with the Mahomedan law. Defendants 2 to 6 filed a joint written statement claiming that the deceased was a Halai Memon of Kathiawar and as such was governed by Hindu law regarding succession; that the deceased could dispose of his property by a will and that the will was binding on the plaintiff. Defendant 1, one of the sons of the deceased, supported the plaintiff's contention. The other defendants did not file written statements. The main question to be decided in this case is whether the deceased in the matter of succession and inheritance was governed by Hindu law or Mahomedan law. The deceased was a Halai Memon of Kathiawar and the question regarding the law of succession applicable to Halai Memons of Kathiawar was considered by the Bombay High Court in *Mahomed Haji Abu* v. *Khatubai* (1) where a Bench of the Bombay High Court went elaborately into the question as to who these Halai Memons were and the law regarding succession. Scott, C. J. at p. 653 states as follows:

> "Speaking generally the evidence which will later be referred to with more particularity establishes that the Memons of Kathiawar of whatever group or sect follow the Hindu rule of succession."

This case went up on appeal to the Privy Council. This is reported in *Khatubai* v. *Mahomed Haji Abu* (2). Their Lordships of the Privy Council went into the question as to what was meant by a Halai Memon. Though their Lordships confined themselves to the question of the law applicable to Halai Memons of Porebunder, they did not dissent from the general views expressed by Scott, C. J., that Halai Memons of Kathiawar were governed by the same law. These decisions are a clear indication that Halai Memons of Kathiawar are governed by Hindu law as regards the succession of their properties; but as the deceased was a resident of Gondal in Kathiawar it will be necessary in this case to consider the evidence as to whether Halai Memons of Gondal are also governed by Hindu law as regards the succession of their properties. The contesting defendants in this case examined 21 witnesses on commission. The plaintiff though given an opportunity did not cross-examine any of these witnesses; nor did she examine any witness on commission though given an opportunity to do so. It will be necessary to go into the evidence taken on commission in this case. (After discussing evidence, the judgment procedeed). All these witnesses are

(1) A. I. R. 1918 Bom. 39=51 I. C. 513=43 Bom. 647.

(2) A.I.R. 1922 P.C. 414=72 I.C. 202=50 I.A. 108=47 Bom. 146 (P.C.)

unanimous in stating that Hindu law of succession governs Halai Memons of Kathiawar and particularly Gondal. The plaintiff did not take the trouble of cross-examining these witnesses and did not take the trouble of calling any witnesses in Gondal or other places in Kathiawar to prove that Mahomedan law of succession applies to Halai Memons of Gondal. The plaintiff called certain witnesses in this Court but neither the plaintiff, nor her husband nor defendant 1 gave evidence to prove that Mahomedan law governs Halai Memons of Gondal. Not much attention need be paid to the witnesses called in this Court as most of them state that they never heard of Hindu law being applied to Halai Memons of Kathiawar and some of them state that Halai Memons being Mahomedans, Mahomedan law must be applied to them and many of the instances given by the witnesses in this Court were of persons with whose estates they were concerned and who had left wills.

It is admitted by the contesting defendants that Halai Memons can always dispose of their property by will as they wish. It may be noticed here that Halai Memons had held a conference at Rajkot in Kathiawar and one of the resolutions passed at that conference was the following :

" This meeting of the All-India Memon Conference resolves that (as regards) the Hindu law that has been continuing to apply to our community in the matter of inheritance in spite of our being staunch Mussalmans, considering the same to be against the "Shariat" (Mahomedan religion) (this Conference) expresses (its) strong aversion towards it ; and in (our) status of being Mussalmans, (this Conference) cannot now, any longer, put up with this law therefore (this Conference) strongly urges all our Memon Jamats as well as the public workers to destroy this evil and bring the Muslim law into force. Moreover it humbly requests the (Kathiwar) Agency and the Native States that they as immediately as possible put such an important religious question into force (i.e. take it upIso that the Mahomedan law may be put into force)."

This resolution clearly shows that all Halai Memons of Kathiawar knew that Hindu law was applicable to them as regards succession and that they wanted to change the law. I am clearly of opinion that there can be no doubt that Hindu law of succession applies to Halai Memons of Kathiawar and especially Halai Memons of Gondal and that the deceased was governed by the Hindu law as regards succession and was entitled to dispose of his property by will. It is admitted in this case that the deceased did leave a will and there can be no doubt that the provision of the will is binding on the plaintiff. By that will the deceased left a legacy to the plaintiff. In that will the deceased declared that he was governed by Hindu law as regards succession. I would therefore hold that the deceased was governed by Hindu law as regards succession and that he could dispose of his property by will. The plaintiff's suit must therefore be dismissed with costs.

R.K. *Suit dismissed.*

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*A.I.R. 1932 Rangoon 180

OTTER AND BAGULEY, JJ.

Emperor

v.

B. R. Vertannes—Respondent.

Criminal Appeal No. 1670 of 1930, Decided on 22nd August 1932, against order of Head Quarters Magistrate, Insein, D/- 30th March 1932.

(a) Arms Act Rules (1924), Sch. 7 — Schedule only deals with exemptions from payment of fee chargeable for license.

Schedule 7 does not provide for the exemption of any person or class of persons at all. It simply describes what classes of persons are exempt from payment of fee chargeable for a license in Form No. 16 in respect of certain arms. Among those classes are persons who were members of the Indian Defence Force and who have been awarded the long service medal. The accused who claimed to belong to that class was not entitled to claim exemption from the operation of the Arms Act but may be entitled only to a free grant of a license. The most that a person falling within item (c), Sch. 7 of the Rules of 1924 might be entitled to, might be a paper declaring that the holder was entitled to a license without payment. Such a person would not be entitled to a life certificate of exemption for he is not exempted at all. [P 182 C 2]

*** (b) Arms Act (1878), S. 14 — License or exemption not granted by virtue of Act and Rules would be invalid and no protection to accused charged with contravening Act exists**

Both licenses and exemptions are granted by virtue of the Act and Rules. Any license or exemption not so granted would be invalid, and no protection to an accused person charged with contravening the Act. If it is established that an accused had no license under the Act or Rules and if he could not prove himself to be exempted under the Act or Rules, he would be a person within the provisions of S. 14 of the Act. Moreover, the fact that a person had been treated as entitled, e. g., to an exemption in any one year

or for any period, would not prevent the matter from being re-opened in any succeeding year or period : *A. I. R.* 1932 *Rang.* 146, *Dist.*

[P 182 C 1,2]

*** (c) Arms Act (1878), S. 27 — Publication printed in Government of India Press is not notification.**

A publication printed by the Government of India Press in 1923 entitled the "Arms Act" and described inter alia as "a brief explanation of the Arms Act" is not a notification within the meaning of S. 27. [P 182 C 2]

E. W. Lambert—for the Crown.

J. A. Vertannes—for Respondent.

Otter, J.—The respondent was charged under S. 19 (f), Arms Act 1878, with being in possession of a double-barrelled gun without a license. By S. 14, Arms Act, it is provided that no person shall have in his possession any firearms except under a license and in the manner, and to the extent permitted thereby. He was acquitted upon the ground (apparently) that he was an exempt person by reason of item 1 (c) in Sch. 7, appended to the Arms Rules 1924. I must say at once that, if I have correctly stated the grounds of acquittal it is a little difficult to comprehend the conclusion come to by the Magistrate.

It is only necessary to point out that Sch. 7 (to which I have referred) does not provide for the exemption of any person or class of persons at all. This is plain from the heading to the schedule which is as follows :

" Persons to whom no fee is chargeable for a license in Form 14 in respect of certain arms."

This may be compared with the heading to Sch. 1 which is "persons exempted." The latter schedule (as also appears very plainly at its head) was passed by virtue of R. 3 of the Rules of 1924 which deals with exemptions and exclusions, whereas Sch. 7 (as is also plainly stated) is passed by virtue of R. 46 (8) of those rules. The rule deals with fees payable for licenses and sub-R. 8 provides that no fee shall be chargeable in respect of a grant or renewal of any license to any member of any of the classes specified in Col. 1, Sch. 7. Among these classes are persons who were members of the Indian Defence Force and who have been awarded the long service medal. The exemption claimed by the respondent has all along been based upon the contention that he is within this class of persons. As I have said however the respondent is not exempted by reason of this provision but might only be entitled to a free grant of a license. There is no doubt that the rules of 1924 were in force when the offence is said to have been committed and as it is admitted that the respondent had no license which was in force at the time mentioned in the charge I do not understand the Magistrate's decision. Much argument in support of the finding of the Magistrate however was addressed to this Court and I must examine shortly the suggestions put forward.

It is common ground that the rules of 1924 took the place of the Indian Arms Rules of 1920 which came into force on 1st January of that year. It is also common ground that a person who had been before 1st January 1920 awarded the Volunteer Long Service Medal was by reason of R. 3 and item 11-A, Sch. 1 to those rules "A person exempted" from the prohibition contained in S. 14 of the Act. On behalf of the Crown however it was said that in the present case the evidence that the respondent was such a person was insufficient and that he had therefore failed to satisfy the Court that he fell within the exemption. I do not propose to examine this question at any length, for it seems that for the purpose of this appeal it may be disregarded. Accused produces a medal of the class under review with his name upon it and states in his written defence that it was awarded him in 1919. There is also little doubt, I think, upon the evidence that he for some years at least, was treated as a person so awarded and it is said that the licenses Exs. 1 and 2 were granted to him without payment. The respondent however is unable to produce any military or other record which proves that the medal in question was awarded to him before 1st January 1920. The only importance now attaching to the date when the medal was awarded is that by reason of R. 49 of the 1924 rules and the proviso thereto, certain exemptions made under the old rules of 1920 are preserved. But as was pointed out by the Assistant Government Advocate such exemptions must be consistent with the rules of 1924.

As an entirely different privilege in respect of the class of persons to which the respondent is said to belong (viz., the grant of a license without fee) was created by the Rules of 1924 it can not be said that the previous exemption

claimed by him is consistent with these later rules ; indeed, this was not contended for on behalf of the respondent. Mr. Vertannes who appeared on his behalf however argued that in view of the evidence we should be satisfied that he was granted a license without payment and also I think that he had been treated by the Insein authorities as a person exempted.

For this reason (it was said) it is not open to this Court to consider whether the respondent falls within an exempted (or privileged) class at all as a decision upon the matter by the appropriate authority must be taken to have been already arrived at. Upon this I regard the evidence before the Court as insufficient. It is true that two licenses (Exs. 1 and 2 granted in 1923 and renewed for two years in 1924) are before me ; but it is not proved they were issued without payment. It is obvious that the words sought to be relied on (free of all fee) on the license do not apply. Nor is the suggested admission in the letter of 31st December 1931 " even if it were a decision by the District Magistrate " (which it is not) any more than a statement that under the Arms Rules of 1920, when the respondent purchased his gun in 1922 he was not bound to take out a license or even an exemption certificate. But even had there been such a decision it is plain that this or any Court could go into the matter. Further, I think that the statement in the letter, namely, that it was the duty of the respondent to take out a license is quite correct. Both licenses and exemptions are granted by virtue of the Act and Rules. Any license or exemption not so granted would be invalid, and no protection to an accused person charged with contravening the Act.

Either the Court of trial or this Court on appeal would be entitled to consider whether an offence had or had not been committed and if it were established that an accused had no license under the Act or Rules and if he could not prove himself to be exempted under the Act or Rules he would be a person within the provisions of S. 14 of the Act. No doubt in such a case the offence would be purely technical. Moreover, of course, the fact that a person had been treated as entitled e. g., to an exemption in any one year or for any period, would not prevent the matter from being re-opened in any succeeding year or period. One further matter must be mentioned. A copy of a publication, apparently printed by the Government of India Press in 1923 entitled the Indian Arms Act and described inter alia as " A brief explanation of the Indian Arms Act " was produced in the Court below and relied upon in Court. It is perfectly true, that in this publication reference is made to a " Life Certificate of exemption " free of fee for arms in respect of which this exemption had hitherto been enjoyed. An attempt was made to argue that the publication was a notification within the meaning of S. 27 of the Act. It is unnecessary to say more than that the publication is nothing more than it says it is, viz., " A brief explanation." It is clearly not a notification published in the Gazette of India.

Similar matter was reproduced in a a supplement to the Burma Gazette of 5th July 1924 entitled "Miscellaneous Department No. 92 V 23." There can be no doubt at all however that portions of both these documents are misleading; for so far as I can see, there is nothing whatever in the Act itself or any rule or schedule authorizing the grant of such a certificate "of exemption" to a person with the qualification claimed by the respondent. The most that a person falling within item (c), Sch. 7 of the Rules, 1924 might be entitled to, might be a paper declaring that the holder was entitled to a license without payment. It is plain that such a person would not be entitled to a life certificate of exemption for he is not exempted at all.

The case of *Emperor* v. *U San Win* (1) was cited to us, and it was said that this Court ought not to set aside the acquittal in the present case owing to the remarks of the learned Chief Justice. But the present case differs in its essentials from that authority. A substantial question of construction arises and the mattea is one of importance, to not only the Local Government but also the public in general. The proper supervision of arms in this Province and also of those subject in any greater or less degree to the provisions of the Arms Act and rules can scarcely be said to be trivial only. Moreover in the case relied upon, the question was a pure question of fact,

(1) A. I. R. 1932 Rang. 146=138 I. C. 523=10 Rang. 312.

whereas in the present case the Court is scarcely concerned with the facts at all. Further as the result of our decision is that the Magistrate was clearly wrong, a miscarriage of justice must surely have occurred. The Magistrate treated the respondent as exempt; whereas if I am right he is not exempt at all; but is bound to hold a license in accordance with the Arms Act, for any arms and ammunition in his possession so long as the law remains as it is at present.

Whether he is entitled to a license without payment will at present depend upon whether he can satisfy the licensing authority that he is within Sch. 7 (d) appended to the 1924 rules. Upon the whole therefore I am of opinion that the respondent should have been convicted by the Magistrate and I would set aside the order of acquittal and substitute a conviction. Upon the question of penalty we were not addressed by the learned advocate for the respondent but it is plain that a nominal penalty only should be imposed. There can be little doubt I think that the respondent (and those advising him) was misled by the misleading publications to which I have referred, and it may well be also that he honestly believed that he was entitled to be exempted. For the offence committed a maximum punishment of three years' imprisonment is provided with or without the imposition of a fine.

In view of the special circumstance of this case I think that a nominal fine will be sufficient and the respondent is therefore sentenced to pay a fine of Rs. 10. The gun (D. B.) will be retained by the police until the respondent or some other person becomes entitled to possession of it, e. g., a duly licensed purchaser.

Baguley, J.—I agree.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Rangoon 183

PAGE, C. J.

Maung San Pe—Applicant.

v.

Ma Lai Mai—Opposite Party.

Criminal Revn. No. 115-B of 1932, Decided on 7th June 1932, against order of Additional Special Power Magistrate, Kyauktan, in Criminal Misc. 5 of 1932.

Criminal P. C. (1898), S. 488—Child with mother—Mother refusing to live with husband—Father is bound to maintain child.

A father is bound to maintain the child even though it is living with its mother against whom decree for restitution of conjugal rights was passed. The correct procedure is that father should apply for custody of the child.

[P 183 C 2]

Thein Maung—for Applicant.

Burjorjee—for Opposite Party.

Order.—In this case a decree for restitution of conjugal rights was obtained by the husband against the wife. The wife refuses to return to her husband, but has retained custody of the child. If the Court is of opinion that her present application for an award of maintenance for the child is merely a device by which the wife is endeavouring to obtain maintenance for herself, then, no doubt, an order of maintenance ought not to be made. On the other hand, as Hartnoll, J., pointed out in *Nan Saw Shwe* v. *Maung Hpone* (1)

"there was no decree that the father should have the guardianship of his child, and in my opinion as long as it remains with the mother the statutory obligation on him to maintain it remains still binding on him."

I think that those observations apply to the facts of the present case. The child is not to be allowed to starve merely because the husband and wife do not live together. I realize the force of the argument presented on behalf of the applicant that where a husband whose wife has deserted him and has taken the child with her is prepared to take the child, it ought not to be held that the father is neglecting or refusing to maintain his child within S. 488, Criminal P. C. In the present case however the child is four years old, and it is open to the applicant to apply as provided by law for the custody of the child. Meanwhile it seems to me that he is bound to maintain the child. The question is how much ought the father to be ordered to pay? He certainly ought only to be required to pay such a sum as will be sufficient to maintain the child. If he is ordered to pay a sum which will leave a surplus after the maintenance of the child is provided for, it will be putting temptation in the wife's way to spend what remains over upon herself.

I think the proper order to make is that the applicant do pay to the mother

(1) [1912] 6 L. B. R. 127=14 Cr. L. J. 98=18 I. C. 658.

of the child Rs. 5 a month from the date on which the application for maintenance was filed. How long this order will remain in force depends upon whether the father elects to apply that the custody of the child be given to him. The remedy lies in his own hands. The result is that the application in revision is accepted, and the order of the lower Court is varied by ordering that in lieu of maintenance at the rate of Rs. 10 a month Rs. 5 a month be substituted as from the date when the application for maintenance was filed. There will be no order for the costs of either party in either Court.

R.K. *Order varied.*

A. I. R. 1932 Rangoon 184

BROWN, J.

Emperor.

v.

Nga Sein Po—Accused.

Criminal Revn. No. 155-B of 1932, Decided on 11th May 1932, against order of Third Addl. Magistrate, Minhla, in Criminal Regular Trial No. 18 of 1932.

Burma Excise Act (1917), S. 16—Possession of two or more excisable articles—Each article must be considered separately—When different liquors are seized more than one punishment is undesirable.

Where the limit prescribed is for each kind of excisable article separately, there is nothing to prevent the possession of each kind of article up to the limit prescribed, although if a person possesses two or more such articles the total of all may exceed the prescribed limit of each. The possession of more than prescribed quantity of each article does not make up one offence. Each kind of excisable article must be considered separately, when different kinds of liquor are however seized together, it is undesirable that more than one punishment should be inflicted.

[P 184 C 2]

Brown, J.—The accused Sein Po on his own admission has been found guilty under S. 30 (a), Excise Act, for the possession of seven quarts of country alcoholic liquor other than spirit and tari, and he has also been found guilty under S. 37 of the Act for possession of half a quart of country spirit. He has been sentenced to pay a fine of Rs. 10 for each offence. The proceedings have been submitted to this Court by the Session Judge of Tharrawaddy with a recommendation that the fine of Rs. 10 under S. 30 (a), Excise Act, be set aside. The reason given is that the double punishment transgresses the provisions of S. 71, I. P. C. S. 16, Excise Act, makes the possession of any quantity of any excisable article in excess of the limit prescribed by the Local Government by notification under the section illegal. Finance Department No. 77, dated 18th September 1917, as subsequently amended (p. 42 of the Burma Excise Manual), prescribes the limits for possession of excisable articles under S. 16. The limit for spirit included within the definition of country alcoholic liquor is one reputed quart bottle. The limit for country alcoholic liquor other than spirit and tari is also in the Tharrawaddy district one reputed quart bottle. There is nothing however that I can see in the Act, or the notification, to make it illegal for a person in the Tharrawady district to possess both one quart bottle of spirit and one quart bottle of country liquor other than spirit and tari.

The limit prescribed is for each kind of excisable article separately, and there is nothing to prevent the possession for each kind of article up to the limit prescribed. In this view of the case I do not think it can be said that the possession of seven quarts of liquor under S. 30 (a) and the possession of half a quart of country 'spirit under S. 37 together make up one offence. Each kind of excisable article must be considered separately. Ordinarily speaking, when different kinds of liquor are seized together, as in this case, it is undesirable that more than one punishment should be inflicted; but the total fine in the present case of Rs. 20 cannot be looked upon as unduly excessive, and I do not think the order passed is actually illegal. No application on the point has been made by the accused person himself, and I do not think that it is necesary to interfere in revision. With these remarks the proceedings will be returned to the Sessions Judge.

B.R./R.K. *Revision disallowed.*

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* A. I. R. 1932 Rangoon 185

CUNLIFFE, J.

Ma Joo Tean and *another*—Plaintiffs.

v.

Ma Thein Nyun and *others*—Defendants.

Civil Regular Suit No. 141 of 1931, Decided on 27th May 1932.

(a) Interpretation of Statutes—All India statute—Provincial custom is no guide.

A peculiar custom in one province should not be a material factor in deciding the meaning of an all India statute. [P 186 C 2]

*** (b) Transfer of Property Act (1882), S. 58 (f)—Equitable mortgage—"Document of title"—Tax receipt and copy of map are not documents of title.**

A tax receipt and a copy of a map are not documents of title within the meaning of S. 58 (f). They do not even afford reliable evidence of title. The nature of a document, the subject of a deposit, cannot be merely symbolic and sanctified by the intention of the depositor; it cannot be metamorphosed and drawn by equity into the requisite legal category laid down in S. 58. The word "title-deeds" no doubt connotes mtore formality than the words "documents of title"; but the intention of the framers of the Act in S. 58 (f) was to confine the necessary deposit to documents which are of such a nature that they would ordinarily and simply support an ownership of the property and would convey a legal title to any purchaser : *Case law referred.* [P 186 C 2; P 187 C 1]

J. Hormasji with *Miss. Dantra*—for Plaintiffs.

K. C. Bose—for Defendant 3.

Judgment.—The substantive point in this case is a short one. It turns however upon a question of considerable importance. The plaintiffs are the holders of a registered mortgage on land belonging to the late U Po Loke. Defendants 1 and 2 are the legal representatives of U Po Loke. They do not appear to defend the action. Defendants 3 are a Chettyar Firm who claim to be the holders of a prior equitable mortgage upon the land mortgaged to the plaintiffs. Defendant 4 is the purchaser of part of the said land. Defendants 5, 6 and 7 put in a written statement; but have come to a settlement with the plaintiffs. They no longer dispute the validity of the plaintiff's mortgage.

The following are the material facts : The date of the plaintiffs' registered mortgage is 3rd January 1928. It was executed by U Po Loke and his widow Ma Thein Nyun, defendant 1. Prior to this registered mortgage the plaintiffs claim to have lent money to U Po Loke and his wife on an equitable mortgage by a deposit of a tax receipt and a plan of the land. This equitable mortgage however need not be considered closely as on taking legal advice it was converted into the registered mortgage in suit.

As to defendants 3 they first advanced Rs. 15,000 to the late U Po Loke and his wife in the year 1926. To support this transaction U Po Loke also deposited a tax receipt and another plan of the property. In the year 1927 a further Rs. 15,000 was lent by defendants 3 and a similar deposit was made. Later on, to be exact on 28th November 1927, these two loans were consolidated and converted into one loan of Rs. 31,500; and again the same deposit was made. On this occasion a memorandum in writing was also deposited. Subsequently in the month of November 1929, a further collateral security in the form of a promissory note was executed in favour of defendants 3 by U Po Loke and his wife, the principal and interest then amounted to Rs. 41,300. It is also in evidence that U Po Loke and Ma Thein's land had no title-deeds. It became their property by an oral deed of partition which is certified by U Thein Maung, an advocate of this Court. The main conflict therefore is between the plaintiffs, the registered mortgagees and defendants 3, the alleged equitable mortgagees. It is conceded that an equitable mortgage in India has the same value, if proved, as a registered mortgage ; but the plaintiffs deny that defendants 3 hold any equitable mortgage within the meaning of S. 58 (f), T. P. Act. S. 58 (f) is in the following terms :

"Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab and in any other town which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon the transaction is called a mortgage by deposit of title-deeds."

This is the only Indian statutory definition equivalent in form to the English equitable mortgage. Now I have been referred to and read for myself a number of cases showing what various Judges, at various times, and in various countries considered to be equitable mortgages. The doctrine of equity with regard to the law of mortgages was evolved in England in the first quarter of the 19th century not without a great deal of opposition from the Courts of Common Law.

Lord Eldon, for example thought that the recognition of an equitable mortgage by mere deposit was most undesirable as it infringed an important section of the Statute of Frauds. Equitable mortgages and the power to create them have always been dangerous weapons in the hands of unscrupulous people.

It is obvious here that the late U Po Loke was a fraudulent person. He raised money twice over on the same property without informing either of the lenders of what he had done. The tax receipt which is said to have constituted the document of title supporting defendants 3's loan is of a different year to the tax receipt which supported the plaintiffs' loan before the registered mortgage was created.

At the present time in British India it does not seem to me to matter very much —although the text-book editors seem to think it does—that in England, many years ago, by the decision in *Goodwin* v. *Waghorn* (1) it was held that in the absence of title-deeds a receipt for purchase money containing the terms of an agreement for sale was a sufficient deposit, in equity, of a document of title. This case is greatly relied on by defendants 3. I have read it more than once very carefully. No question of competing mortgages was there before the Court. Nor were the exact provisions of a Statute being considered. The case was decided before the Conveyancing Act of 1881; and, of course, long before the recent Law of Property Act had been passed. Nor do I derive much assistance, on principle from a reference to an Irish authority in which the deposit of a map was considered to be sufficient deposit of a document of title. No report of that case is available to me. It is therefore impossible for me to know what the exact circumstances of the decision were.

In the case of the *Official Assignee* v. *Basudevadoss* (2) a Bench of the Madras High Court held that a patta of land is a document of title by deposit of which an equitable mortgage can be created. This decision is the nearest I can find to the case before me now. As in this case, there were no title-deeds available. It was pointed out by Srinivasa Ayyangar, J., that a patta or agreement of lease was the only document which a raiyat could possibly have in his possession for the purpose of creating an equitable mortgage, and that the leasehold which was evidenced by the patta was universally recognized as an occupancy tenancy throughout the Presidency. There again however there were no competing mortgages; and I have an uneasy feeling (I only say so with great respect) that the learned Judges who decided that case may have unwittingly furnished a precedent to construe this particular section of the Transfer of Property Act in a different manner in different parts of British India. I do not consider that a peculiar custom in one province should be a material factor in deciding the meaning of an All India Statute. Indeed, Coutts-Trotter, C. J., seems to visualize this point in his short concurring judgment. In the case of *Behram* v. *Sorabji* (3) it was laid down that the three requirements for a mortgage under S. 58 (f) are a debt, a deposit of title-deeds, and an intention that the latter should be the security for the former. It is conceded that there was a debt here; and I am quite satisfied that there was an intention (although subsequently a dishonest one) that the deposit should be security for the debt. We are thrown back therefore on the question whether a tax receipt and a copy of a map are documents of title or title-deeds within the meaning of the section. In my opinion they are not. They do not even afford reliable evidence of title. I decline to hold that the nature of a document the subject of a deposit may be merely symbolic and that, sanctified by the intention of the depositor, it can be metamorphosed and drawn by equity into the requisite legal category laid down in the section.

If this were so I apprehend that a series of tram tickets issued from a terminus, conveniently situated near the property to be encumbered, might well fulfil the test. I see no reason to extend the meaning of the expressions "documents of title" or "title-deeds" further than the natural meaning contained in these expressions. Presumably there is a slight difference between the expressions "title-deeds" and "documents of

(1) 13 L.J. (n.s.) 172.
(2) A. I. R. 1925 Mad. 723=88 I. C. 401=48 Mad. 454.
(3) A. I. R. 1914 Bom. 15=23 I. C. 140=38 Bom. 372.

title." The word "title-deeds" no doubt connotes more formality than the words "documents of title"; but it seems to me that the intention of the framers of the Act in S. 58 (f) was to confine the necessary deposit to documents which are of such a nature that they would ordinarily and simply support an ownership of the property and would convey a legal title to any purchaser. Anyone can produce a tax receipt. We know that very often, for one reason or another taxes on property are paid by people who are not the owners of the property at all. Anyone, too can procure a copy of a map, or as many copies of a map as he chooses.

Finally, I may say that I deprecate strongly the use of English decisions in equity to abrogate the clear provisions of an Indian Statute. The principles of equity should in my view only be employed to modify the Common law operating harshly or unfairly between the parties concerned.

For these reasons I uphold the plaintiffs' claim against the claim of defendant 3. The memorandum of 28th November 1927, appears to me to be a mere recital and in no way constitutes the real bargain between the parties. It therefore can be disregarded. I hold that defendants 3 possess no mortgage on the suit land within the meaning of S. 58 (f).

As to defendant 4 he claims to be a bona fide purchaser for value without notice of earlier encumbrances. I reject this contention. It is in evidence that a search was made on his behalf in the Register. That search was made so carelessly that I hold it comes within the meaning of gross negligence referred to in S. 3 of the Act. I disbelieve the innuendo that the Register was faked. I do not agree with the elaborate argument under S. 41. I think that argument is quite inapplicable to the facts.

In the result I find for the plaintiffs against defendants 1, 2, 3 and 4 in the terms of the prayer.

K.N./R.K. *Order accordingly.*

G. A. Dar
Advocate High Court
Jammu & Kashmir
Srinagar

A. I. R. 1932 Rangoon 187

PAGE, C. J. AND CUNLIFFE, J.

Maung Ba and *another*—Appellants.

v.

Mai Oh Gyi—Respondent.

First Appeal No. 58 of 1928, Decided on 22nd December 1931, against decision of Dist. Judge, Munbu, in Civil Regular No. 1 of 1925.

(a) Buddhist Law (Burmese)—Succession—Case under S. 18 of Book 10 of Manukye—Younger brother and sister are to be preferred to older ones than deceased.

In cases to which S. 18 of Book 10 of the Manukye applies the younger brothers and sisters are to be preferred to those who are older than the deceased in considering the right to succeed : *A. I. R.* 1926 *Rang.* 142, *Foll.* [P 188 C 1]

(b) Buddhist Law (Burmese)—Succession—One *U* dying leaving behind two sons and two daughters—*U's* wife predeceasing him—Subsequently one daughter and one son both unmarried dying—Property left by *U* not partitioned—Surviving son and daughter take equally irrespective of that one is older and other younger than deceased.

Section 17 of Book 10 of the Manukye provides "if after the death of the parents and before the division of the property left, an unmarried child shall die, the law for partition of the deceased child's effects amongst the relations (brothers and sisters) is that they shall share in equal proportions." [P 188 C 2]

Where one *U* whose wife had predeceased him dies leaving behind two sons and two daughters and subsequently one daughter and one son both unmarried die, and the property left by *U* is not partitioned, the case is governed by S. 17 of Book 10 of the Manukye and the surviving son and daughter take equally in the property of their deceased brother and sister irrespective of the fact that one is older and the other younger than the deceased : *Rang. F. A. No.* 261 *of* 1929, *Ref.* [P 188 C 2]

Ganguli—for Appellants.

Anklesaria with *Thein Maung*—for Respondent.

Page, C. J.—This case relates to the inheritance of the property of one U Weik Gale, who died about 1883. U Weik Gale's wife predeceased him. He died leaving four children : (1) U Chin, who married the plaintiff as his second wife, and who survived him. U Chin died in 1920; (2) U Taung Thu, who died unmarried in 1904; (3) Mai Dok Ma, who died unmarried in 1914; and (4) Mai Bu, the defendant, who died unmarried in 1928. The present suit was brought in 1925 by the surviving widow of U Chin to recover the share in the inheritance of U Weik Gale which fell to her husband. The younger sister, Mai Bu, was impleaded as defendant, and on her death in 1928 the present appellants were impleaded as her heirs and legal representatives upon

the footing that they were her adopted children. The status of the appellants has been the subject of litigation, and the validity of their adoption is not now challenged. The case has run a somewhat strange course. A partial decree was passed by the learned District Judge of Minbu. That decree was considered by the High Court on appeal. This Court, being of opinion that proper issues had not been raised and determined at the trial, recast the issues, and remanded the proceedings to the District Court of Minbu, not in order that they should be determined according to law as one might have expected, but that the learned District Judge should try and determine the issues as settled by the High Court, and return the proceedings in order that this Court should be in a position finally to determine the appeal.

At the hearing after remand the learned District Judge passed a decree substantially in favour of the respondent. From that decree the present appeal has been brought, and cross-objections to the decree have been filed by the respondent. Now, the main question that falls to be determined in the case is the extent of the share of the inheritance of U Weik Gale that ultimately fell to the plaintiff's husband, U Chin. On behalf of the appellants it is contended that S. 18 of Book 10 of the Manukye applies to this case, with the result that U Chin became the heir of U Weik Gale to the extent of one-fourth of his property, but that U Chin as the eldest child was precluded by S. 18 of Book 10 from participating as an heir in the shares inherited by his brother and sister, and that Mai Bu as the only surviving sister was entitled as against the plaintiff to three-fourths of the joint estate, and the whole of the separate estates of her brother and sister who predeceased her. It is settled law that in case to which S. 18 applies the younger brothers and sisters are to be preferred to those who are older than the deceased: *Maung Tu* v. *Ma Chit* (1). In that case however the Court did not purport to consider what the relative position of the elder and younger brothers and sisters of the deceased was in cases which fell under S. 17 of Book 10 of the Manukye, and notwithstanding the diligence of the learned advocates, with the exception of one unreported case, *Civil First Appeal No.* 261 *of* 1929, no authority was discovered that bears upon the construction of S. 17. Now, S. 17 in Richardson's Translation is not placed in the same position in Vol. X as it is in the Burmese version. In the Burmese version S. 17 is inserted in S. 16 after the words "his children are entitled to inherit," and the body of S. 17 is placed after the concluding words of S. 16. In my opinion however that circumstance is of no importance, for in unequivocal language S. 17 provides that:

> "if after the death of the parents, and before the division of the property left, an unmarried child shall die, the law for the partition of the deceased child's effects amongst the relations (brothers and sisters) is, that they shall share in equal proportions."

In the unreported case to which I have referred it is pointed out that in other Dhammathats the same rule is laid down. In my opinion this Court is bound to give effect to S. 17 in cases which fall within its ambit. In the present case therefore the first question that falls to be determined is whether after the death of U Weik Gale and his wife there was a division of his property between his four children before they died. It is the common case of both parties that no such division took place, and that no partition of the estate of U Weik Gale was ever made. This is a case therefore to which S. 17 directly applies, and in the events that have happened it is immaterial whether the property in suit is joint property or the separate property of the several children of U Weik Gale. In either case the plaintiff as the sole heir of U Chin is entitled to one-half, and Mai Bu was entitled to the other half. The learned trial Judge has so held, and in our opinion any other decision upon this issue in the circumstances obtaining in the present case would not be correct. (His Lordship then proceeded to determine other issues raised in the appeal and the appeal was left pending for amendment of the decree.)

Cunliffe, J., concurred in the order.

P.N./R.K. *Order accordingly.*

(1) A. I. R. 1926 Rang. 142=96 I. C. 870=4 Rang. 62.

A. I. R. 1932 Rangoon 189

PAGE, C. J. AND BROWN, J.

Tan Ma Shwe Zin—Applicant.

v.

Tan Ma Ngwe Zin and *others*—Opposite Parties.

Civil Misc. Appln. No. 39 of 1932, Decided on 22nd June 1932.

(a) Letters Patent (Rangoon), Cl. 37—Appeal to Privy Council—Final order—Remand order disposing rights of parties finally is final order—Civil P. C., S. 109.

An order which remands a case for further consideration prima facie does not purport finally to dispose of the rights of the parties. But if the effect of the order is that the Court has finally determined the cardinal issue in the suit, and only subsidiary and subordinate issues remain to be decided the remand order is a final order within Cl. 37, Letters Patent, and appealable as such. [P 189 C 2]

Where therefore the cardinal issue in the case was whether or not a particular will was governed by the Succession Act and the Court of appeal held that inasmuch as the testatrix was a Chinese Buddhist, her will was not governed by the Indian Succession Act, but by the personal law to which Chinese Buddhists in Burma are subject, the remand order must be held to have decided "the cardinal point of the suit," and as after the decision of the High Court that can never be disputed again, order of the High Court is final notwithstanding that there may be subordinate inquiries to make, and as such is appealable to Privy Council : *Case law referred.* [P 190 C 1]

(b) Civil P. C. (1908), S. 110—Court should see that conditions precedent are fulfilled.

It is incumbent upon the Court to be satisfied that the conditions precedent have been fulfilled before an order is passed granting leave to appeal, although the opposite side may not oppose the application for leave to appeal to Privy Council. [P 190 C 1]

Cowasjee Anklesaria and *Jeejeebohy* — for Applicant.

McDonnell, Clifton and *Hartnoll*—for Opposite Parties.

Page, C. J.—This is an application for a certificate granting leave to appeal to His Majesty in Council. It is common ground that the value of the subject-matter in dispute at the trial, and involved in the appeal to His Majesty in Council is over Rs. 10,000, and we are satisfied that a substantial question of law between the parties is involved in the appeal. The question is whether the order from which an appeal to His Majesty in Council is sought is a final order within Cl. 37, Letters Patent. Now, in *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand* (1), at p. 127 (of 47 *I. A.*), Lord Cave, who delivered the judgment of the Judicial Committee, observed :

"The question as to what is a final order was considered by the Court of appeal in the cases of *Salamen* v. *Warner* (2), *Bozon* v. *Altrincham Urban District Council* (3) and *Issacs* v. *Salbstein* (4). The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties."

In *Bozon* v. *Altrincham Urban District Council* (3) Lord Alverstone, C. J., observed :

"It seems to me that the real test for determining this question ought to be this : Does the judgment or order, as made, finally dispose of the right of the parties ? If it does, then I think it ought to be treated as a final order ; but if it does not, it is then, in my opinion, an interlocutory order."

Now the order in question is an order of remand, and on the face of it such an order, which remands a case for further consideration prima facie does not purport finally to dispose of the rights of the parties. But as was pointed out in *Rahimbhoy Hibibhoy* v. *Turner* (5) and *Syed Muzhar Husein* v. *Bodha Bibi* (6), if the effect of the order is that the Court has finally determined the cardinal issue in the suit, and only subsidiary and subordinate issues remain to be decided the remand order is a final order within Cl. 37, Letters Patent, and appealable as such. In the light of the law thus enunciated can it be said that the order of remand from which it is contended that an appeal lies to His Majesty in Council in the present case was a final order ? To determine that question it is necessary to consider what were the matters in issue between the parties, and what the Court decided in the order under consideration.

We have heard the learned advocates on behalf of the applicant and the respondents, and it is common ground that the only matter that was in issue between the parties was whether the will of a Chinese Buddhist woman, under which certain property had been bequeathed to certain religious and charitable uses, was pro tanto null and void by reason of the provisions of S. 118, Succession Act (39 of 1925). The learned advocate for the

(1) A. I. R. 1920 P. C. 86=47 I. A. 124=14 S. L. R. 191=47 Cal. 918=56 I. C. 302 (P.C.).

(2) [1891] 1 Q. B. 734=60 L. J. Q. B. 624=39 W. R. 547.

(3) [1903] 1 K. B. 547=72 L. J. K. B. 271=51 W. R. 337=67 J. P. 397=19 T. L. R. 266.

(4) [1916] 2 K. B. 139=85 L. J. K. B. 1433=114 L. T. 924=32 T. L. R. 370=60 S. J. 444.

(5) [1891] 15 Bom. 155=18 I. A. 6 (P.C.).

(6) [1895] 17 All. 112=22 I. A. 1 (P.C.).

applicant referred to paras. 5, 6 and 7 of the plaint which run as follows :

"5. By the said will the late Tan Ma Thin bequeathed to religious and charitable uses the properties specified in the attached Sch. C which plaintiff prays may be read as part of this plaint.

6. The said will of the late Tan Ma Thin, though executed more than 12 months before her death, was not deposited in a place provided by law for the safe custody of the wills of living persons within six months from its execution or at any time.

7. Plaintiff avers that the said bequests to religious and charitable uses of the properties set forth in the attached Sch. C are null and void and that the said Tan Ma Thin died intestate in respect of the said properties."

Having regard to the form of the plaint the learned advocate for the applicant conceded that the claim of the plaintiff that the bequests of the property in Sch. C were null and void was based, and based only upon S. 118, Succession Act, and that unless the plaint is amended it would not be open to the applicant to contend that such bequests were null and void upon any other ground. It follows therefore upon that footing that the cardinal issue in the case was whether or not this will was governed by the Succession Act (39 of 1925). The Court of appeal has held that, inasmuch as the testatrix was a Chinese Buddhist, her will was not governed by the Succession Act, but by the personal law to which Chinese Buddhists in Burma are subject. It follows therefore that the Court by the remand order finally disposed of the alleged right of the applicant to set aside the bequests of the property in Sch. C upon the ground that such bequests were null and void by reason of S. 118, Succession Act. In these circumstances, in my opinion the remand order decided

"the cardinal point of the suit and as after the decision of the High Court that can never be disputed again, their order is final notwithstanding that there may be subordinate inquiries to make: Per Lord Hobhouse in *Syed Muzhar Huscin* v. *Bodha Bibi* (6)."

The learned advocate for the respondents did not oppose the present application, but it is incumbent upon the Court to be satisfied that the conditions precedent have been fulfilled before an order is passed granting leave to appeal.

For these reasons the application succeeds ; and a certificate of leave to appeal to His Majesty in Council will issue.

Brown, J., agreed.

K.N./R.K. *Application allowed.*

** A. I. R. 1932 Rangoon 190
Full Bench

PAGE, C. J., BAGULEY AND BA U, JJ.

Emperor

v.

Nga Po Min and *others*—Accused.

Criminal Ref. No. 97 of 1932, Decided on 11th July 1932, arising out of Criminal Appeals Nos. 1541 to 1547 and 1575 of 1932, of the High Court.

****(a) Evidence Act (1872), S. 118 —Accused though competent to testify is incompetent witness—Criminal P. C. (1898), S. 342 --Oaths Act (1873), S. 5.**

An accused person is competent to testify within S. 118, Evidence Act, but such a person is incompetent to be a witness for an oath cannot be administered to him, and all witnesses are required to take an oath or make an affirmation before they can lawfully be examined, or give evidence by or before any Court : *A. I. R.* 1914 *Cal.* 276, *Rel. on.* [P 191 C 2]

***(b) Criminal P. C. (1898), S. 342 — Procedure not followed--Test is whether there is failure of justice—Oaths Act (1873), Ss. 5 and 6.**

Where the accused has materially been prejudiced by the breach of procedure, a failure of justice has occurred; and also where there has in effect been substituted another mode of trial for that prescribed by the legislature, it is presumed that a fair trial has not been accorded to the accused, and there has been a failure of justice. But a decision just and reasonable on the merits should not be disturbed, because in the course of the proceedings some flaw can be detected that is not fundamental, and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure: *A. I. R.* 1930 *Cal.* 212 and *A.I.R.* 1927 *P. C.* 44, *Foll.* [P 192 C 1]

Tun Byu—for the Crown.

Ba Tun—for Accused.

Order of Reference.

Otter and Baguley, JJ.—In Special Trial No. 2 of 1932, the learned Special Judge sitting at Prome had before him 11 persons sent up under S. 396, I. P. C. read inter alia with S. 34 of the Code. The Special Judge charged them all firstly with dacoity under S. 395, I. P. C., and secondly under S. 302 read with S. 34 of that Code. The case for the prosecution was that these cases were connected with the rebellion and therefore S. 9 (1), Burma Act No. 4 of 1931, was applicable. In the result one of these accused was discharged and two others were acquitted. The remainder were convicted on appeal to this Court. Among the list of defence witnesses for appellant 1 Po Min appears the name of one Po Lwin, who was one of the persons tried jointly and con-

victed with the other appellants. Po Lwin was duly sworn and called as a witness on behalf of Po .Min on 17th May 1932. His evidence shortly was that Po Min had been beaten with a cane by the police in order to extract a confession. By S. 342 (4), Criminal P. C. (1898), it is provided that no oath shall be administered to an accused. It appears to us that the course adopted might affect the legality of the proceedings, and we under R. 12, in Ch. 11 of the "Appellate Side Rules of Procedure (Criminal)" refer for the decision of a Bench or a Full Bench, as the Chief Justice may direct, the following questions:

(1) Was the evidence of Po Lwin admissible ? and if not admissible (2), what effect in law, if any, has the admission of the evidence of this witness upon the trial and conviction of any or all of the appellants ?

We have referred this matter as prima facie it would appear that the course taken being contrary to the express provision of the Code, was contrary to law. It may be however that in the circumstances of the present case the legality of the trial of the appellant called or the remaining appellants would not be affected. As however the point appears to us important, and as it may be thought advisable some general expression of opinion on the subject under review should be given, we have thought it right not to dispose of the matter ourselves, but to take action under the rule above mentioned. It will be convenient to state that there are certain reported cases in which similar questions have been considered and decided. We would draw particular attention to the case of *Empress* v. *Durant* (1). Other cases are *Reg* v. *Hanmanta* (2), *Empress of India* v. *Asgar Ali* (3) and *Queen-Empress* v. *Dala* (4).

Opinion.

Page, C. J.—The material facts are set out in the order of reference and need not be repeated. Two questions have been referred to the Full Bench for determination:

"(I) Was the evidence of Po Lwin admissible? (2) If not, what effect in law (if any), has the admission of the evidence of this witness upon the trial and conviction of any or all of the appellants ?"

As regards (1) there can be no doubt, in my opinion that Po Lwin's evidence was inadmissible. At Common law an accused person cannot be either examined or cross-examined, *R.* v. *Payne* (5) and the reason is that there can be no sanction that such a person will speak the truth. In India an accused person is "competent to testify" within S. 118, Evidence Act (1 of 1872), but such a person is incompetent to be a witness, for an oath cannot be administered to him, and all witnesses are required to take an oath or make an affirmation before they can lawfully be examined, or give evidence by or before any Court. *In judicio non creditur nisi juratis.* Oaths Act (10 of 1873), Ss. 5 and 6, Criminal P. C. (5 of 1898), S. 342 (4), *Nafar Sheik* v. *Emperor* (6)). It is common ground that, at the time when Po Lwin was permitted to take the oath and be examined and cross-examined as a witness, he was an accused person.

The answer to the first question propounded therefore is in the negative. (2) As regards the effect which the admission of the evidence of Po Lwin had upon the trial it is to be observed that Po Lwin's name was mentioned as being a co-accused in the list of witnesses cited by the accused Po Min. In such circumstances it is highly improbable that the learned Special Judge, in allowing Po Lwin to be examined and cross examined as a witness on oath contrary to law, acted through inadvertence; and with all due deference it seems to me that the learned Special Judge misunderstood the plain terms of S. 342 of the Code, founded as they are upon a well-known and time-honoured rule of the Common law. However as I had occasion to point out in *Emperor* v. *Erman Ali* (7), at p. 1246 (*of* 57 *Cal.*):

"the effect of non-compliance with the statutory rules of procedure, in my opinion, must vary according to the gravity and the effect of the breach and the test in each case is whether the proceedings have resulted in a miscarriage of justice."

In that case I ventured to lay down, and I desire to affirm, the following test by which the effect of the failure of the Court to conform to the provisions of the Code of Criminal Procedure is to be measured and ascertained:

"The test to be applied, in cases where the prescribed rules of procedure have not been fol-

(1) [1899] 23 Bom. 213.
(2) [1877] 1 Bom. 610.
(3) [1879] 2 All. 260.
(4) [1885] 10 Bom. 190.
(5) 1 C. Cr. 347.
(6) A. I. R. 1914 Cal. 276=20 I. C. 741=14 Cr. L. J. 485=41 Cal. 406.
(7) A. I. R. 1930 Cal. 212=1930 Cr. C. 212=31 Cr. L. J. 536=57 Cal. 1228 (F. B.).

lowed, to ascertain whether there has been a mistrial, if always essentially the same, namely, whether there has been a miscarriage of justice; for if the appeal Court is satisfied in point of fact that the accused has materially been prejudiced by the breach of procedure clearly a failure of justice has occurred; while if by reason of the breach of procedure, there has in effect been substituted another mode of trial for that prescribed by the legislature as affording the best means of obtaining a fair trial it is presumed that a fair trial has not been accorded the accused, and in that case also there has been a failure of justice. In either case therefore the proceedings pro tanto will be set aside upon the ground that by reason of the breach of the rules of procedure a miscarriage of justice has been occasioned. On the other hand, if the appeal Court is not satisfied that the breach of procedure falls within one or other of those categories in my opinion it ought not to hold that the proceedings have become vitiated merely because there has been a transgression of the prescribed rules by which such proceedings are to be regulated. It is ever to be borne in mind that rules and regulations are intended to be the handmaid and not the mistress of the law, and that in criminal proceedings, it is of the utmost importance that a decision just and reasonable on the merits should not be disturbed, because in the course of the proceedings some flaw can be detected that is not fundamental, and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure": *Emperor* v. *Erman Ali* (7).

See also *Abdul Rahman* v. *Emperor* (8). I would answer the second question in this sense.

Baguley, J.—I agree.

Ba U, J.—I agree.

R.K. *Reference answered.*

(8) A. I. R. 1927 P. C. 44=100 I. C. 227=54 I. A. 96=28 Cr. L. J. 259=5 Rang. 53 (P.C.).

A. I. R. 1932 Rangoon 192 (1)

PAGE, C. J. AND BROWN, J.

Aisha Bee Bee—Applicant.

v.

Noor Mohamed and *others*—Opposite Parties.

Civil Misc. Appln. No. 48 of 1932, Decided on 29th June 1932, in respect of order of High Court in Civil Misc. Appln. No. 24 of 1932.

Letters Patent (Rangoon), Cl. 37—Final order—Civil P. C. (1908), S. 109.

An order refusing to allow the applicant to appeal to the Court of appeal in forma pauperis, is not a final order within Cl. 37: *A. I. R.* 1920 *P. C.* 86, *Rel. on.* [P 192 C 1]

Kalyanwalla—for Applicant.

Anklesaria and *Khan*—for Opposite Parties.

Order.—This is an application for a certificate granting leave to appeal to His Majesty in Council from an order of this Court refusing to allow the applicant to appeal to the Court of appeal in forma pauperis. It is contended that such an order is a final order within Cl. 37, Letters Patent. Plainly it is not. In *Khan Ramchand Manjimal* v. *Goverdhandas Vishindas Ratan* (1) at p. 127 (of 47 *I. A.*) Lord Cave, delivering the judgment of the Judicial Committee, laid down that

"the question as to what is a final order was considered by the Court of appeal in the cases of *Salaman* v. *Warner* (2), *Bozson* v. *Altrincham Urban District Council* (3) and *Isaacs* v. *Salbstein* (4). The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties."

The order from which it is sought to appeal to His Majesty in Council does not purport to affect the merits of the suit in any sense, or to determine the rights of the parties. This application is misconceived and is dismissed with costs, advocate's fee five gold mohurs.

R.K. *Application dismissed.*

(1) A. I. R. 1920 P. C. 86=56 I. C. 302=47 I. A. 124=14 S. L. R. 191=47 Cal. 918 (P. C.).

(2) [1891] 1 Q. B. 734=60 L. J. Q. B. 624=39 W. R. 547.

(3) [1903] 1 K. B. 547=72 L. J. K. B. 271=51 W. R. 337=67 J. P. 397=19 T. L. R. 266.

(4) [1916] 2 K. B. 139=85 L. J. K. B. 1433=114 L. T. 924=32 T. L. R. 370=60 S. J. 444.

A. I. R. 1932 Rangoon 192 (2)

PAGE, C. J.

Maung Chit Sein—Accused — Applicant.

v.

Emperor—Opposite Party.

Criminal Revn No. 215-B of 1932, Decided on 7th June 1932, against order of Sess. Judge, Hanthawaddy, in Criminal Revn. No. 72 of 1932.

Criminal P. C. (1898), S. 435 — Burma Courts Act (1922), S. 27.

Applications in revision from the Courts of the Magistrates in Rangoon should ordinarily be filed in the Court of the Sessions Judge of Hanthawaddy in view of Notification No. 39 of 2nd February 1931. [P 193 C 2]

Kyaw Myint—for Applicant.

McDonnell—for the Crown.

Order.—This application in revision is misconceived. Indeed, the moment that the legal position was pointed out to the learned advocate for the applicant he admitted that there were no grounds upon which the application could be supported It appears that a charge was

framed against an accused person under S. 324, I. P. C., by the Third Additional Magistrate of Rangoon, and an application was presented to the Sessions Judge of Hanthawaddy in revision under S. 435, Criminal P. C., for the purpose of obtaining an order that a charge under S. 307, I. P. C., ought to be framed against the accused. At the hearing of the application a preliminary objection was taken on behalf of the respondent that the Sessions Judge of Hanthawaddy had no jurisdiction to entertain the application in revision. The learned Sessions Judge held that he possessed jurisdiction in that behalf under the Judicial Department Notification No. 91 of 25th June 1925. The notification now in force is Judicial Notification No. 39 of 2nd February 1931. Under that notification and S. 435, Criminal P. C., prima facie the Sessions Judge of Hanthawaddy, Rangoon, is invested with revisional jurisdiction in connexion with the application in question. Under the notification however it is:

"provided that with respect to the Rangoon Town District this notification shall be construed subject to the provisions of the Letters Patent constituting the High Court of Judicature at Rangoon and of S. 27, Burma Courts Act, 1922."

Section 27, Burma Courts Act, provides:

"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, Magistrates exercising jurisdiction in the City of Rangoon when committing prisoners for trial shall commit them to the High Court. (2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, all appeals which lie under that Code to the Court of Session from the sentences or orders of Courts or Magistrates exercising jurisdiction in the City of Rangoon would lie to the High Court and not to the Court of Session."

An application in revision is not an appeal, and I asked the learned advocate for the applicant whether notwithstanding S. 27, Burma Courts Act, a District Magistrate would possess revisional jurisdiction with respect to the application in question under S. 435, Criminal P. C. The learned advocate frankly and properly conceded that he would have such jurisdiction. I then asked him if he could draw any distinction quoad the vesting of jurisdiction under S. 435, Criminal P. C., between the District Magistrate and the Sessions Judge, and again the learned advocate conceded that no such distinction could be drawn. The learned advocate stated that in these circumstances there was no ground upon which he could reasonably contend that the present application should succeed.

In my opinion the application fails, and must be dismissed. In future, applications in revision from the Courts of the Magistrates in Rangoon should ordinarily be filed in the Court of the Sessions Judge of Hanthawaddy.

R.K. *Application dismissed.*

A. I. R. 1932 Rangoon 193

PAGE, C. J.

Emperor

v.

Maung Chit Sein—Accused.

Criminal Revn. No. 378-A of 1932, Decided on 10th June 1932, against order of 3rd Addl. Magistrate, Rangoon, in Criminal Regular Trial No. 393 of 1932.

Criminal P. C. (1898), Ss. 206 and 207—Complicated and difficult questions of law and fact arising — Magistrate in grave charges should commit accused to Sessions—Duty of Magistrate laid down—Criminal Trial.

The function of a Magistrate is to dispose of petty cases, and he ought to commit to Sessions cases of a complicated or serious nature which he is neither by training nor experience qualified to try. The effect of the evidence as set out in the depositions should be determined by the Magistrate after considering the case as a whole. If the Magistrate is of opinion that a prima facie case has not been made out against the accused such as would justify the accused being put on his trial he must at once be discharged. On the other hand if the circumstances as disclosed in the depositions necessitate the framing of a charge against the accused for an offence the seriousness of which may vary according to the facts that are established, the Magistrate should try the case himself or commit it to the Sessions if the offence is one in which complicated or difficult questions of law or fact arise. [P 194 C 2]

McDonnell—for the Crown.

Kyaw Myint—for the Accused.

Judgment. — In this case criminal proceedings were instituted against the respondent in the Court of the 3rd Additional Magistrate of Rangoon pursuant to a complaint that he had stabbed one A. M. Steven, who was the manager of the mill in which he was employed. A number of witnesses were called for the prosecution, and the accused was examined by the Magistrate. After hearing argument for and against the charge which it was contended ought to be framed the 3rd Additional Magistrate, Rangoon, framed a charge against the accused

under S. 324, I. P. C. Having decided to try the case himself the Magistrate directed that the witnesses for the prosecution should be present for cross-examination on 31st May. An application in revision was filed in the Sessions Court of Hanthawaddy. The ground of revision was that having regard to the circumstances as disclosed in the depositions, the proper charge on which the accused ought to be committed for trial was a charge of attempted murder under S. 307, I. P. C. An objection was taken on behalf of the respondent to the jurisdiction of the learned Sessions Judge. The Sessions Court held that it possessed jurisdiction to revise the charge which had been framed, and the respondent thereafter presented an application in revision to the High Court against the order of the Sessions Judge of Hanthawaddy.

At the hearing of that application in revision it was held that the learned Sessions Judge of Hanthawaddy had revisional jurisdiction in the matter. It transpired however that whether the Sessions Court of Hanthawaddy accepted the application in revision and framed a more serious charge against the accused or rejected the application in either event an application to revise the order of the Sessions Court in all probability would be presented to this Court.

In order to save time and further proceedings the High Court suo motu has called for the proceedings before the 3rd Additional Magistrate in revision, and the application now comes on for hearing. In considering what is the proper charge to be framed against the accused I desire to say as little as may be about the facts or the merits of the case. It must not be taken that anything that falls from me today is intended in any way to prejudice the trial of the accused. In my opinion it is clear from a perusal of the evidence as disclosed in the depositions that the offence, if established is a grave one and it is manifest that a charge framed under S. 324, I. P. C., would be inadequate. Upon the face of the depositions as they stand the proper charge upon which the accused should be tried is a charge under S. 307, I. P. C. I desire to point out that Magistrates generally, and Magistrates in Rangoon and in the adjoining districts in particular, do not exercise sufficient care and discrimination in deciding whether cases should be committed to Sessions or tried in the Magistrate's Court. The effect of the evidence as set out in the depositions should be determined by the Magistrate after considering the case as a whole and endeavouring to take a broad and commonsense view of the situation. If the Magistrate is of opinion that a prima facie case has not been made out against the accused such as would justify the accused being put on his trial he must at once be discharged. On the other hand if the circumstances as disclosed in the depositions necessitate the framing of a charge against the accused for an offence the seriousness of which may vary according to the facts that are established the Magistrate should try the case himself if it is within his cognizance and the offence in the circumstances disclosed in the depositions appears to be be a trivial one. *E contra* a Magistrate ought not to take upon himself the responsibility of trying a case which taking a reasonable view of the effect of the depositions must be regarded as involving the trial of the accused for a grave offence or one in which complicated or difficult questions of law or fact arise. The function of a Magistrate is to dispose of petty cases, and he ought to commit to Sessions cases of a complicated or serious nature which he is neither by training nor experience qualified to try. I have observed that Magistrates do not always exercise a wise discretion in this respect. On the one hand cases not infrequently are committed to Sessions which are of a trivial nature, and which ought to have been tried in the Magistrate's Court. On the other hand I have observed that Magistrates sometimes decide to try cases of a serious and complicated nature which, although triable by a Magistrate obviously ought to be tried by a higher and more experienced tribunal. The present case affords an illustration of the view that I have expressed. No judicial officer capable of appraising the value of evidence could fail to realize that the facts as set out in the depositions in the present case prima facie disclose an offence of extreme gravity which obviously neither the 3rd Additional Magistrate of Rangoon, nor, I venture to think any other Magistrate ought to try.

The result is that a charge under S. 307, I. P. C., will be framed against

the accused and he will be committed to stand his trial at the ensuing Sessions of the High Court. The proceedings will be returned to the Court of the 3rd Additional Magistrate of Rangoon to act in conformity with this order.

R.K. *Order accordingly.*

A. I. R. 1932 Rangoon 195

PAGE, C. J. AND MYA BU, J.

Ma Shwe Tha and *others*— Applicants.

v.

Ma U Kra Zan—Opposite Party.

Civil Revn. No. 140 of 1931, Decided on 18th May 1932, against order of Dist. Court, Akyab, in Civil Misc. Case No. 47 of 1930, D/- 6th June 1931.

(a) Civil P. C. (1908), O. 33, Rr. 5, 6, 7 and 15—Dismissal of application under R. 7 (3) for not complying with provisions of R. 5 (a) is bar to fresh application.

According to the provisions of O. 33, Rr. 5. 6, 7 and 15 the dismissal of an application by reason of the provisions of R. 5 (a) after hearing argument under R. 7 (2) is to be held a refusal under R. 7 (3) and a bar to a fresh application under R. 15 : 9 *L. B. R.* 93 (*F.B.*); *A.I.R.* 1926 *Rang.* 200; *A I.R.* 1929 *Rang.* 128 & 1 *Lah.* 151, *not Foll.*; 9 *L.B.R.* 93; 20 *Bom.* 86; 33 *I. C.* 812 and *A.I.R.* 1924 *Cal.* 1039, *Rel. on.*; *A. I. R.* 1926 *Mad.* 875, *Diss. from.* [P 196 C 2]

(b) Civil P. C. (1908), O. 33—Time for redrafting O. 33 is long over due.

The time for redrafting O. 33 is long overdue. Rules of procedure should be clear and unambiguous, but the language in which the provisions of O. 33 are couched is obscure and difficult to interpret. [P 195 C 1]

Sein Tun Aung—for Applicants.

Venkatram—for Opposite Party.

Page, C. J.—This is a hard case, but the application in revision must be accepted. In my opinion the time for redrafting O. 33, is long overdue. Rules of procedure should be clear and unambiguous, but the language in which the provisions of O. 33 are couched is obscure and difficult to interpret. In the present case the applicant for leave to sue in forma pauperis made a similar application in Civil Miscellaneous Case No. 8 of 1930. In the former case the District Court did not reject the application under R. 5 but after hearing the parties dismissed the application for leave to sue in forma pauperis, under R. 7 (3) because the application did not comply with the provisions of O. 33, R. 5 (a). Now if an application for leave to sue in forma pauperis is disallowed under R. 7 (3) such an application falls within R. 15 and the order dismissing the application for leave to sue in forma pauperis operates as a bar to a second application in that behalf within R. 15. In my opinion the legislature could not have intended that an application for leave to sue in forma pauperis should operate as a bar to a fresh application, if the first application was rejected or disallowed merely because it was not in conformity with R. 5 (a). But the Court is concerned not with what the legislature intended but what it enacted and in my opinion, any application for leave to sue in forma pauperis which is disallowed under R. 7; *Howa* v. *Sit Shein* (1), falls within the ambit of R. 15.

In *Howa* v. *Sit Shein* (1). a Full Bench of the Chief Court of Lower Burma (Young, J. dissentiente), held that the rejection of an application for leave to sue in forma pauperis because of noncompliance with the provisions of Rr. 2 and 3 must be made under R. 5 (a) and could not be made under R. 7 (3), and that it made no difference that notice had been served upon the Government Advocate or the opposite party under R. 6, or an inquiry held under Rr. 7 (1) and (2). The ratio decidendi of that judgment appears to be that it was intended that the dismissal of an application for leave to sue in forma pauperis should only operate as a bar to a fresh application in that behalf when the application was dismissed upon one or more of the grounds set out in R. 5 other than R. (a) and therefore that R. 5 (a) was not one of the "prohibitions" referred to in R. 7 (2). It followed, according to the reasoning in that case that it was not open to the parties to the application at an inquiry held under S. 7 (2) to canvass or present an argument with respect to the question whether or not the application was in conformity with R. 5 (a).

With all respect it appears to me that the learned Judges in that case were endeavouring to mitigate the effect of what had been enacted by the legislature. That however is to legislate, and not to administer the law. Moreover in the recent case of *U Ba Dwe* v. *Maung Lu Pau* (2) a Full Bench of this High Court has expressly held that under R. 7 (2) the parties are entitled to present an argument for the purpose of satisfying the Court that the application has or has not complied with the terms of any of Cls. (a) to (e), O. 33,

(1) [1917] 9 L. B. R. 93=42 I. C. 803 (F.B.).
(2) A. I. R. 1932 Rang. 107=139 I. C. 265=19 Rang. 357 (F.B.).

R. 5 and as I interpret the meaning and effect of O. 33 the Court would not be justified in holding that R. 15 applies to the disallowance of an application for leave to sue in forma pauperis (whether the order purports to be made under R. 5 or R. 7) upon the ground that there has been a violation of R. 5 (b) to (e) and also in holding that R. 15 does not apply to the disallowance of such an application whether the order is made under R. 5 or R 7, upon the ground that the application was not in conformity with R. 5 (a).

It may be that the law ought to be enacted in that sense, but I am of opinion that it is not the law as it stands at present. I can see no justification having regard to the provisions of O. 33 for differentiating between R. 5 (a) on the one hand and R. 5 (b) to (e) on the other for holding that R. 15 does not apply to an order dismissing the application for non-compliance with the provisions of R. 5 (a). The view which I take is in consonance with the law laid down in *Ranchhod Morar* v. *Bezanji Edulji* (3), *Atul Chandra Sen* v. *Peary Mohan* (4) and *Ali Afzal* v. *Purna Chandra* (5). The opinion expressed by the Full Bench of the Chief Court in *Howa* v. *Sit Shein* (1) was approved by a single Judge of this Court in *Ma Sein* v. *Ma Kya Hmin* (6), *Mang Pe Kye* v. *Shwe Zin* (7) and was followed by the Lahore High Court in *Mt. Bal Kaur* v. *Shib Das* (8). The Madras High Court in *P. Krishnamoorthy* v. *P. Ramayya* (9) however have held that O. 33, R. 15, only refers to cases in which the application for leave to sue as a pauper was dismissed "on the merits." With all due respect I confess that I do not appreciate what is meant by dismissal on the merits in this connexion. Does it mean when the applicant failed to disclose a cause of action in his application or when he is not a pauper in fact or when he has violated the provisions of R. 5 (c) or (e)? Whatever may be the intention of the Madras High Court in holding that R. 15 only applies where the application was dismissed "on the merits," one thing is clear that there is not a word to that effect to be found in R. 15. R. 15 is drawn in wide and clear terms, and once again I take leave to say that, however meritorious the interpretation of the rule by the Madras High Court may be, that is a matter for the legislature and not for the Court.

For these reasons in my opinion the application in revision must be accepted and the application for leave to sue in forma pauperis dismissed. The effect of the recent Full Bench ruling in *U Ba Dwe's* case (2) in my opinion is that the law laid down by the Full Bench of the Chief Court in *Howa* v. *Sit Shein* (1) and two single Judges of this Court in *Ma Sein* v. *Ma Kya Hmyin* (6) and *Maung Pe Kye* v. *Ma Shwe Zin* (7) was not correct and these cases must be regarded as overruled. There will be no order as to costs.

Mya Bu, J.—I agree that according to the provisions of Rr. 5, 6, 7 and 15, O. 33, Civil P. C., the dismissal of an application by reason of the provisions of Cl. (a), R. 5 after hearing argument under R. 7 (2) must be held to be a refusal under R. 7 (3) and a bar to a fresh application under R. 15. Inasmuch as the dismissal of an application by reason of the provisions of Cl. (a), R. 5, either under R. 5 or under R. 7 (3) is based upon some defect in the form or in the manner of presentation of the application it would be hard to apply the bar of res judicata to a second application simply because the order of dismissal was made under R. 7 (3). But under the rules as they stand, this is unavoidable and since the rules must be interpreted as they stand we are constrained to hold, in this case that the second application was barred by the provisions of R. 15. The rules need redrafting so as to obviate such hard results. The application in revision succeeds. I agree in the order allowing the revision and making no order as to costs.

P.N./R.K. *Application accepted.*

(3) [1896] 20 Bom. 86.
(4) [1916] 33 I. C. 812.
(5) A. I. R. 1924 Cal. 1039=84 I. C. 703.
(6) A. I. R. 1926 Rang. 200=4 Rang. 245=98 I. C. 26.
(7) A. I. R. 1929 Rang. 128=7 Rang. 359=118 I. C. 415.
(8) [1919] 1 Lah. 151=56 I. C. 207.
(9) A. I. R. 1926 Mad. 875=50 Mad. 63=96 I. C. 962.

A. I. R. 1932 Rangoon 197

BAGULEY, J.

Ko. Po Kun—Appellant.

v.

C. A. M. A. L. Firm—Respondent.

Special Second Appeal No. 224 of 1931, Decided on 12th February 1932, against decision of Dist. Court, Toungoo, in Civil Appeal No. 12 of 1931.

(a) Interpretation of Statutes—Retrospective effect—Intention must be clear either expressly or by necessary implication.

No statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication: *West* v. *Gwynne*, (1911) 2 *Ch.* 15 and *A. I. R.* 1927 *All.* 1 (*F. B.*), *Rel. on* | [P 198 C 2]

(b) Transfer of Property (as amended by Act 20 of 1929), S. 101—S. 101 is not retrospective — Interpretation of Statutes, Amending Act.

Section 101 is a section which affects existing rights and therefore despite S. 63, Act 10 of 1929, the new S. 101 has no retrospective effect: *A. I. R.* 1927 *Mad.* 85, *Ref.* [P 199 C 1]

(c) Transfer of Property Act (1882), S. 101—Keeping alive for benefit of purchaser-mortgagee—Intention is immaterial—Mortgagee-purchaser can assert his right.

Where a prior mortgagee purchases the property in satisfaction of his mortgage, he can assert his right to continue the mortgage if it is for his benefit independently of any intention he may or may not have had at the actual time of taking over the transfer: *A. I. R.* 1922 *Bom.* 211 and 34 *All.* 268, *Diss. from*; 26 *Bom.* 88 and 18 *Bom.* 86, *Expl.* and *Dist.*; *A. I. R.* 1928 *Rang.* 287; *A. I. R.* 1924 *P. C.* 36 and *A. I. R.* 1930, *Cal.* 335, *Rel. on.* [P 200 C 2]

Judgment.—This appeal arises out of a mortgage suit brought by the respondent firm against the appellant and several others. The appellant and his wife were joined in the suit on the allegation that they had purchased the land in suit from the other defendants, the mortgagors, subsequent to the date of the mortgage, and as such they had the right to redeem. The trial Court gave a preliminary mortgage decree against the other defendants, but dismissed the suit as against Po Kun and his wife. On appeal to the District Court the learned Additional District Judge allowed the appeal and gave a preliminary mortgage decree in the usual form for the amount sued against all the defendants. Hence the present appeal. The allegations of the appellant with which it is necessary to deal for the purpose of the present case are as follows: In 1915 Shwe Hman and his wife executed a registered mortgage in favour of appellant and his wife for Rs. 450, the mortgage being a usufructuary one. Possession was given the same year and has remained with the appellant ever since. On 7th May 1925 the same property was again mortgaged to Po Kun and his wife by Shwe Hman alone by registered deed, his wife having died in the meantime; but it is said that he had married again. He had children by his first wife. This mortgage was also a usufructuary one, and possession remained with Po Kun. On 6th November 1925 Shwe Hman and his children mortgaged three pieces of land, including the land already mortgaged, to the respondent firm for Rs. 800. The mortgage was a simple mortgage and registered. On 28th April 1928 Shwe Hman alone executed a deed of sale of the same land to Po Kun and his wife for Rs. 1,700.

The respondent firm in general denied all the appellant's allegations save that he had bought the land subject to the firm's mortgage. On facts the learned District Judge has found that the first mortgage of 1915 was not duly attested; that the first mortgage was absorbed in the second mortgage, the total advanced up to that time being Rs. 1,000 mentioned in the second mortgage deed and not Rs. 1,450; that the sale absorbed the second mortgage; and that the prior mortgage or mortgages were not kept alive for the benefit of the appellant. With regard to the facts, it was not very seriously contended before me that at the time of the execution of the second mortgage deed Rs. 1,450 had been paid to Shwe Hman. The second mortgage deed itself does not look like a subsequent mortgage, and as regards the payment of Rs. 1,000 over and above the Rs. 450 the evidence is of practically no value. It must also be noted that with regard to the first mortgage not only is the proof of attestation doubtful, but there is no pooof of any kind that Shwe Hman's wife executed it, and in the absence of proof of execution by Shwe Hman's wife the value of Po Kun's interest in the first mortgage would be reduced to a mortgage over Shwe Hman's interest in the land. As it has been found that only a further Rs. 550 was paid up to the time of the second mortgage, it is immaterial to the appellant whether he is regarded as holding one mortgage for Rs. 450 over Shwe Hman's

interest dated 1915 and a second mortgage over the same interest for Rs. 550, or whether he is to be regarded as holding one mortgage dated 1925 for Rs. 1,000, over Shwe Hman's intetest. This clears the ground to a certain extent.

We are left with the position that appellant had a mortgage over Shwe Hman's interest for Rs. 1,000; that that interest was subsequently mortgaged by Shwe Hman to the respondent firm by a simple mortgage without possession; and that subsequently Shwe Hman transferred his interest in the land to Po Kun and his wife for the sum of Rs. 1,700, which included the Rs. 1,000 already paid. It is shown that in addition to this thousand rupees which had been paid at the time of the second mortgage further sums were paid from time to time to Shwe Hman, and a balance payment was made at the time of the execution of the sale deed bringing the total up to Rs. 1,700.

The sale deed makes no mention of any encumbrance in favour of the respondent firm. It is a short and simple conveyance selling the land outright for Rs. 1,700, and the sale deed refers to the land as

"being free from prior mortgage, sale, gift and transfer and belonging to me solely;"

and adds

"In the event in future of any one, such as an heir, interfering (I) will pay damages for the different expenditures incurred by the vendee as well as the current values of the paddy land."

The question that is to be decided is whether Po Kun can put up the prior mortgage in his favour as a shield under S. 101, T. P. Act. The first question to be dealt with is whether S. 101 to be applied, is the one now in force as altered by S. 51, Act 20 of 1929, or whether we must deal with S. 101 as it stood before this amending Act came into force.

The present suit was filed on 27th August 1930, that is, after Act 20 of 1929 came into force, and the question is whether this amending Act will have retrospective effect. For the respondent firm it was admitted that S. 101 in its new form would make it necessary to decide the appeal in favour of the appellant, but it is contended that the amending Act was not retrospective in its effect. On behalf of the appellant it is urged that S. 63, Act 20 of 1929, expressly lays down that various amendments to the old Transfer of Property Act introduced by this amending Act shall not be retrospective in certain cases, and the alteration of S. 101 is not one of the sections mentioned in this connexion. It is argued that the fact that certain sections are definitely made not retrospecive implies that the remaining sections must be regarded as having retrospective effect. There is certainly something to be said in this connexion, but on the whole I am satisfied that I cannot accept it. Turning to the well-known work, "Maxwell on the Interpretation of Statutes" (Edn. 8) I find at page 186 the passage:

"It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication"

which, according to a foot-note, is a fundamental rule cited and approved by Kennedy, L. J. in *West* v. *Gwynn* (1).

In Beal's Cardinal Rules of Legal Interpretation (3rd Edition) beginning at p. 468, there are a series of extracts from judgments of great authority in England between the years 1846 and 1912, which all point to the fact that:

"statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject-matter or context, show that such was their object."

Two of these extracts show that the rule is based on a canon of Lord Coke; and in one there is a dictum of Lord Blackburn (S.C. 3., App. Cas. at p. 703) stating that this is the general rule "not merely of England and Scotland, but I believe of every civilized nation." So far as India is concerned there is a Bench ruling, *Girja Nandan* v. *Hanuman Das* (2), in which this maxim appears to have been accepted by all the five Judges who formed the Bench so far as an Act which gives or takes away rights, although the Bench was divided as to whether it would apply to an amending Act which was merely of a declaratory nature; and in *Muhammad Abdussamad* v. *Qurban Husain* (3) at p. 129 there is a dictum of the Privy Council:

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(1) [1911] 2 Ch. 1=80 L. J. Ch. 578=104 L. T. 759=55 S. J. 519=27 T. L. R. 444.

(2) A. I. R. 1927 All. 1=99 I. C. 161=49 All. 25 (F. B.).

(3) [1903] 26 All. 119=31 I. A. 30=8 Sar. 593 (P. C.).

"It is not however in accordance with sound principles of interpreting statutes to give them a retrospective effect."

In an unofficially reported case, *Balaji Singh* v. *Gangamma* (4) the question of the extent to which statutes can be regarded as retrospective is summed up by Devadoss, J., in the following words:

"(1) Legislative enactments have no retrospective effect unless explicitly stated to be so in the enactments themselves.

"(2) Amending statutes should not be construed as having retrospective effect if they affect vested interests."

(The remainder of the headings of the summing up related to statutes of a declaratory nature or affecting procedure with which we are not now concerned.) In my opinion S. 101 is a section which affects existing rights, and therefore despite S. 63, Act 20 of 1929, I must hold that the new S. 101 has no retrospective effect and that this case must be decided on S. 101 in its old form.

I only have had one case of this Court quoted before me on the main point, *N. V. N. Natchiappa Chettiar* v. *Ko Tha Zan* (5), the head-note of which runs as follows:

"Where a purchaser buys immovable property which is encumbered, and the circumstances are such that it is for the benefit of the purchaser that the mortgages involved in the purchase should not be extinguished, they enure for the benefit of the purchaser. Where in a case to which the concluding words of S. 101, T. P. Act, apply, i.e. where the continuance of an encumbrance is for the benefit of the purchaser, the question of intention of parties need not be examined."

This ruling is of course good law unless I consider it to be overruled by a Privy Council decision. The judgment is a very short one, and in view of the definite statements in many other cases that the question of intention is all important, I think it necessary to deal with the matter rather more fully. On behalf of the respondent *Bai Rewa* v. *Vali Mahomed Miya Mahomed* (6) is quoted as showing that stress must be laid on intention. At p. 1013 there is a passage:

"The law on the subject is enacted in S. 101, T. P. Act, under which on the acquisition of superior right the inferior right is extinguished unless the owner declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit."

After this the judgment goes on to say that there had been no declaration as contemplated and that although stress must be laid on the last words of the section and as the appellant would be benefited by the continuance of the mortgage it must be held that there had been no merger. It further goes on to say:

"The last clause of S. 101, T. P. Act, i. e., the words 'continuance would be for his benefit' are merely a guide to the intention of the owner. . ."

This case was a Letters Patent appeal and in the judgment under appeal (which is fully reported) of Macleod, C. J., he states that his remarks in another appeal—which are reproduced in the footnote—applied to this case. In that judgment he referred to *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (7) which was decided on facts which came into existence before the Transfer of Property Act came into force. The judgment goes on to say:

"But S. 101, T. P. Act, makes it clear that now no effect can be given to an intention to keep alive a charge or other encumbrances unless it is formally expressed. . . ."

With due respect I am unable to accept this statement of the law, for even on the narrow reading of S. 101 I fail to see how a person can be said formally to express his intention when the section says that he could do so by necessary implication. Reference is also made to *Fakiraya* v. *Gadigaya* (8), but the facts upon which this case arose came into existence in 1892 before the time the Transfer of Property Act came into force in Bombay, and the same applies to *Lomba Gomaji* v. *Vishvanath Amrit Tilwankar* (9). For the respondent *Jugal Kishore* v. *Ram Narain* (10) was also cited, where it was held that:

"In considering the question whether an encumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property the point of time to be regarded is the date of the acquisition of the property. If an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive."

This case deals with the point as though the intention of the purchaser was all important and it would appear to me

(4) A. I. R. 1927 Mad. 85=99 I. C. 143.
(5) A. I. R. 1928 Rang. 287=113 I. C. 809=6 Rang. 488.
(6) A. I. R. 1922 Bom. 211=70 I. C. 912=46 Bom. 1009.
(7) [1884] 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P.C.).
(8) [1901] 26 Bom. 88=3 Bom. L. R. 628.
(9) [1893] 18 Bom. 86.
(10) [1912] 34 All. 268=13 I. C. 619.

that that intention must be what the purchaser intended at the time he obtained an assignment of the property and with the knowledge that he had at that time. The judgment at p. 271 states that:

"The rule contained in S. 101, T. P. Act, reproduces a rule well known to English Courts of equity;"

and it then goes on to consider the latest English case in which the point was considered, viz., *Liquidation Estate Purchase Co.* v. *Willoughby* (11). With due respect I am unable to admit that the Courts in this country must look to English rules of equity which are supposed to have been reproduced in Indian statute law. To do so would be to endeavour to decide a case not on the words of the statute, but on the intentions of the legislature, and this, it is well known, the Courts must not do. In any case even if it were admissible to look at the intentions of the legislature at the time the Act was passed, that is, before 1882, it is still not admissible to look at an interpretation of a rule which was pronounced 16 years after the Act came into force, and the only other authority on this point which is mentioned in the judgment is one dated 1883 which must have dealt with facts which happened before the Transfer of Property Act came into force. Even if the doctrine that the owner must have a definite intention to keep a charge alive is accepted, there is a Privy Council ruling in *Malireddi Ayyarddi* v. *Gopalakrishnayya* (12) in which at p. 195 (*of* 47 *Mad.*) there is a statement that:

"It is further to be presumed, and indeed the Transfer of Property Act, S. 10, so enacts, that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit."

A recent Calcutta ruling, *Mangtulal Bagaria* v. *Upendra Mohan Pal* (13) at p. 89 (*of* 57 *Cal.*) contains a statement:

"The plaintiff as mortgagee therefore is entitled to assert his right as such mortgagee against the defendant and may claim that his mortgage interest has been kept alive notwithstanding his purchase of the equity of redemption, as this was for his benefit": see S. 101, T.P. Act.

This reading of the section is exactly the same as to be found in the *Rangoon* case (5) before mentioned. If it is for the mortgagee's benefit he can assert his right to continue the mortgage independently of any intention he may or may not have had at the actual time of taking over the transfer. The only basis on which the respondent can succeed is by pleading what is known as the rule in *Toulmin* v. *Steere* (14). This however is a rule which the Privy Council refused to apply in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (7) which was a case on facts which existed before the Transfer of Property Act came into force, and their Lordships again refused to apply the rule in *Mohamed Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (15). For these reasons I am satisfied that there can be no possible doubt as to the correctness of the *Rangoon* case (5), and therefore the appellant is bound to succeed in this appeal.

It is admitted that as he has only a mortgage over Shwe Hman's share he is only entitled to a mortgage over Shwe Hman's half interest; and he is prepared to allow the property in question to be sold provided he has a first claim to the extent of a thousand rupees on half the sale proceeds of Shwe Hman's interest in that holding. For these reasons I vary the decree of the lower appellate Court. The property mortgaged will be sold, but the holding mortgaged to Po Kun must be sold separately, and out of the sale proceeds of that holding Po Kun would be entitled to a half-share up to a maximum of one thousand rupees; and if the respondent firm's mortgage is fully satisfied he will of course be entitled to half the balance left from the sale of that holding, the other holdings being sold first.

R.K. *Appeal allowed.*

(11) [1898] A. C. 321=67 L. J. Ch. 251=78 L. T. 329=14 T. L. R. 295.
(12) A. I. R 1924 P. C. 36=79 I. C. 592=51 I. A. 140=47 Mad. 190 (P.C.).
(13) A. I. R. 1930 Cal. 335=125 I. C. 661=57 Cal. 82.
(14) [1817] 3 Mer. 210=17 R. R. 67.
(15) [1912] 39 Cal. 527=39 I. A. 68=14 I. C. 496 (P.C.).

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TO

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IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

SIND JUDICIAL COMMISSIONER'S COURT
1932

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MILNE, J. C. AND RUPCHAND, A. J. C.

Firm of Khemchand Ramdas — Applicants.

v.

Commissioner of Income-tax — Opponent.

Misc. Appln. No. 113 of 1929, Decided on 15th October 1931.

(a) Income-tax Act (1922), S. 66 (3) — Scope.

Section 66 (3) is limited to a case of refusal on the ground of any question of law arising, and it cannot be construed as covering a refusal on some other grounds, such as that the application was barred by limitation : *A. I. R.* 1928 *Bom.* 434, *Foll.* ; *A. I. R.* 1926 *Cal.* 998, *Ref.* [P 2 C 1]

*** (b) Income-tax Act (1922), S. 66 (3)— Amendment suggested — Specific Relief Act (1877), S. 45.**

It is suggested that the assessee in Sind should be placed in the same position as an assessee amenable to the jurisdiction of a High Court referred to in S. 45, Specific Relief Act, so as to secure him the indubitable right to have questions of law arising out of orders of appellate officers of income-tax decided by a Court of law where Commissioner refuses to state a case on fanciful and unfounded grounds. [P 2 C 2]

Kimatrai Bhojraj—for Applicants.

C. M. Lobo—for Opponent.

Rupchand, A. J. C. — This application purports to be an application under S. 66, Cl. (3), Income-tax Act, and is made under the following circumstances.

The applicant assessee received a letter by post on 9th November 1928, intimating to him that an adverse order had been passed against him by the appellate officer of income-tax ; that order was dated 7th November 1928, and the intimation was issued from the Income-tax Officer on the following day. He made an application for a copy of the order on 22nd November, and received the copy on 10th December. He then made an application to the Commissioner of Income-tax for a reference to this Court under S. 66 (2) and made the necessary deposit. The Commissioner rejected his application on the ground that it was made on 9th December, more than a month after the date on which the appellate order was passed and that it was therefore out of time. The assessee has now come to us with a prayer that the Commissioner be ordered to refer to us for our decision the questions of law arising out of the appellate order.

The application is opposed inter alia on the ground that it does not fall within the purview of Cl. (3), S. 66, as that clause is limited in its scope to a refusal by the Commissioner to state the case on the only ground that no question of law arises out of the appellate order complained against.

Section 66 (2) of the Act was amended by Act 1 of 1930. It now provides for an application by the assessee to the Commissioner for a reference being made "within 60 days" of the date on which he is served "with notice" of the order complained against. Prior to the amendment the clause provided for a period of one month from "the passing of" the order complained against.

It is not seriously disputed that even according to that clause prior to its amendment the applicant's petition to the Commissioner was within time, as the period of one month should have been computed from the date of which intimation reached the assessee and not from the date when the order was signed, and that exemption for the period occupied by the assessee in obtaining a copy of the

order should also have been allowed to him in view of the provisions of S. 29, Lim. Act. But it is suggested that Cl. (2) had not received a judicial interpretation at the date of the order passed by the Commissioner and that he had made a bona fide error in holding that the application was barred by limitation ; and it is urged that although the order passed by the Commissioner was wrong, we have no jurisdiction to review it or to compel a reference under the powers vested in us by Cl. (3) of that section.

In the course of argument, a question was put to the learned Government Pleader whether in the event of the assessee withdrawing the present petition, the Commissioner would review his previous order and refer to us such questions in the appellate order as are questions of law, but he has intimated to us that the Commissioner would not be prepared to do so and wants a ruling on the preliminary objection raised by him.

However much I may be in sympathy with the applicant, I am afraid, I must decide this objection in favour of the Commissioner.

The point now in issue was first raised in *Kumar Sarat Kumar Roy* v. *Commissioner of Income-tax* (1) but was left undecided.

This point again came up for decision before the Bombay High Court in *In re Madhavdas Jethabhai* (2). In that case their Lordships refused to entertain an application of this nature under S. 66 (3) and said :

"It seems to us impossible to construe sub-S 3 in a way that would be directly contradictory to its express terms. The legislature having chosen to limit sub-S. (3) to a case of refusal on the ground of any question of law arising, it would obviously be beyond our province to construe that section as covering a refusal on some other grounds, especially as another remedy is open to the applicant under S. 45, Specific Relief Act, as is shown, for instance, by the Privy Council case of *Alcock Ashdown & Co.* v. *Chief Revenue Authority, Bombay* (3)."

It would therefore appear that so far as the High Courts specified in S. 45, Specific Relief Act, are concerned, as assessee may, in befitting cases, obtain relief under that section although not under S. 66 (3), Income-tax Act. This Court is not one of the Courts specified under that section, and in view of the ruling in *Indian Life Insurance Co. Ltd.* v. *Commissioner of Income-tax* (4), a person who is assessed to income-tax by an Income-tax Officer in Sind cannot even ask the Bombay High Court to help him under that section.

The result therefore of our declining jurisdiction under S. 66 (3), Income-tax Act, in cases of this kind is that it might lead to injustice, the assessees in Sind being apparently left without a remedy.

It is urged, and not without some force, that it could never have been the intention of the legislature to place assessees in this province in a less favourable position than those who are assessed by officers amenable to the jurisdiction of High Courts referred to in S. 45, Specific Relief Act, and to deprive them of their indubitable right to have questions of law arising out of orders of appellate officers of income-tax decided by a Court of law merely and solely because the Commissioner refuses to state a case on certain fanciful and unfounded grounds. But my difficulty is that the clause in question is not capable of being extended so as to confer jurisdiction in matters other than those mentioned therein. It purports to confer summary jurisdiction in certain matters and in no others. It follows therefore that such summary jurisdiction cannot be extended to other matters. The clause does not purport to deal with the ordinary jurisdiction of the Courts and if in the exercise of its ordinary jurisdiction this Court cannot grant relief to an assessee resulting in inequity or injustice, it is for the legislature to remedy the same either by extending the provisions of S. 45, Specific Relief Act, to this Court or by amending the provisions of S. 66 (3), Income-tax Act. Our functions are jus dicere and not jus dare, and it is not within our competence either to reform the clause according to the supposed intention of the legislature or to make the law reasonable.

In another case, I had occasion to draw attention to the serious inconvenience and failure of justice which is likely to arise in consequence of the powers under S. 45, Specific Relief Act, not being conferred upon this Court, which is the highest Court of justice in this province. There is no apparent reason why no Court

(1) A.I.R. 1926 Cal. 998=96 I.C. 702=2 I.T.C. 279.
(2) A.I.R. 1928 Bom. 434=113 I.C. 619.
(3) A.I.R. 1923 P.C. 138=75 I.C. 392=50 I.A. 227=47 Bom. 742 (P.C.).
(4) A.I.R. 1931 Bom. 150=130 I.C. 593.

in or outside Sind should be vested with jurisdiction to compel public officers and public bodies in Sind to perform their duties, and I can only express a hope that this want of jurisdiction will be cured at an early date.

As Cl. (3) does not vest jurisdiction in us to deal with the present application, I have no other option but to dismiss it, but under the circumstances I would make no order as to costs.

Milne, J. C.—It is not contended before us that the application was time barred as held by the Commissioner. It follows that the assessee has been deprived of the remedy to which by law he is entitled.

One would have expected the Income-tax authorities in view of their mistake to allow the applicant his remedy. That would have been a fair and straightforward course. But the position taken by the authorities is that on purely technical grounds they cannot be compelled to render to the applicant the justice which is his due.

The question then is whether we can direct the Income tax Commissioner that the application not being time barred a case should be stated thereon if the application involves any point of law. I agree with my learned brother Rupchand that we cannot do so. But I still hope that the income-tax authorities will take a reasonable view of the situation and consider the applicant's claim on the merits.

V.B./R.K. *Order accordingly.*

A. I. R. 1932 Sind 3

WILD, J. C. AND RUPCHAND, A. J. C.

Chainrai and *others*—Appellants.

v.

Dolaram and *others*—Respondents.

Misc. Appeal No. 47 of 1928, Decided on 26th November 1930, against order of Dist. Judge, Sukkur.

Provincial Insolvency Act (1920), S. 54—Consent decree more than three months before presentation of insolvency petition—Execution proceedings initiated within three months cannot be challenged under S. 54.

If a consent decree is passed in favour of a creditor more than three months before the presentation of the insolvency petition, the execution proceedings on such decree, initiated within three months of presentation of the insolvency petition cannot be challenged under S. 54. [P 4 C 1]

Assudomal Rewachand—for Appellants.

Tahilram Maniram and *Dipchand Chandumal*—for Respondents.

Rupchand, A. J. C.—These are appeals against orders passed under S. 54, Provincial Insolvency Act, and arise under the following circumstances:

The appellants are related to the insolvents. They applied for execution of their decrees and were entitled to a rateable distribution in certain proceeds of property which was sold in execution of a decree passed in favour of the Official Assignee, Karachi, against the insolvents.

On 13th January 1927 after the sale proceeds of the insolvents' property had come into Court a petition was made to declare them insolvents. This petition was filed more than three months after the consent decrees were passed in favour of the appellants. The Official Receiver did not therefore object to the appellants having a rateable distribution in the sale proceeds. But the respondents who are certain other creditors applied under S. 54, Provincial Insolvency Act, to prevent payment to the appellants on the ground that the consent decrees passed in their favour were by way of a fraudulent preference. The learned trial Judge refused to give effect to this plea as the decrees were passed more than three months prior to the petition. The learned District Judge, Sukkur, has however allowed the application of the respondents and has said:

"Now it is true that these two decrees were passed more than three months before the date of the petition . . . .But the section does not speak only of decrees being suffered. Every judicial proceedings taken or suffered with a view to giving undue preference can be annulled by the Court. Execution proceedings following upon a decree are undoubtedly judicial proceedings. Once a decree is passed a debtor has no choice about submitting to the execution proceedings. But if it be held that the original decree was suffered by him to be passed willingly I think it will be absurd to hold otherwise in respect of the subsequent proceedings which follow as a matter of course . . . . The execution proceedings in the decree now under discussion were held within three months of the date of petition. . . . That order is a judicial proceeding following on the decrees which are held to have been fraudulent. I think it is perfectly competent to the Court under S. 54 to annul at least this order in favour of the collusive decree-holders."

We are afraid we cannot accept the reasoning of the learned District Judge

as sound. The conditions precedent to an applicability of S. 54 of the Act are that the act complained of which is to be deemed fraudulent and void against the receiver should have been done by the insolvent with a view of giving preference to a creditor over others and that such act should have been done within three months of the presentation of the petition. Now preference implies freedom of choice and free will. In this case the preference if any given by the insolvents was given by them when they submitted to decrees being passed against themselves and not when in consequence of those decrees the appellants were able to claim payment of the amounts due to them under the said decrees. The execution proceedings which give the appellants the advantage of claiming payment of money were no doubt judicial proceedings but they were neither taken nor suffered by the debtors with a view to give preference to the decree-holders. These proceedings were taken by the creditors in consequence of the alleged preference already given to them and they were not suffered by the debtors because the debtors could legitimately do nothing in those proceedings to prevent payment. The fact that they remained absent would not render the payment which they could be compelled to make in execution proceedings a payment made by them with a view of giving a preference to the appellants. The execution proceedings taken against the insolvents or the ex parte orders for payment passed against them could not therefore afford a fresh starting point for computing the period of limitation of three months under this section. For these reasons we set aside the orders of the learned District Judge and allow these appeals with costs throughout.

V.B./R.K. *Appeals allowed.*

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* A. I. R. 1932 Sind 4

WILD, J. C.

Official Liquidators of Karachi Bank, Ltd.—Applicants.

v.

Directors, Manager and *Auditors of Karachi Bank, Ltd.*—Opponents.

Civil Misc. Application No. 26 of 1929, Decided on 7th July 1930.

(a) Companies Act (1913), S. 282—Showing bad debts which are not paid and are not likely to be paid as part of profit amounts to making false statement.

Where the directors of a bank show on the balance sheet a cash profit for the year by adding bad debts or doubtful debts which were never paid and which are never likely to be paid, it amounts to making a false statement and a very material one. The fact that no dividend is declared makes no difference. [P 5 C 2]

*** (b) Companies Act (1913), S. 282—Person signing false balance sheet as manager is liable although he may not be manager in fact.**

A person signing a false balance sheet as manager makes himself liable to prosecution under S. 282, although he may not have been manager in fact or signs the same because the directors wish him to do so; the plea that it was signed because directors wished him to do so may however be considered in extenuation of the offence if he is prosecuted. [P 6 C 2]

(c) Companies Act (1913), S. 282—Directors signing false balance sheet are liable to prosecution—The fact that they did not attend meeting or had no knowledge of banking or accounts is immaterial.

If a person joins a Board of Directors and allows his names to be used as a bait to induce the public to deal with the concern of which he is a director he must take the consequences if he does not exercise due care and attention in signing a false sheet and the fact that he did not attend the meetings of the directors or had no knowledge of banking and accounts will not exonerate him from his liability, though it may entitle him to some sympathy on that account. [P 7 C 1]

*** (d) Companies Act (1913), Ss. 131 (2) and 282—Auditors signing auditors' report below false balance sheet make false statement and are liable under S. 282.**

Auditors signing the auditors' report in a false balance sheet which is to the effect that in their opinion the balance sheet is drawn up in conformity with law and exhibits a true and correct view of the company's affairs wilfully make a false statement in the report which by S. 131 (2) has to be attached to the balance sheet and are liable to prosecution under S. 282. [P 7 C 1]

Partabrai D. Punwani—for Applicants.

Kimatrai Bhojraj, Dipchand Chandumal, Tolasing K. Advani, Kewalram Jethanand, Srikishendas H. Lulla, Javermal Vilayatrai and *Motiram Idanmal*—for Opponents.

Judgment.—This is an application under S. 237, Companies Act, 1913, made by the Official Liquidators of the Karachi Bank, Limited, for a direction that they should prosecute the directors, auditors and manager of the said bank for offences under S. 282 of the said Act. The application also states that the manager of the bank is liable for false statements made in Form G of the Act, but that part of the application is dropped.

Section 282, Companies Act, reads as follows :

" Whoever in any return, report, certificate, balance sheet or other document, required by or for the purpose of any of the provisions of this Act wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine."

In this case the false statements are said to be contained in the bank's balance-sheet for the year 1927 and the alleged false statements are that the assets of the bank were over valued, the bad or doubtful debts underestimated and it was falsely shown that in the year 1927 the bank made a profit of Rs. 15,608-14-9.

Very little has been said as to the first alleged false statement that the assets of the bank were overvalued and this matter is searcely pressed.

As regards the underestimation of the bad or doubtful debts, reliance is placed in the report of Mr. Jamshed Mehta who was called in to examine the position of the bank when the bank wished to secure a loan of ten lakhs of rupees from the Imperial Bank of India. Mr. Jamshed Mehta considered the bad or doubtful debts, but his estimate was not accepted by the directors of the bank. They considered each item and for reasons which they gave, they to a very great extent reduced the amount of bad or doubtful debts and arrived at the figure of Rs. 2,92,382 5-2. It may be noted that this amount is very considerably more than the amount of bad or doubtful debts shown by the directors of the bank in their balance-sheet for the year 1926. In that balance-sheet they estimated the debts considered bad or doubtful at Rs. 62,299-2-5. Now in a matter of this kind I am not prepared to hold the estimate of Mr. Jamshed Mehta as conclusive. Obviously it is a very difficult matter to arrive at a correct conclusion as to the amount of any particular debt which will be recovered, as for a correct estimate of this it is necessary to know all the circumstances of each case, and the financial position of each debtor. In his letter of 16th April 1928 to the Auditors of the Karachi Bank, Limited, Mr. Jamshed Mehta has mentioned that as he had to take into consideration that the Karachi Bank intended to borrow from the Imperial Bank, he had to take a very conservative and rigid view in valuation of the loans made by them to the parties and the securities held, and he goes on to say that in some cases he had no knowledge of the strength of the sureties and had therefore to eliminate such parties from consideration and valuation. This means that Mr. Jamshed Mehta adopted a very conservative view in estimating the amount of bad or doubtful debts and eliminated them altogether from consideration where he had no sufficient knowledge of the solvency of the debtors. I am therefore not prepared to hold on the evidence before me that there is prima facie proof that the bad or doubtful debts for the year 1927 which were shown at Rupees 2,92,382-5-2 as compared with the bad or doubtful debts shown in the balance sheet of 1926 at Rs. 62,299-2-5 were underestimated.

The third charge however regarding the false statement in the balance-sheet that the profit earned by the bank in 1927 amounted to Rs. 15,608-14-9 is more serious and is, in my opinion, prima facie proved. This amount of profit is arrived at by crediting to the bank a sum of Rs. 45,214-2-3 which is the amount in suspense for bad or doubtful items of interest. Now it is not asserted that this amount of interest was ever paid to the bank. It was merely an amount due from those debtors whose debts were considered bad or doubtful. If this amount of Rs. 45,214-2-3 had not been credited to the bank as was done in the balance-sheet, obviously there would have been no profit at all but a loss. An ordinary person looking at the balance-sheet probably would not understand the mass of figures contained in it, but this at least he would have understood from it that the bank had made during the year a profit of Rs. 15,000 odd on its working for that period. This figure of Rs. 15,000 odd is repeated in a statement of the profit and loss account which appears below the balance-sheet, though no one has attempted to explain how the sum of Rs. 15,000 odd in this account has been arrived at. What the directors of the bank have done is to show a cash profit for the year by adding in a sum which is due no doubt, but was never paid and was never likely to be paid. The balance-sheet therefore contains a false statement and a very material

one and I am unable to see how it can be argued that it was not intended to mislead.

It was argued that as the balance-sheet showed bad or doubtful debts of nearly three lakhs of rupees and the directors in their report stated that they did not declare any dividend any member of the public having read the balance-sheet would have at once understood that the position of the bank was bad and would not have been misled by any statement contained therein. I can not however accept this argument as it appears to me that an ordinary person looking at the balance-sheet would have thought that the bank was in a flourishing condition which was not really the case. He would have said to himself:

"Here is a bank whose capital borrowed from the public is only 2½ lakhs of rupees but yet it has aequired from its savings reserve Fund of Rs. 1½ lakhs and has assets valued at Rs. 41 lakhs, less about Rs. 3 lakhs of bad or doubtful debts."

He would have thought that a concern which had increased its assets from its original capital of Rs. 2½ lakhs to Rs. 40 lakhs was a flourishing concern and he would have particularly noticed that even in the bad year 1927 the bank had made a profit of over Rs. 15,000. The principle argument advanced in defence of the correctness of the balance-sheet is that interest is certainly due on the debts which are regarded as bad or doubtful and must be shown somewhere in the balance-sheet. That may be so but where or in whatever way this interest should have been shown it should not have been shown as received when it was actually not received. Another argument advanced is that though a balance-sheet may show a loss, there may yet be a profit for the year and as an illustration of this the case is cited of a man who buys property for Rs. 1,000 and lets it out on lease for Rs. 50 a year. The following year owing to the depreciation of property the property is worth Rs. 750 only and a balance-sheet would show a loss. The property might however in that year be leased for Rs. 75 instead of Rs. 50 and there will therefore be a profit as compared with the first year although the value of the assets had decreased I do not dispute that the Karachi Bank might have made a profit although their assets had dwindled from 48 lakhs in 1926 to 41 lakhs in 1927. But the figures in the balance-sheet show that they did not in fact make a profit and this illustration therefore is not of much value in relation to the facts of this particular case.

I hold then that the statement contained in the balance sheet of 1927 that the profit for the year was Rs 15,608-14-9 is prima facie a false statement.

The question now for consideration is whether the directors, manager and auditors wilfully made the false statement in the balance-sheet knowing it to be false. It is not disputed that these persons other than the Auditors have signed the balance-sheet and that the statement made by them is wilfully, that is to say intentionally made. As regards their knowledge whether the statement was false, there can be no doubt as regards the managing director and the manager who must have known that the statement was false.

As regards the manager, various pleas have been taken which are that he was not really a manager but only a clerk, that as he was not bound to sign the balance-sheet he must be considered not to have signed it and lastly that as he was merely a paid servant of the bank he only signed the balance-sheet because the directors wished him to do so. As regards the first two pleas it makes no difference whether the manager was really a manager or not. He has signed the balance-sheet as such and whether it was necessary for him to sign or not the fact remains that he has done so and he has made himself liable for prosecution under S. 282. The plea that he signed the balance-sheet because the directors wished him to do so is one which might be considered in extenuation of the offence if he is prosecuted. But there is nothing to show that he acted under such compulsion as would make his act not an offence.

Nothing has been said to show that Mr. Lokamal was ignorant of the contents of the balance-sheet but it is argued for the directors Mr. Misquita and Dr. Fonseca that they did not often attend the meetings of the directors and had no knowledge of banking and accounts. As regards that they may be entitled to some sympathy if owing to ignorance of banking methods, they have signed a false balance-sheet but at the

same time if persons join a Board of Directors and allow their names to be used as a bait to induce the public to deal with the concern of which they are directors they must take the consequences if they do not exercise due care and attention in signing a false balance-sheet. Both Mr. Misquita and Dr. Fonseca were present at the meeting of the directors on Monday the 21st May 1928 when the balance sheet for 1927 was considered and settled and I think it is impossible for me to say that they were unaware that the balance-sheet contained a false statement.

The case is somewhat different with R. B. Shivratan G. Mohatta who appears to have been not much more than a nominal director of the bank, and though he attended the meeting of 21st May 1928 was according to the medical certificates which he has produced very ill at the time. It is possible that he signed the balance-sheet without any knowledge of its contents and I think I should be justified in giving him the benefit of the doubt.

There remains now the case of the auditors who can hardly take the plea that they do not understand accounts. It is argued for them that they objected on various occasions to the methods in which the directors drew up their balance-sheets. The fact remains however that they signed the balance sheet of 1927 possibly because they did not wish to sever their connexion with the bank. It is argued that they did not in fact sign the balance-sheet but only the auditors report or note below it which is to the effect that in their opinion the balance-sheet is drawn up in conformity with the law and exhibits a true and correct view of the company's affairs. In my opinion however the balance-sheet does not exhibit a true and correct view of the company's affairs and accordingly if the auditors are considered to have merely signed the report or note and not the balance-sheet they have wilfully made a false statement in their report which by S. 131 (2) has to be attached to the balance-sheet.

I accordingly direct the official liquidators to prosecute the managing director, the manager, the auditors and Messrs. Lokamal Chellaram, M. Misquitta and A. B. Fonseca for an offence under S. 282, Companies Act, and direct that they should bear the official liquidators' costs in this inquiry. No direction is given to the official liquidators to prosecute R B. Shivratan G. Mohatta who will bear his own costs in this inquiry.

R.M./R.K. *Order accordingly.*

A. I. R. 1932 Sind 7

MILNE, J. C. AND HAVELIWALA, A. J. C.

Abdul Jabar—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 58 of 1931, Decided on 29th June 1931, for revision of order of City Magistrate, Karachi.

Criminal P. C. (1898), S. 245—*A* filing complaint against *T* under Ss. 504 and 506, I. P. C.—*A* alleging compromise, *T* denying it—Order of acquittal without inquiring whether case was or was not compounded is bad in law and prosecution of complainant under S. 211, I. P. C., should be set aside—Criminal P. C. (1898), S. 476.

A filed a complaint under Ss. 504 and 506, I. P. C., against *T* and one other. He stated to the Magistrate that the case had been compounded. The accused denied the composition. The Magistrate, without recording any evidence to satisfy himself whether the case had really been compounded or not, ordered acquittal of the accused and at *T's* request lodged a complaint against *A* under S. 211, I. P. C.

Held: that the offences under Ss. 504 and 506 could be compounded by the person insulted or the person intimidated. But when the composition was denied by the accused, it was incumbent upon the Magistrate to inquire into the matter. A composition is a matter of arrangement and consent between parties. If there had been no composition there had been nothing to effect the acquittal of the accused; the original complaint was still pending and had to be disposed of, and the order of the Magistrate acquitting the accused without inquiring whether the case was or was not compounded was bad in law and should be set aside. The order of acquittal being illegal, his subsequent order under S. 476, Criminal P. C., and complaint against the applicant under S. 211, I. P. C., were manifestly bad in law and consequently must be set aside. [P 8 C 1, 2]

D. N. O'Sullivan—for Applicant.

C. M. Lobo—for the Crown.

Milne, J. C.—In this matter the applicant had filed a complaint under Ss. 504 and 506, I. P. C., against Sub-Inspector Tharumal and one other on 7th November 1930. The complainant stated in Court on 10th October that he had compounded the case. It does not appear that the accused were then present in Court. The accused Sub-Inspector stated later that he had not compounded the case and applied under

S. 476, Criminal P. C., that the Court should lodge a complaint against the applicant under S. 211, I. P. C. This the Court did. I may note that it would appear from the Magistrate's order of 3rd February as if the Sub-Inspector of Police were cognizant of his pleader's endeavours to get the applicant to drop his complaint.

The offences under Ss. 504 and 506, I. P. C., can be compounded by the person insulted or the person intimidated. But when the composition was denied by the accused, it was incumbent upon the Magistrate to inquire into the matter. A composition is a matter of arrangement and consent between the parties: *Murray* v. *Queen-Empress* (1). Though the Magistrate had passed an order of acquittal, he was not therefore functus officio. It was not necessary for him to pass any order of acquittal; under S. 345 (6) the composition has the effect of acquittal. If there has been no composition, there has been nothing to effect the acquittal of the accused; the original complaint is still pending and is to be disposed of. Neither party contends on revision that the case has been compounded and applicant accepts the position that the case has not been compounded. The lower Court should therefore dispose of the applicant's complaint according to law.

In view of the above order and as complainant has had no sufficient opportunity to prove the truth of his complaint we direct the lower Court to withdraw the complaint filed under S. 211, I. P. C.

Haveliwala, A. J. C.—This is a criminal revision application filed by the applicant Abdul Jabar, praying that the order of the City Magistrate of Karachi refusing to proceed with his complaint against the opponents Tharumal and Naboo under Ss. 504 and 506, I. P. C., be set aside and the Magistrate be directed to proceed with his complaint.

It is further prayed that the order of the Magistrate under S. 476, Criminal P. C., be set aside and the complaint against the applicant under S. 211, I. P. C., be stayed till the complaint of the applicant under Ss. 504 and 506, I. P. C., is heard and decided on merits.

Now, it appears that the applicant filed a complaint against the two persons Tharumal and Naboo for an offence under Ss. 504 and 506, I. P. C. It is the case of the applicant that, on the opponents compounding the case, on the day of hearing, he told the Magistrate that the case was compounded. The opponents seem to have protested that the case was not compounded and the case was a false one. Whereupon, the learned Magistrate, without recording any evidence of the complainant Abdul Jabar, or without satisfying himself that the case was compounded, passed an order acquitting the accused.

It is urged that this order of acquittal is bad in law. It is perfectly clear that the learned Magistrate has not followed the procedure laid down in Ch. 20, Criminal P. C., and his order of acquittal is not based on a consideration of the evidence in the case. For S. 245 says:

> "If the Magistrate, upon taking the evidence referred to in S. 244 and such further evidence, if any, as he may, of his own motion, cause to be produced and (if he thinks fit) examining the accused, finds him not guilty, he shall record an order of acquittal."

Now here, when the opponents protested that the case was not compounded, it was the obvious duty of the Magistrate to satisfy himself whether the case was compounded or not, and if it was not, he should have asked the complainant to proceed with his complaint and record his evidence, and after recording the evidence, if he was satisfied that the complaint was false, he should have acquitted the accused. But this evidently he did not do, and merely fancied on the statement of accused that the case was false and acquitted the accused. This the learned Magistrate evidently could not do under S. 215, and so his order of acquittal is quite wrong and cannot stand.

Under the circumstances, we set aside the order of acquittal and order that the Magistrate do proceed with the complaint of Abdul Jabar according to law.

This order of acquittal being illegal, his subsequent order under S. 476, Criminal P. C., and complaint against the applicant under S. 211, I. P. C., are manifestly bad in law, and consequently we set them aside.

K.N./R.K. *Order accordingly.*

(1) [1893] 21 Cal. 103.

* A. I. R. 1932 Sind 9

MEHTA, A. J. C.

Emil Adolph Zippel and *others* — Plaintiffs.

v.

K. D. Kapur & Co.—Defendants.

Suit No. 881 of 1927, Decided on 19th August 1931.

*** (a) Civil P. C. (1908), O. 6, R. 14—Signature of co-plaintiff on plaint is not imperative—O. 6, R. 14 merely deals with matter of procedure.**

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. The object of the signature to the plaint is to prevent as far as possible disputes as to whether the suit was instituted with the plaintiff's knowledge and authority. Such authority may be established by other means besides the signature. O. 6, R. 14, Civil P. C., which requires a pleading to be signed by a party, is merely a matter of procedure and it is the business of the Court to see that this provision is carried out : *A. I. R.* 1925 *Sind* 159, *Foll.* [P 10 C 2]

(b) Jurisdiction—Where Court can reasonably assume jurisdiction, suitor should not be turned out on ground that some other Court has undoubted jurisdiction.

The question of jurisdiction is as a rule a very ticklish one. If a Court in which a suit is brought can reasonably assume jurisdiction, it should not turn away a suitor merely because in the case of some other Court there could not possibly be any doubt on the ground of jurisdiction. [P 11 C 2]

*** (c) Contract — C. I. F.—Buyer cannot insist on actual delivery of goods—Tender of shipping documents is sufficient performance for payment from buyer—Seller is however responsible to deliver goods of stipulated quality at contract destination or port.**

The buyer in a C. I. F. contract cannot insist on actual delivery of goods before being called upon for payment and mere tender of shipping documents is sufficient performance on the part of the seller to entitle him to claim payment. Still the tender of shipping documents does not exonerate a seller from any other duty under such a contract. The seller is under the duty of delivering goods of the stipulated quality at the port mentioned in the contract : (*Case law discussed*). *Goitein on Law of C. I. F. Contracts, 2nd Edn., p.* 4, and *Kennedy on Law of C. I. F. Contracts, p.* 2, *Ref.* [P 12 C 1]

(d) Civil P. C. (1908), S. 20 (c)—Suit for breach of contract can be filed at place where contract was made or where breach occurred or where contract has been performed or its performance completed.

According to S. 20 (c), a suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. In a suit for damages for breach of contract the cause of action consists of making of the contract and of its breach ; so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and not being performed, the breach occurred. The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract has been performed or its performance completed. [P 12 C 1]

(e) Jurisdiction — C. I. F. Contract—Place where goods are to be delivered also helps to decide question of jurisdiction.

In the case of a C. I. F. contract the place where the documents are to be tendered or symbolical possession of the goods sold is to be given, or price for the goods is to be paid is not necessarily the only place which would decide the question of jurisdiction. The place where the goods are to be delivered does also help to decide the question of jurisdiction : *A. I. R.* 1924 *Sind* 4, *Dist.* ; *A. I. R.* 1925 *Sind* 132 and *A. I. R.* 1924 *Sind* 29, *Ref.* [P 13 C 1]

*** (f) Contract Act (1872), S. 51—Party is absolved from duty of delivering goods if person to whom goods are to be delivered is absconding.**

A party is absolved from the duty of delivering if the person to whom the goods are to be delivered is absconding. In order to support an allegation of readiness and willingness to deliver actual tender is not in all cases necessary, e. g., a tender will be dispensed with where the defendant has refused to perform the contract, or where, on the day for the performance of it, he has absconded and having closed his place of business has left no agent or other person to represent him : (1871) 8 *B. H. C. R. App.* 133, *Foll.* [P 14 C 2]

(g) Contract Act (1872), S. 107—Property in goods sold not passing to buyer.

Where the property in the goods sold has admittedly not passed to the buyers the seller has no right to resale. [P 14 C 2]

(h) Contract—C. I. F.—Buyer failing to accept draft—Damages to sellers how calculated explained—Contract Act (1872), S. 73.

Where in the case of a C. I. F. contract the buyers fail to accept the drafts and cannot be made to pay for the goods purchased the sellers are only entitled to the difference between the contract price and the price of the goods on the date of the breach. In the case of a C. I. F. contract ordinarily the date of breach is the date on which the documents would have to be tendered : *A. I. R.* 1924 *Bom.* 325 and 422, *Ref.* ; *Goitein in the Law of C. I. F. Contracts, 2nd Edn. p.* 79, *Rel. on.* : (*Case law discussed*). [P 15 C 1]

*** (i) Contract Act (1872), S. 73—Breach of contract of sale—Measure of damages where no market available for long time after breach how calculated explained.**

Where for a long time after breach there is no available market for the goods and the goods are then resold, the seller is entitled to the difference between the contract price and that realized on resale : *A. I. R.* 1926 *Mad.* 1021, *Ref.* [P 16 C 1]

(j) Interest—Interest on unliquidated damages.

No interest can be allowed on unliquidated damages. [P 16 C 1]

Dipchand Chandumal—for Plaintiffs.

Kewalram Jethanand—for Defendants.

Judgment.—This is a suit for damages on a breach of contract. It is stated in the plaint that on 12th February 1925 the defendants sent an order to the plain-

tiffs for five cases of shawl cloth quality No. 304 at sh. 3-10 1/4d. per yard C. I. F. and C. I. Karachi, June/July shipment: that another similar order was repeated on 19th February 1925: that the plaintiffs despatched the goods according to the terms of the indents and forwarded the documents (invoices, bills-of-lading and policies of insurance) to the National Bank of India, Limited, to be delivered to the defendants against acceptance of the drafts aggregating £1497-13-3: that the defendants failed to honour the drafts which were consequently noted: that the plaintiffs thereafter sold the goods in March and April 1926 realizing the net sum of Rs. 9,524-0-4, the equivalent of about £702 according to the then rate of exchange: that as difference between the contract price and the price realized, together with interest and costs, the plaintiffs claim £906, i. e., Rs. 12,984-5-0, at the exchange rate of sh. 1-5 3/4d. for which the plaintiffs pray for judgment, with all costs of this suit and interest from date of suit.

The defendants by their written statement contended that the power under which Mr. Dipchand Chandumal filed this suit on behalf of the plaintiffs was defective; that the goods were not shipped in time and did not answer the description and quality as ordered: that the shipping documents were not tendered to the defendants for acceptance so that the breach of the contracts, if any, had been on the plaintiffs' part: that the defendants had no knowledge of the resale of the goods ordered: that the resale, if any, was bad in law and not binding on the defendants, the plaintiffs having no right to resell the goods and no notice of the resale having been given to the defendants; that the resale had been unduly delayed: that the price realized on the resale did not represent the true market rate of the date of the sale; that the details of the claim were not correct: that the plaintiffs had no cause of action: that this Court had no jurisdiction to entertain the suit and that therefore the suit was liable to be dismissed with costs.

The issues on which the parties went on trial are as follows:

(1) Is the plaint properly filed and verified?
(2) If not, is the suit maintainable?
(3) Were the goods shipped in time?
(4) Were the goods of contracted shipment and quality?
(5) Were the shipment documents tendered to the defendants?
(6) On whose part was the breach committed?
(7) Had the plaintiffs a right to resell the goods?
(8) If so, is the resale binding on the defendants?
(9) To what damages, if any, are the plaintiffs entitled?
(10) Has this Court jurisdiction to try the suit?
(11) General.

Issues 1 and 2.—It was contended that the plaint had not been properly signed and that Mr. Dipchand who has filed this suit on behalf of the plaintiffs' firm had not the authority of all the three partners of the plaintiffs' firm. I do not think there is any substance in this contention. Leopold Riddley, the constituted attorney of Emil Zippel & Co., gave a power to Mr. Dipchand to file a suit, but as the power to Riddley was signed by only one partner of the firm Mr. Kewalram maintains that the filing of the suit is not on behalf of all the three partners as it should have been. It appears that in order to cure this technical defect a copy of the plaint has been got signed by all the three partners of Emil Zippel & Co. and put in. In *Metharam Dautram* v. *Pahlajrai Gopaldas* (1), Rupchand, A. J. C., has, on the authorities quoted therein, rightly taken the view that there is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. The object of the signature to the plaint is to prevent as far as possible disputes as to whether the suit was instituted with the plaintiffs' knowledge and authority. Such authority may be established by other means besides the signature. O. 6, R. 14, Civil P. C., which requires a pleading to be signed by a party is merely a matter of procedure and it is the business of the Court to see that this provision is carried out. Mr. Heine, the manager of the plaintiffs firm (Ex. 6) has given us the names of the three partners of his firm and all these three partners have signed the plaint. The suit is therefore properly filed, and if there was any defect in the beginning it has been set right.

Issues 3 and 4.—Mr. Kewalram for the defendants has stated that he withdraws the contentions which necessitate the raising of those two issues.

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(1) A. I. R. 1925 Sind 159=80 I. C. 141=19 S. L. R. 236.

Before considering the other issues I shall take up issue 10 which relates to jurisdiction. It is contended on behalf of the defendants that the suit contract was to be performed at Amritsar because the documents were to be tendered and delivered at Amritsar; the drafts were to be presented and honoured at Amritsar; the defendants resided and traded at Amritsar; and the breach of contract, if any, had taken place at Amritsar, and consequently this Court has no jurisdiction to entertain this suit. It is urged that although the contracts were C. I. F. Karachi, which meant that the port to which the goods were to be shipped was Karachi, nevertheless the delivery of the actual goods at Karachi was not an essential part of the contract as merely tender of documents in such a contract would amount to delivery of goods. In support of this view the ruling in *Biddel Bros.* v. *E. Clements Horst Co.* (2) is quoted which is that the buyer pays for the documents and not the actual goods and that the buyer is not entitled to insist on seeing the goods. Although this decision when taken to appeal *Biddel Bros.* v. *E. Clements Horst Co.* (3) was set aside, two Judges upholding the buyer's contention that he can insist on seeing the goods before his liability to pay arises, it was later on confirmed by the House of Lords who agreed with the original Judge and the dissenting appellate Judge: *E. Clements Horst Co.* v. *Biddel Bros.* (4). This decision was also followed in *Karberg & Co.* v. *Blythe Green, Jourdian & Co.* (5), and re-affirmed in appeal, *Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (6), the purport of which was that a C.I.F. contract was one in which possession is to be given symbolically.

In a later case, *C. Sharpe & Co. Ltd.* v. *Nosawa & Co.* (7), it was held that a C. I. F. contract is performed as soon as the seller tenders documents, and the date of the performance is the date when the documents should come forward. The ruling in *Johnson* v. *Taylor Bros. & Co. Ltd.* (8), is quoted in support of the proposition that if no place be named for tender of shipping documents in the case of C. I. F. contracts the place must be presumed to be where the buyer resides or carries on business. In *Steel Bros. & Co. Ltd.* v. *Dayal Khatav & Co.* (9), there is a dictum of Mulla, J., relying on an English ruling [*Saunders* v. *Maclean* (10)] to the effect that the bill of lading represents the goods in law and in fact and its possession places the goods at the disposal of the purchaser. Yet two more rulings, *M' Cance* v. *London & N.W. Ry. Co.* (11) and *Cooper* v. *Knight* (12), have been cited in support of the contention that the question of the actual delivery of goods does not arise at all in a C. I. F. contract and that the seller has performed his part of the contract as soon as he had tendered the shipping documents to the buyer. In *Mehta & Co.* v. *Parmeshardas Parshotamdas* (13) the jurisdiction of this Court was challenged on the ground that the contract between the parties was on C. I. F. terms and the contract was entered into at Amritsar where also the documents of title to the goods were to be tendered to the purchaser and the payment for them was to be made by him. Raymond, A. J. C., came to the conclusion that the jurisdiction of the Karachi Court had been rightly impugned. At p. 300 there is an observation that the fact of the goods lying in Karachi was immaterial so far as the cause of action in that case was concerned. *Sabapathi Pillay* v. *Thandayaroya Odayar* (14). has also been quoted to show that the place where documents are to be tendered is the place which decides jurisdiction.

The question of jurisdiction is as a rule a very ticklish one. If a Court in which a suit is brought can reasonably assume jurisdiction, it should not turn away a

(2) [1910] 1 K. B. 214.
(3) [1911] 1 K. B. 934.
(4) [1912] A. C. 18=81 L. J. K. B. 42=105 L. T. 563=17 Com. Cas. 55=12 Asp. M. C. 80=56 S. J. 50=28 T. L R. 42.
(5) [1915] 2 K. B. 379=84 L. J. K. B. 1673=113 L. T. 185=21 Com. Cas. 1=31 T. L. R. 351.
(6) [1916] 1 K.B. 495=85 L. J. K. B. 665=114 L. T. 152=21 Com. Cas. 174=13 Asp. M. C. 235=60 S. J. 156=32 T. L. R. 186.
(7) [1917] 2 K. B. 814=87 L. J. K. B. 33=118 L. T. 91=22 Com. Cas. 286.
(8) [1920] A. C. 144=89 L. J. K. B. 227=122 L. T. 130=25 Com. Cas. 69=64 S. J. 82=36 T. L. R. 62.
(9) A. I. R. 1924 Bom. 247=87 I. C. 67=47 Bom. 924.
(10) [1883] 11 Q. B. D. 327=52 L. J. K. B. 481=49 L. T. 462=31 W. R. 698=5 Asp. M. C. 160.
(11) [1861] 126 R. R. 528.
(12) [1901] 17 T. L. R. 279.
(13) A. I. R. 1924 Sind 4=80 I. C. 303=16 S. L. R. 293.
(14) [1920] 43 Mad. 309=54 I. C. 515.

suitor merely because in the case of some other Court there could not possibly be any doubt on the ground of jurisdiction. That the buyer in a C. I. F. contract cannot insist on actual delivery of goods before being called upon for payment, and that mere tender of shipping documents is sufficient performance on the part of the seller to entitle him to claim payment, is a proposition which having regard to all the authorities quoted, cannot be seriously disputed. The question however is whether the tender of shipping documents exonerates a seller from any other duty under such a contract. Is there any other obligation which might affect the question of jurisdiction? According to S. 20 (c), Civil P. C., a suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. In a suit for damages for breach of a contract the cause of action consists of the making of the contract and of its breach; so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and not being performed, the breach occurred. The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract has been performed or its performance completed. To quote the hackneyed definition of "cause of action"

"it means every fact which it would be necessary for the plaintiffs to prove in order to support his right to the judgment of the Court;"

in other words:

"it is a bundle of essential facts which it is necessary for the plaintiffs to prove before he can succeed in the suit."

Now, in this case no doubt the order was sent by the defendants from Amritsar and the documents were to be tendered at Amritsar and the drafts were to be presented and honoured at Amritsar: still it was also a part of the plaintiffs' performance of the contract to follow up the tender of the documents by delivering goods at Karachi of the stipulated quality. In *Sitaram Marwari* v. *Thompson* (15), it was held that if the acceptance of an offer is by performance of a condition the suit may be instituted at the place where the condition is to be performed. A suit can be filed at the place where the contract should have been performed or its performance completed. A practice has no doubt grown up among businessmen of treating documents for almost all practical purposes as if they were the goods themselves. The documents may purport to deliver the goods of the right quality, still it does not mean that the goods of the right quality were in fact delivered by the mere delivery of documents. All the rulings quoted on behalf of the defendants simply go to show that the main duty of the seller in a C. I. F. contract is to tender the shipping documents and if he does that, he is presumed to have actually delivered the goods and consequently he would be entitled to payment. It is merely a fiction of custom recognized by law Courts. It however does not relieve the seller of the duty of delivering goods of the stipulated quality at the port mentioned in the contract. Goitein on the Law of C. I. F. Contracts, Edn. 2, p. 4, says:

"Performance of a contract for the sale of goods is essential; but the manner of performance and its incidents are dependent upon the special nature of the contract. The seller's duties are broadly speaking two: to ship goods of the contract description and to tender the usual documents. The former is the primary obligation and the latter is consequential upon it, though of equal obligation with it. Performance is completed by means of the latter obligation."

Thus then shipping the goods of the contract description to the proper destination is a part of the performance the seller undertakes in a C. I. F. contract. Kennedy on C. I. F. contracts at p. 2 says:

"On presentation of shipping documents if they are complete and regular the buyer is bound to pay the price irrespective of the arrival of the goods; but by paying he is not precluded from subsequently rejecting the goods or recovering damages for breach of the contract of sale, if on examination the goods are found not to be in accordance with the contract."

It is true that the seller in the present case by merely tendering the documents at Amritsar would have been entitled to payment; but that was not all the performance expected of him. The performance of the contract was complete when the goods were actually taken delivery of and found to be of the contract quality. It has been held in *Read* v. *Brown* (16), that evidence which if not proved would give the defendant a right to an immediate judgment must be part of the

(15) [1905] 32 Cal. 884=2 C. L. J. 66.

(16) [1888] 22 Q. B. D. 128=58 L. J. Q. B. 120 =60 L. T. 250=37 W. R. 131.

cause of action. In the present case the defendants by their written statement have taken up the contention that the goods that arrived in Karachi were not according to sample as ordered. If they could prove that assertion they were entitled to an immediate judgment. In *Kooverbhan Sukhanand* v. *Louis Dreyfus & Co.* (17), there is a decision of Kincaid, J. C., and Aston, A. J. C., to the effect that a contract which had to be completed at Karachi gave the Karachi Court jurisdiction to entertain a suit for damages for failure to make that delivery. There is another ruling of our own Court, *Firm of Khalsa Bros. Agency* v. *Hariram Sriram & Co.* (18), in which Raymond, A. J. C., observed at p. 166:

"Now no doubt the payment for the goods was to be made in Peshawar but this was unquestionable for the convenience of the purchasers who resided there."

In that case the contract was "Free Karachi Harbour" and it was held that the Karachi Court had jurisdiction. Although the last two cases were not cases of C. I. F. contracts still the principle enunciated amounts to this that the place where the documents are to be tendered or symbolical possession of the goods sold is to be given or price for the goods was to be paid was not necesarily the only place which would decide the question of jurisdiction. The ruling in *Mehta* and *Co.* v. *Parmeshardas Parshotamdas* (13), relied upon on behalf of the defendants is really distinguishable. In that case the claim was to recover the amount of the drafts which had not been accepted and the bills-of-lading were also in the name of the purchaser. In the present case damages are claimed for breach of contract and the bill-of-lading is in the name of the seller. The plaintiffs find their goods in Karachi at the time of the breach and it is at Karachi that the plaintiffs begin to deal with the goods so as to indemnify themselves against the loss caused by the non-acceptance of the drafts. This is not a suit for the recovery of the amount of the dishonoured drafts. As the goods were lying in Karachi the market price of the goods at Karachi has to be determined as on the day of the breach. Mr. Dipchand for the plaintiffs relies on the very case *Biddel Bros* v. *E. Clements Horst Co.* (2) relied on on behalf of the defendants and argues that according to that ruling the buyer's right to reject the goods remains unimpaired if upon arrival they are found upon examination not to be in conformity with the contract. The logical conclusion of this decision which was finally upheld by the House of Lords is that the seller's duty to perform his part of the contract is not complete unless and until the goods arrive at the port of destination and are found to be of the same quality as agreed upon between the parties. In the present case the cause of action to the plaintiffs is the fact of the difference between the contract price of the goods and the market price of the same or similar goods at Karachi on the date of the breach. Had the market price in Karachi been higher than the contract price there would have been no cause of action at all to the plaintiffs. The fact therefore that the price at Karachi and not at Amritsar has given cause to the plaintiffs to come to Court is a sufficient cause of action to enable this Court to assume jurisdiction. Mr. Kewalram has argued that the goods in the present case were sold ex godown Amritsar so that even the sale took place in Amritsar. He is wrong. The goods were really sold in Karachi for Amritsar delivery. On issue 10 therefore I find in favour of the plaintiffs in the affirmative.

Issues 5 *and* 6, which relate to the question as to who committed the breach may be considered together. The admitted facts are that the plaintiffs' letter to the defendants which is Ex. 18 on the record was an intimation to the defendants that the drafts had been sent to the National Bank for presentation against the shipment. The drafts in accordance with the defendants' own instructions (Ex. 14) to the plaintiffs had been drawn at 30 days sight. That at the time of the presentation of the drafts the defendants could not be found at their usual address and that therefore the drafts had to be noted is an equally undisputed fact. In spite of all this it is contended on behalf of the defendants that since the shipping documents were not actually tendered the plaintiffs had committed a breach of the contract and not the defendants. This is entirely untenable having regard to

(17) A. I. R. 1925 Sind 132=79 I. C. 30=19 S. L. R. 207.
(18) A. I. R. 1924 Sind 29=83 I. C. 539=17 S. L. R. 164.

the sworn evidence that the documents would surely have been tendered if the drafts had been accepted. It is to be borne in mind that the actual payment was to be 30 days after the presentation of the drafts. The agreement as admitted by the defendants was delivery against payment and not acceptance. The delivery in this case could have been made by the tender of documents. The tender of documents was therefore to be simultaneous with the payment and not with the acceptance. Then again tender presupposes a person to whom one could tender. If the defendants were not to be found at their usual place of business it was not possible for the plaintiffs or for a matter of that for the National Bank at Amritsar who acted as agents of the plaintiffs to tender the documents or to be ready to tender the documents. According to S. 51, Contract Act, where a contract consists of reciprocal promises to be simultaneously performed no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. Illus. (1) is that in a contract for payment on delivery:

"*A* need not deliver the goods unless B is ready and willing to pay for the goods on delivery."

On the presentation of the drafts if the defendants had accepted them there was an obligation on the part of the plaintiffs to tender documents not otherwise. According to S. 32, Sale of Goods Act, delivery of goods and payment of price are concurrent conditions. That is what really was agreed upon by the defendants themselves by their letters. The question then is: Were the defendants ready and willing to pay for the goods; and were the plaintiffs not ready to tender the documents notwithstanding? On the undisputed facts the answer can only be that the defendants were not ready and willing to pay for the goods and so it is immaterial whether at the time of the presentation of the drafts the plaintiffs' bank at Amritsar had or had not got the documents ready to be tendered. In spite of the intimation that had been sent to them at the time of the shipment the defendants took no trouble to inquire of the bank whether the documents were available or not. By reason of their having closed their business the defendants must have known that they could not be approached and could not be offered the drafts for acceptance in the ordinary course of business. Defendants (Ex. 28) in answer to cross-question No. 26 admits that documents were to be tendered on payment and not on acceptance of the drafts. In *Dayabhai Dipchand* v. *Dullabharam Dayaram* (19) it was held that a party is absolved from the duty of delivering if the person to whom the goods are to be delivered is absconding. In order to support an allegation of readiness and willingness to deliver actual tender is not in all cases necessary, e. g., a tender will be dispensed with where the defendant has refused to perform the contract or where on the day for the performance of it he has absconded and having closed his place of business has left no agent or other person to represent him. It is perfectly clear that defendants were not willing to meet their obligation and had no intention to perform their part of the suit contracts. The fault of the breach therefore lies at their door and consequently they are liable in damages.

Issues 7, 8 *and* 9 relate to the question of damages and so they may be considered together. What actually happened in this case was that when the plaintiffs were informed by the National Bank that the defendants had failed to accept the drafts and could not be made to pay for the goods purchased the plaintiffs set about to resell the goods which were lying at the time in Karachi. It is contended by Mr. Kewalram on behalf of the defendants that there was no stipulation in the contract itself for resale nor were the plaintiffs under S. 107, Contract Act, entitled to resell the goods. There is no doubt that in the abstract this is true since the property in the goods had admittedly not passed to the defendants the plaintiffs had no right to resale. If authority is wanted in support of this view it is to be found in the *Bank of Morvi Ltd* v. *Baerlein Bros.* (20) and also in *M. B. Mehta* v. *Joseph Heurlux* (21). The plaintiffs are only entitled

(19) [1871] 8 B. H. C. R. App. 133.
(20) A. I. R. 1924 Bom. 325=79 I. C. 1012=48 Bom. 374.
(21) A. I. R. 1924 Bom. 422=80 I. C. 766=48 Bom. 531.

to the difference between the contract price and the price of the goods on the date of the breach. We are thus confronted with the next question "What was the date of breach in this case?" There is abundant authority that in the case of a C. I. F. contract ordinarily the date of breach is the date on which the documents would have to be tendered. Goitein at p. 79 says when the date of delivery is material for the ascertainment of the measure of damages that date will ordinarily be the date when the documents have to be tendered. In *C. Sharpe & Co. Ltd* v. *Nosawa & Co.* (7) it is held that if a contract provides for delivery of goods by means of documents or by handing over the keys of a warehouse the date for that is the time when that ought to have been delivered. In the case reported in *Steel Bros. & Co. Ltd.* v. *Dayal Khatav & Co.* (9) the same view has been taken, viz., that the date of performance in the case of a C. I. F. contract is the date on which documents ought to have been tendered. Now in the present case the agreement was one of documents against payment and the payment was to be 30 days after presentation of the drafts.

On this basis 29th August 1925 was the date of payment for the first shipment of five cases of shawl cloth and 25th September 1925 was the date of payment for the second shipment of five cases of shawl cloth. Thus then the breach took place about the time of these two dates. The plaintiffs have therefore to show that the market price at that time was the same, viz, Re. 1-12-0 per yard which they actually realized six months hence by the resale; whilst the defendants undertake to prove that the market price was more. From the evidence brought on the record by both parties, it is clear that the market price of shawl cloth of the quality No. 304 was not available to them. Defendants have tried to show through the examination of three witnesses, L. Harkishen (Ex. 32), Kishinchand (Ex. 33) and the manager of Dewanchand (Ex. 34), that having regard to the price of slightly different kind of shawl cloth, the price of the cloth of the quality No. 304 towards the end of July and beginning of August 1925 during which they put the breach, was in the vicinity of Rs. 2-12-0. As against this we have the evidence of the plaintiff Mr. Heine (Ex. 6) who says that he received by cable intimation of non-payment of the first shipment on 4th September and of the second shipment on 6th October 1925. He immediately cabled to the defendants as will appear from Ex. 19. Receiving no reply from the defendants he took steps to sell the goods.

Some correspondence was carried on with one Berkley who was at Amritsar and who was anxious to be appointed as agent of the plaintiffs' firm. The correspondence covered the period between September to November. Berkeley was able to quote an offer of Re. 1-12-0 per yard. The plaintiffs thought that the price was not adequate although the market had been admittedly falling about that time and they entered into correspondence with a dealer named Ramnarain of Amritsar. The correspondence is Ex. 21 on the record: it goes up to March 1926 and the plaintiffs had to finally accept the offer of Re. 1-12-0 per yard ex godown Amritsar made by Ramnarain & Co. Now it must be remembered that the plaintiffs had no local agent who could have been entrusted with the task of selling the cloth lying in Karachi and as they were in a foreign country the negotiations would necessarily take time. It is however to be seen whether during the six months taken by the plaintiffs actually to realize the price of Re. 1-12-0 the market had so fluctuated as to justify the contention of the defendants that the price realized in March 1926 could not reasonably be taken as the price at the time of the breach. Now, Berkeley between September and November had offered Re. 1-12 0 per yard: even Ramnarain in November had offered Re. 1-11-3. That shows that the price between September 1925 and March 1926 had not varied to any appreciable extent. Even the price of quality No. 3636 as given by the defence witnesses was Re. 1-15-9 on 19th October 1925 and Re. 1-13-6 on 14th April 1926 which proves that there was no great change. Ex. 30 is a statement put in by plaintiffs' witness (Ex. 29). Although that is in regard to shawl cloth of different quality, there is the outstanding fact that between December 1925 to March 1926 the price of shawl cloth had remained more or less stationary. Ex. 32 who is defendant's own witness

says that if proper efforts had been made shawl cloth of the quality No. 304 would have realized a price of Rs. 2 per yard. Thus then the assertion that the damages should be calculated on the basis of Rs. 2-12-0 per yard as the price of the cloth on the date of the breach has not been satisfactorily established.

Now, it was argued that if the plaintiffs had sold the cloth in Karachi and not in Amritsar the price realized would have been more. As a matter of fact the goods were sold as they were in Karachi for Amritsar. We have it in the evidence of Ex. 31 that there was no market in Karachi for shawl cloth and that most of the cloth imported in Karachi had to be taken to Amritsar and Kashmir where they dyed and embroidered the cloth for making shawls. If there was no market in Karachi then the price of the nearest market would be relevant. Where for a long time after breach there is no available market for the goods and the goods are then resold, the seller is entitled to the difference between the contract price and that realized on sale: That was the decision in *Ramalingam Chettiar* v. *Gokuldas Madhavji and Co.* (22). Of course the onus of proving that there was no market in Karachi for the kind of shawl cloth indented by the defendants lies on the plaintiffs, but I think that onus has been discharged by the evidence of the witness (Ex. 31) who is a Karachi merchant dealing in shawl cloth as also from the fact that the evidence of market price adduced by the defendants was also of Amritsar. I hold therefore that Re. 1-12-0 per yard was the market price of the goods in suit at the time of the breach.

Objection is taken on behalf of the defendants to the item of £35-5-9 on the head of telegram charges. When the defendants themselves maintain that the plaintiffs should not have delayed the resale, it does not lie in their mouth to complain about the cabling charges. The next objection is to the item of £125-1-0 given in the plaintiffs' memo of particulars which represents interest on the loss to the plaintiffs at 6 percent per annum from April 1926 to the date of the suit. I think that this objection must be allowed. No interest can be allowed on unliquidated damages. There is no doubt that the property in the goods had not passed and therefore the plaintiffs are not entitled to charge interest. With regard to the rate of exchange there is no evidence at all before me to support the contention of the defendants that the rate was not the proper rate on the relevant date.

The indent price was sh. 3-10 1/4d per yard. The plaintiffs have calculated on the basis of sh. 3-10 1/2 d. The difference of 1/4 d. should be allowed. The total quantity of the cloth was 8,180 yards. The deduction will therefore amount to £8-10-5. The plaintiffs are therefore entitled to the damages as claimed by them less £133-11-5.

Order.—Judgment for the plaintiffs for Rs. 11,178-5-0 with costs and interest from the date of suit till payment.

B.V./R.K. *Suit decreed.*

(22). A. I. R. 1926 Mad. 1021=97 I. C. 871.

A. I. R. 1932 Sind 16

MILNE, J. C. AND MEHTA, A. J. C

Chuto Sahijo and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 184 to 190 of 1931, Decided on 27th July 1931, against order of First Addl. Sess. Judge, Hyderabad.

Penal Code (1860), Ss. 399 and 402—Explanations given by accused explaining circumstances which brought accused together before police and trial Court differing—Evidence to show same is admissible as showing conduct—Criminal P. C. (1898), S. 162.

Per *Milne, J.C.*—In a trial under Ss. 399 and 402, I. P. C., evidence showing that the explanation given by the accused to the Police Officers explaining the circumstances which brought the accused together was different from the explanation given at the trial, is admissible as showing that the conduct of the accused was not that of innocent persons; *A. I. R.* 1926 *Sind* 151 and *A. I. R.* 1925 *Sind* 237, *Foll.* [P 17 C 2]

Per *Mehta, A.J.C.*—It is doubtful if in order to discredit the version of an accused person at the trial, the use of the statement before the police, although it may be substantially of a non-incriminatory character otherwise is not provided against in S. 162, Criminal P. C.: *A. I. R.* 1924 *Bom.* 510 and *A. I. R.* 1931 *Bom.* 311, *Rel. on.* [P 17 C 2]

C. M. Lobo—for the Crown.

Milne, J. C.— The accused were charged under Ss. 399 and 402, I. P. C., with making preparations for committing a dacoity and being among five or more persons assembled for that purpose. The accused were convicted and sentenced to undergo rigorous imprisonment for two years for the offences under each

section—the sentences to run concurrently.

The prosecution story is that one Jurio reported to the police that certain of the accused had asked him to join them in committing a dacoity and that they had assembled in the mussafarkhana for that purpose. The Sub-Inspector went to the mussafarkhana and surrounded the people whom Jurio pointed out. One or two of them escaped. The accused were found with hatchets, lorhs, lathis, chisels and keys in a heap in front of them. One of the accused was made an approver; on this evidence the accused were convicted as stated above.

The accused appealed from jail and no appearance has been made on their behalf but we have been through the record with the assistance of the learned Public Prosecutor.

The case against the accused depends first on the evidence of the approver Faizu, Ex. 16. He was arrested at the scene of the offence and states that he had arranged with the accused to commit the offence. He fully implicates all the appellants in the alleged offence but being an approver his evidence requires corroboration.

The next witness on whom the Public Prosecutor relies is the witness Jurio (Ex. 7) who informed the police about the intended commission of the offence. He met accused 5 and two others on the road who told him that they have been looking for a house which they intend to rob and were going to discuss the matter in the mussafarkhana with their accomplices. They asked the witness to join them. He went with the accused to the mussafarkhana and found the appellants and others there. It was decided to commit the robbery and the witness promised to join them, but instead of doing so he left and reported to the police. This witness also implicates all the accused.

Kimatrai (Ex. 13) is a punch witness of the arrest of the accused and of the finding of the articles in front of them. These articles were not recovered from the possession of any particular accused, but they were lying in one heap on the ground under an ajrak. This is general corroboration of the approver's story.

Finally there is the evidence of the Deputy Superintendent of Police (Ex. 39) that the day after they were seized the accused explained the circumstances which brought them to the mussafarkhana and these explanations are different from the explanations given by the accused in the Sessions Court. That evidence is admissible as showing that the conduct of the accused was not that of innocent persons: vide *Hussainbibi* v. *Crown* (1).

I am of opinion then that there is sufficient corroboration of the evidence of the approver against each of the accused and would dismiss these appeals.

Mehta, A. J. C.—I wish to add a few remarks of my own on one particular point.

It is not quite clear from the judgment under appeal, but it appears to me that the mind of the learned Additional Sessions Judge who tried this case must to a certain extent, perhaps to a very great extent, has been influenced by the alleged falsity of the statement made by the accused to the police soon after their arrest. The sum total of the evidence which weighed with the trial Judge as proving the guilt of the convicted persons is to be found given in a short paragraph towards the end of his judgment which reads as follows:

"The evidence of the circumstances in which accused 1 to 7 were secured, with the evidence of Jurio, corroborated by the report he filed, and the ridiculous defences which some of these seven accused give leave no doubt however as to the guilt of these accused."

I am not sure that in order to discredit the version of an accused person at the trial, the use of his statement before the police, although it may be substantially of a non-incriminatory character otherwise, is not provided against in S. 162, Criminal P. C. I am aware of the fact that there are two rulings of this Court: *Umer Duraz* v. *Emperor* (2) and *Hussainbibi* v. *Crown* (1) in which it is held that S. 162, Criminal P. C., does not apply to statements of accused persons before the police but only to statements of witnesses before the police. There are contrary rulings of the Bombay High Court given in *Emperor* v. *Vithu Balu* (3) and in *Emperor* v. *Issuf Mohamad* (4).

(1) A. I. R. 1926 Sind 151=93 I. C. 248=27 Cr. L. J. 456=20 S. L. R. 74.
(2) A. I. R. 1925 Sind 237=86 I. C. 410=26 Cr. L. J. 778=19 S. L. R. 142.
(3) A. I. R. 1924 Bom. 510=83 I. C. 1007=26 Cr. L. J. 223.
(4) A. I. R. 1931 Bom. 311=133 I. C. 748=32 Cr. L. J. 1077=1931 Cr. C. 567=55 Bom. 435.

In the present case however I am satisfied that the conviction of the appellants can be supported without relying on their statements before the Deputy Superintendent of Police. The finding of the weapons and house-breaking implements under circumstances rightly justifying the inference of possession is, to my mind, sufficient and cogent corroboration of the statement of the approver Faizu and of the informer Jurio. The statements of the accused before the police which the prosecution have proved to be false through the evidence of the Deputy Superintendent of Police have not been a determining factor with me.

I therefore agree that the conviction of the appellants is not liable to be set aside and that these appeals should be dismissed.

V.B./R.K. *Appeal dismissed.*

* A. I. R. 1932 Sind 18

MILNE, J. C.

Gladys Bourke—Petitioner.

v.

Richard Edmund Bourke — Respondent.

Divorce Petition No. 4 of 1930, Decided on 5th October 1931.

*** Divorce Act (1869), Ss. 14 and 16 — Woman found guilty of adultery — Adultery resulting from husband's conduct towards her—Court should make allowance in treating her case with leniency.**

In dealing with divorce cases it should ever be remembered that the woman is the weaker vessel, that her habits of thought and feminine weakness are different from those of the men and that what may perhaps be excusable in the case of woman would not be excusable in the case of man. Where it is found that the woman has been guilty of adultery and that her adultery has resulted from the husband's conduct towards her, the Court should make allowance in treating her case with leniency. Where there is sufficient evidence to prove cruelty and adultery on the part of the husband who deserts his wife without making any provision for maintenance of the wife and the wife who was living in her father's house after her desertion by the husband cohabits with a person living as a guest in the father's house, the conduct of the husband in deserting his wife and making no provision for her, conduces greatly to the wife's adultery and it is a fit case in which the Court should exercise its discretion by granting to the wife a decree nisi under the provisions of S. 14: *Pretty* v. *Pretty*, (1911) *P.* 83 *Rel. on.*; *Wyke* v. *Wyke*, (1904) *P.* 149; 8 *B. H. C.* 48; *Burdon* v. *Burdon*, (1901) *P.* 52 and *A. I. R.* 1930 *Cal.* 729, *Ref.* [P 20 C 1]

Khemchand Gopaldas—for Petitioner.

Judgment.—This is a petition for divorce by one Mrs. Gladys Bourke, Christian, resident of Karachi, against Richard Edmund Bourke, Anglo-Indian Christian, formerly employed in Telegraph Department in Karachi, and now residing at Maymyo, Burma. The parties married on 25th September 1912 and there were five children by the marriage. The parties were Christians by religion, and were domiciled in British India. The grounds alleged are cruelty and adultery.

The marriage certificate produced proves the alleged marriage and shows that the parties were domiciled in British India. The evidence on record shows that the parties were and are domiciled in British India. The respondent is now residing in Maymyo (Burma) and the summons in this matter was served on him there. The respondent has not appeared though duly served and the petitioner has filed affidavits in proof of her case.

F. J. Bernard, an employee in the Government Telegraph Office, in receipt of Rs. 325 a month, gives evidence of admissions by the respondent of misconduct with prostitutes and of cruelty by respondent to the petitioner. Respondent once followed the petitioner into the house of the witness who lived near them, picked up a curry stone and would have hit her had the witness not intervened. On another occasion respondent chased the petitioner to the witness' house with a bread knife in his hand and the witness had to prevent him from injuring her. Witness had seen respondent knocking at the door of the house occupied by Dondhin in the servants' quarters; Dondhin was a servant of the petitioner and respondent with whom it is alleged respondent committed adultery.

D. O'Donnel is also employed in the Government Telegraph Office; he came to live with the petitioner and her father in 1923 after her husband had deserted her; he was their paying guest. He made advances to the petitioner which she resisted for about 12 months; thereafter he used to cohabit with the petitioner unknown to her father but when her father came to know about this he left them in anger. Since then the petitioner has been living with him and he has had a second child by her; he is willing to marry the petitioner if she is granted dissolution of marriage.

P. Hanighan is the father of the petitioner. He gives evidence of respon-

dent's cruelty to the petitioner. Respondent struck the petitioner with a lighted lamp; when the respondent deserted his wife, the petitioner came to stay with the witness but as he could not maintain her, he had to take O'Donnel as a paying guest. About 20 months thereafter he became aware of the petitioner's pregnancy and left them. About a year before the witness gave his evidence he obtained definite evidence that the respondent had been in the habit of committing adultery with prostitutes. He got this evidence from one Critchell.

The petitioner has given evidence of cruelty of the respondent; she suspected him of adultery with the servant Dondhin but she had no actual proof of it. She mentions the incidents of cruelty mentioned by the other witnesses. Her husband deserted her in 1923 without leaving any particulars of his whereabouts. She did not make the application before as she was ignorant of the law of divorce and had no means to take the proceedings.

T. P. Critchell a clerk in the office of Messrs. Ralli Bros., was a companion of the respondent. They used to visit houses of prostitutes together; respondent frequently committed adultery in those houses. He gives evidence that the respondent admitted to him that he was on intimate terms with a young Ayah who was his servant.

There is sufficient evidence then to prove cruelty and adultery. Two questions however remain to be considered. The first is the question of the delay in presenting this petition. But it appears that it is only recently that the petitioner had sufficiently definite information to prove adultery. In the circumstances then the delay may be excused.

The more serious question is the admitted adultery of the petitioner. Under Proviso 1, S. 14, Divorce Act, the Court is not bound to pronounce a decree nisi when it finds that the petitioner has during the marriage been guilty of adultery. It was held in *Wyke* v. *Wyke* (1) that the Court must find as a fact that the petitioner's misconduct was caused directly by the matrimonial offence or offences of the respondent and in *John* v. *Mary Anne* (2) that there must be special circumstances attending the commission of adultery to justify the exercise of the Court's discretion. In *Constantinidi* v. *Constantinidi* (3) the respondent committed adultery with a prostitute after his wife had left him with the co-respondent: it was held that he was entitled to a decree nisi. In *Burdon* v. *Burdon* (4) the Court granted a divorce to a wife guilty of adultery; it was held that the adultery had been conduced to by the cruelty, threats and misconduct of her husband.

The petitioner relies in particular on the case of *Pretty* v. *Pretty* (5) and *Wilson De Roze* v. *Wilson De Roze* (6). In the latter case the respondent treated his wife with great brutality and subsequently deserted her without making any provision for her maintenance or that of the surviving child of the marriage, and thereafter frequently visited brothels; the wife driven desperate by want, to maintain herself and her children, adopted the life of a prostitute and, having saved some money, gave up the said mode of livelihood, and then filed a petition for dissolution of her marriage; in the pleading as well as at the trial she did not conceal anything from the Court; it was held that this was a fit case in which the Court should exercise its discretion.

In the present case the petitioner was not a prostitute from want. In the case above quoted the petitioner had adopted the life of a prostitute only for such period as was necessary for her to raise the funds to institute divorce proceedings. In *Pretty* v. *Pretty* (5) it was held that the conduct of the husband had conduced to his wife's subsequent adultery; the Court exercised its discretion in favour of the wife and allowed the decree to be made absolute notwithstanding the fact that at the time of the petition the petitioner had said nothing about her adultery and desertion. I quote a passage from the judgment:

"Some people think they must treat men and women on the same footing. But this Court has not taken, and I hope will never take, that view. I trust that in dealing with these cases it will ever be remembered that the woman is

(1) [1904] P. 149=73 L. J. P. 38=90 L. T. 172=20 T. L. R. 193.
(2) [1871] 8 B. H. C. 48.
(3) [1905] P. 253=74 L. J. P. 122=93 L. T. 651=54 W. R. 121=21 T. L. R. 651.
(4) [1901] P. 52=69 L. J. P. 118.
(5) [1911] P. 83=80 L. J. P. 19=104 L. T. 79 =27 T. L R. 169.
(6) A. I. R. 1930 Cal. 729=129 I. C. 426=57 Cal. 891.

the weaker vessel; that her habits of thought and feminine weaknesses are different from those of the man; and that what may perhaps be excusable in the case of the woman would not be excusable in the case of men. Where you find that the woman has been guilty of adultery and that her adultery has resulted from her husband's conduct towards her, this Court does and I hope always will make allowances in treating her error with leniency."

The conduct of the husband in the case of *Burdon* v. *Burdon* (4) quoted above was perhaps more objectionable than the conduct of the husband in the present case. But bearing the above quotation in mind I must hold that the conduct of the husband in deserting his wife and making no provision for her did conduce greatly to the petitioner's adultery. The petitioner lived in the same house with a person who had been taken in as a paying guest. She was the more exposed on that account to temptation and for that her husband was directly responsible. He deprived her of his support and countenance and left her in an exceedingly difficult position. It is true that after her father left the house she continued her adulterous association with the man O'Donnel, but she had then no choice; she had to maintain herself in some way and the continuance of the adulterous association was perhaps a less voluntary act than its original inception. I am therefore of the opinion that this is a case in which the Court should exercise its discretion and subject to confirmation by the High Court grant a decree nisi under the provisions of S. 14, Divorce Act.

P.N./R.K. *Decree granted.*

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* A. I. R. 1932 Sind 20

ASTON, A. J. C.

Rochanbai Udhomal and *others* — Plaintiffs.

v.

Motumal Shewaram and *others*—Defendants.

Civil Suit No. 384 of 1930, Decided on 13th October 1931.

*** Arbitration Act (1899), S. 14—No valid reference by reason of fraud, misrepresentation or mistake—Party can file objection under S. 14—Alternative remedy by suit is also competent—Objections filed and dismissed—It is not open to objector to have the matter inquired into again by separate suit.**

There appears to be no reason why a speedy remedy should not be available for a person who complains, that an arbitration was improperly procured, because there was no valid reference by reason of fraud, misrepresentation or mistake, if he wished to avail himself of it. It does no violence to language to say that an arbitration procured in this manner has been improperly procured.

A party in his objection to the award under S. 14 can make an objection which challenges the factum of the reference so far as he is concerned and which goes to the root of the jurisdiction of the arbitration and it is within the jurisdiction of the Court to hear this objection : 6 *S. L. R.* 127, *Rel. on.* ; *A. I. R.* 1922 *Lah.* 369 ; *A. I. R.* 1922 *All.* 219 ; *A. I. R.* 1922 *P. C.* 374, *Ref.* ; 47 *Cal.* 806 ; *A. I. R.* 1923 *Sind* 25 ; *A. I. R.* 1924 *Sind* 105 and *A. I. R.* 1926 *Lah.* 125, *not Foll.* [P 22 C 2]

The principle of finality applies to the Court's decree with reference to all matters coming within the purview of S. 14. A party no doubt has an alternative remedy when his complaint is that owing to the absence of a valid agreement of reference the arbitrator had no jurisdiction to make an award. A suit is competent to set aside the award. But if the party elects to file objections under S. 14 and his objections are heard and disallowed, it is not open to him to have the matter inquired into again in a separate suit ; *A.I.R.* 1925 *Sind* 42, *Foll.* [P 23 C 1]

Tahilram Maniram—for Plaintiffs.

Kodumal Lekhraj—for Defendants.

Judgment.—This is a suit filed by the widow and minor sons of one Udhomal, a Hindu, for a declaration that a reference executed by the widow and her brothers-in-law Narumal and Sobhomal referring certain disputes which they had with one Motumal to arbritration and the award obtained thereon, were void, and for partition by metes and bounds of certain immovable property and for separate possession of the plaintiffs' share of the same.

One Kundanmal died in 1926 leaving three sons : Udhomal, Narumal, and Sobhomal and certain immovable property, viz. :

(1) Plot Old S. No. 16 Survey sheet A-20, Napier Qr. Karachi, and (2) Plot old S. No. 21 Survey Sheet 21, Napier Qr. Karachi. At the time of his death he was carrying on utensil business in partnership with his three sons.

Udhomal died about 1928 leaving a widow Rochanbai, plaintiff 1, and five sons plaintiffs 2 to 6. Defendants 2 and 3 carried on the utensil business after his death.

On 16th August 1927 and 21st September 1928 Udhomal and defendants 2 and 3 executed mortgage deeds for Rs. 7,000 and Rs. 5,000 repayable in three years from the dates of the mortgage deeds.

Fresh business debts were incurred by defendants 2 and 3 after the death of

Udhomal and an application was made by creditors to have defendants 2 and 3 adjudicated insolvent and the Official Assignee was appointed interim receiver.

Thereafter an amicable settlement was arrived at. The plot bearing old S. No. 21 was sold by defendant and the proceeds divided among the creditors. Plaintiff signed the conveyance deed ; she also signed a reference to arbitration of the disputes relating to the mortgage dated 16th August 1927 and 21st September 1928 and the nonpayment of a hundi executed by defendants 2 and 3 on behalf of defendant 1.

Plaintiff's case is that she signed the reference on her own behalf and on behalf of her children who were minors on the misrepresentation that it was necessary for her to sign it for the purpose of conveying the plot bearing old S. No. 21 to the purchaser Motumal Tokandas.

The arbitrators held proceedings and passed an award dated 27th June 1930 which they filed in Court.

Plaintiff complains that the arbitrators held proceedings at which she was not represented and that no notice was served on her and she was never informed that proceedings were being held.

She further contends that since the moneys secured by the mortgages had not become payable and the interest had been regularly paid there was no dispute which she was competent to refer on behalf of the minors.

Plaintiff omitted to mention in the plaint that she filed objections to the award of the arbitrators, covering the same ground as her plaint and that the objections were considered and disallowed by my brother Rupchand, A. J. C.

On plaintiff's behalf, reliance is placed on *Dataram Munshi Lal* v. *Harjimal & Sons* (1) as establishing that objections to an award may fall either within or outside the purview of S. 14, Arbitration Act. When a Court disallows objections falling within the purview of S. 14, although the doctrine of res judicata is not strictly applicable, the principle of finality will apply to the decree. This principle however will not apply where a Court assumes jurisdiction, and disallows objections falling outside the purview of S. 14.

It is further contended, that the words "improperly procured," in S. 14 only apply to matters occurring between the reference and the award and that they have no application to anything which has occurred prior to the reference.

The Statute of William 3, C. 15 (1698) enacted by S. 2 as follows :

" And be it further enacted by the authority aforesaid that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect and accordingly be set aside by any Court of law or equity so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage upon the last day of the next term after such arbitration or umpirage made and published to the parties ; anything in this Act contained to the contrary notwithstanding."

In *Anderson* v. *Coxeter* (2), the Court held that under the statute above referred to nothing was a ground for impeaching the award but manifest corruption of the arbitrators.

Mr. Russell in his commentary on the Law of Arbitration and Award (10th Edn. p. 193) observes that the term "undue means" signifies something different from corruption, as, for instance the examination of witnesses in the absence of the parties, [*Plews and Middleton In re* (3), and *Harvey* v. *Shetton* (4).] or a refusal to allow the plaintiff a proper opportuuity of discussing his case: *Spittingue* v. *Carpenter* (5). He adds that the restriction imposed by the language of the Act was subsequently much disregarded for the Courts in England listened to applications to set aside awards under the statute on other grounds than the two enumerated in the section : *Veale* v. *Warner* (6). What is more, the Courts, in addition to the powers they exercised under statute, exercise inherent powers of setting aside awards : see Russell Edn. 10, p 194. Under the Arbitration Act, 1889, 52 and 53 Vict o. 49. the inherent powers of the Court were not referred to. The statutory powers of Courts to set aside award were extended to cases where an arbitrator or umpire misconducted himself or an arbitration or award had been improperly procured : see S. 11 (2). In S. 14, Arbitration Act 9 of 1899, which is largely based on the

(1) A. I. R 1930 Sind 170=121 I. C. 161=24 S. L. R. 145.

(2) [1720] 1 Stra 301.
(3) [1845] 6 Q. B. 845.
(4) [1844] 7 Beav. 455=13 L. J. Ch. 466.
(5) [1735] 3 P. W. 361.
(6) [1670] 1 Sand. 327.

English Act the grounds for setting aside an award are the same.

In *Jai Narain Babu Lal* v. *Narain Das Jaini Mal* (7) doubt was expressed by Sir Shadi Lal, C. J., whether a Court, dealing with a private award, under the Arbitration Act, has jurisdiction to determine a dispute as to the factum or the validity of the contract containing the arbitration clause. He observed that there was a divergence of judicial opinion on the question: see pp. 311 and 314 (of 3 *Lah.*); and Campbell, J., held that the question whether there was a contract and a valid contract was outside the scope of the arbitration.

Sir Shadi Lal referred inter alia to the case of *Matulal Dalmi* v. *Ramkishin Das Madan Gopal* (8) where it was held that when an award is challenged on the ground that there was no submission to arbitration by the parties the remedy lies in a regular suit and not in an application under S. 14, Arbitration Act. No reasons were given by the Court for this decision. Walsh, J., in *Sushil Chandra Das & Co.* v. *Sukhamal Bansidhar* (9) observed that questions of fact and law upon which the jurisdiction of arbitrators depends are for the Courts. It does not follow that an objection which goes to the root of the arbitrators' jurisdiction is not an objection which falls within the purview of S. 14. The Court in deciding objections to an award, is not limited to the consideration of questions which are within the jurisdiction of the arbitrator. The arbitrator has no jurisdiction to try the question whether he was corrupt, whether he was guilty of misconduct. The Court has jurisdiction to decide such questions as well as the question whether the arbitration was improperly procured. Its jurisdiction is not based upon the consent of the parties; it is statutory and inherent.

Kincaid, J. C., in *Sodawaterwala* v. *Volkart Bros.* (10) drew attention to the harm which would be caused to business firms in this Province, if parties were enabled to render the provisions of the Arbitration Act nugatory, by simply alleging that they were misled, or browbeaten, or hypnotized when signing the contract of reference. If he meant by this that a party challenging the jurisdiction of an arbitrator, could not do so by means of a suit, his view was clearly erroneous, since it is in conflict with the decision of their Lordships of the Privy Council in *E. D. Sassoon* v. *Ramdutt Ramkishen* (11), but there appears to be no reason why a speedy remedy should not be available for a person, who complains that an arbitration was improperly procured, because there was no valid reference by reasons of fraud, misrepresentation or mistake if he wishes to avail himself of it. It does no violence to language to say that an arbitration procured in this manner has been improperly procured. No doubt the tendency in England in ancient times was to construe the statutory powers of Courts very strictly and to limit its jurisdiction to set aside awards under 9 William 3, C. 15 to cases of corruption. But the later tendency was for Courts to intervene even in cases not provided for by the statute.

In *Pokar Das* v. *Forbes Campbell & Co. Ltd.* (12) it was held by Crouch, and Hayward, A. J. C. that when a party elects to proceed against individual members composing a firm any person alleged to be a member and denying his liability as such may, if he likes, appear before the arbitrators under protest and whether he has approved or not he may object to the award being filed against him on the ground that it had been improperly procured against him on the misrepresentation that he was a partner. In other words a party in his objections to the award under S. 14, Arbitration Act, can make an objection which challenges the factum of the reference so far as he is concerned and which goes to the root of the jurisdiction of the arbitration and it is within the jurisdiction of the Court to hear this objection: see also *Isribai* v. *Pevibai* (13).

Their Lordships of the Privy Council in *Sassoon* v. *Ramdutt Ramkishin* (11) held that a suit is competent when the validity of an alleged agreement to refer is challenged. They did not affirm that that was the only procedure available for a party.

(7) A. I. R. 1922 Lah. 369=69 I. C. 583=3 Lah. 296.
(8) [1920] 47 Cal. 806=69 I. C. 568.
(9) A. I. R. 1922 All. 219=67 I. C. 487=44 All. 472.
(10) A. I. R. 1923 Sind 25=82 I. C. 81.
(11) A. I. R. 1922 P. C. 374=70 I. C. 777=49 I. A. 366=50 Cal. 1 (P. C.).
(12) [1912] 6 S. L. R. 127=19 I. C. 362.
(13) A. I. R. 1930 Sind 195=121 I. C. 164.

If the party elects to file objections under S. 14, Arbitration Act, with regard to the factum or validity of the alleged reference, I am of opinion, for the reasons I have mentioned, that the Court has jurisdiction to hear the objection.

The plaintiffs filed objections to the award which covered all the facts on which they rely in the present suit. Raymond, J., in *Tayabally Abdul Hussain* v. *James Finlay & Co.* (14) held that a party dissatisfied with a private award could take such objections as the Arbitration Act allowed, and notwithstanding his having done so unsuccessfully, he could thereafter bring a suit to set aside the award on the ground of want of jurisdiction in the arbitrator. This decision was cited with approval in *Rugunathdas Ramsarup* v. *Suldyer Bruderar & Co.* (15) at p. 47 (of 7 *Lah.*) If by this decision, Raymond, A. J. C., meant that a party could under S. 14, Arbitration Act, challenge the validity of the contract and the jurisdiction of the arbitration and if unsuccessful, file a suit to set the award aside on the same grounds, with great respect I disagree with the decision.

I agree with the view of Rupchand, A.J.C., in *Khimji* v. *Nathibai* (16) where the principle of finality applies to the Court's decree with reference to all matters coming within the purview of S. 14, Arbitration Act. A party no doubt has an alternative remedy when his complaint is that owing to the absence of a valid agreement of reference the arbitrator had no jurisdiction to make an award. A suit is competent to set aside the award. But if the party elects to file objections under S. 14 as the plaintiff did with regard to the award in dispute, and his objections are heard and disallowed, it is not open to him in my opinion to have the matter inquired into again in a separate suit.

With reference to issue 2, plaintiffs have in fact sued for consequential relief; they have prayed for partition by metes and bounds and for separate possession of property. The objection with regard to S. 42, Specific Relief Act, does not appear to me to be sustainable.

(14) A. I. R. 1924 Sind 105=80 I. C. 969=17 S. L. R. 15.
(15) A. I. R. 1926 Lah. 125=92 I. C. 712=7 Lah. 42.
(16) A. I. R. 1925 Sind 42=76 I. C. 953=19 S. L. R. 360.

With regard to issue 3 under the Court-fees Act, Art. 17 (5), Sch. 2 the court-fee in a suit to set aside an award was Rs. 10. This fee has now been raised to Rs. 15. For the reasons above set forth with regard to issue 1, I dismiss the suit. Defendant 1 to have costs.

P.N./R.K. *Suit dismissed.*

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* A. I. R. 1932 Sind 23

ASTON, A. J. C.

Fakir Mahomed - Plaintiff.

v.

Fakir Mahomed Nanji and *others*— Defendants.

Suit No. 131 of 1930, Decided on 6th November 1931.

(a) Malicious Prosecution—Elements to be proved—Mere discharge of accused is no evidence of groundlessness of charge.

Discharge of the accused cannot by itself be considered as evidence of the groundlessness of the prosecution, but when the accused is discharged and he brings a suit for damages no obligation is imposed on him to prove affirmatively that he was innocent: 11 *Beng. L. R.* 321 (*P. C.*) and *A. I. R.* 1926 *P. C.* 46, *Foll.* [P 25 C 1]

(b) Malicious Prosecution—Malice is necessary.

Malice is a necessary ingredient in a suit for damages in a malicious prosecution: *A. I. R.* 1924 *Lah.* 1, *Foll.* [P 27 C 1]

*** (c) Tort— Liability — Judicial proceeding—Witnesses cannot be sued in damages for evidence given.**

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding: 11 *Beng. L. R.* 321 (*P. C.*), *Foll.* [P 27 C 1]

(d) Malicious Prosecution — Damages — Plaintiff is entitled to legitimate expenses incurred in defending himself.

In a suit for damages for malicious prosecution plaintiff is entitled to legitimate expenses incurred in defending himself in the criminal Court: 31 *Cal.* 406, *Foll.* [P 27 C 2]

(e) Malicious Prosecution—Damages—Both injury to reputation and danger to liberty are to be considered.

The Court in a suit for damages for malicious prosecution can take into consideration not only the injury to the reputation of the plaintiff but also the danger to liberty. [P 28 C 1]

Fatehchand Asudomal - for Plaintiff.

Srikishendas H. Lula — for Defendants.

Judgment.—This is a suit filed by the plaintiff to recover Rs. 5,000 from the defendants as damages for malicious prosecution. The plaintiff's case is that on or about 28th October 1929 the defendants maliciously and without reasonable or probable cause gave information to the police that the plaintiff had caused grievous hurt to defendant 1. In conse-

quence of the false information, the plaintiff was arrested on 6th December 1929 and a prosecution was launched against him, which ended in his discharge on 30th January 1930. The plaintiff lost heavily in trade; he spent large sums in defending himself, and suffered pain of body and mind. The plaintiff's particulars of the damage are as follows:

Fees to pleaders	Rs. 1,050
Miscellaneous expenses for copies and other Court expenses	Rs. 100
Loss in karkhana	Rs. 2,350
Loss of earning	Rs. 500
Pain of mind and reputation	Rs. 1,000

The defendants in their written statement deny that the information given by the defendants or any of them was given without reasonable and probable cause; they deny that it was malicious or improbable or unreasonable. The prosecution they say was launched by the police and such information as was given by them to the police was in answer to inquiries made by the police in a cognizable case; the defendants were under law bound to answer the inquiries of the police. The defendants dispute their liability for damages; they contend the alleged damages for loss in the karkhana, loss in earning and pain of mind and reputation are too remote, that the Crown is a necessary party and that the suit is bad for misjoinder.

The following were the consent issues:

1. Is the suit bad for misjoinder of parties and causes of action? (Covers para. 6 of W. S.).
2. Is the suit bad for non-joinder? (Covers para. 7 of W. S.).
3. Was the information given by the defendants or any one of them false and malicious and without probable and reasonable cause? (Covers para. 1 of the plaint and paras. 1 and 3 of W. S).
4. Was the arrest, if any, and prosecution on such as would afford any ground to the plaintiff for an action of civil liability? (Covers para. 1 of W. S.).
5. Did plaintiff suffer any damages and are the same attributable to the said arrest and prosecution? If so, to what damages, if any, is the plaintiff entitled? (Covers paras. 4, 5 and 9 of W. S.).
6. Is the claim false and vexatious? If so, are the defendants or any of them entitled to compensatory costs? (Covers para. 8 of W. S.).
7. General.

A little after 8 p. m. on the evening of 25th October, defendant 1 and his two sons, defendants 2 and 3, were driving home in a buggy. They were suddenly attacked by Khoja ruffians, disguised as Sindhis. One of them seized the reins, another struck defendant 1 with a hatchet Defendant 1 received wounds on his forehead, on his right hand, and on his arm. As a result of one of the wounds, he received, he has permanently lost the sight of his right eye. During the cowardly attack, defendant's eldest son hit one of the assailants on the face with the carriage whip. Defendant was driven to hospital. In consequence of a telephone message received by Head Constable Mahomed Shah from Dr. Khialdas that defendant 1 was lying dangerously ill, Inspector Arthur went to the Civil Hospital, about 9 p. m. and recorded the statement of defendant 1 who was in great pain. Defendant 1 said he had been set upon by three men who were Khojas near Banias crossing. He was struck by one of them named Maherali with an axe. Maherali was the only person he identified. So far as he could remember the other two did not strike him. The Head Constable recorded the statements of defendants 2 and 3. Defendant 2 said that as they were driving along Soldier Bazaar Road, they saw three men near the house of Malik Sahib on the right hand side and one man on the left hand side. The man on his side seized the reins, one of the men on the side of his father struck his father blows with a hatchet. He could not identify the men as they had covered their faces. His younger brother Sharif, defendant 3, said his statement was the same. On the following morning Habib and Sharif were called to the police station and their statements were verified by Inspector Arthur. They said the same thing. Between 26th October and 30th October Sub-Inspector Sunderdas was in charge of the investigation.

The police had discovered Sindhi's clothing lying at a distance of about 400 yards from the scene of the offence. So enquiries were made from cloth merchants whether they had sold them to anyone. Nothing resulted from this clue, but on his return the Sub-Inspector met a Makrani named Kadirbux who informed him that one Elias had told him that he had seen the incident. Elias was questioned on 28th October. He did not confirm the statement of Kadirbux, but he gave to the police the names of Gul Mahomed and Ali Mahomed. Gul Mahomed, on being questioned said he

saw the plaintiff and Meherali beating defendant 1. Ali Mahomed said the plaintiff Fakir Mahomed was one of the assailants; he did not know the names of the others. The Sub-Inspector was aware of the fact, that defendant 1 had made a statement to Inspector Arthur on the night of the offence, stating that he had only identified Meherali. He stated in evidence that he wished to know whether defendant 1 would corroborate the story of Gul Mahomed and Ali Mahomed, so he went to the hospital at 2.30 p. m. on 29th October and defendant 1 wasagain questioned. On this occasion the defendant 1 implicated the plaintiff and Rajoo as well as Meherali. On 16th November 1929 the papers were sent by the police to the Public Prosecutor for opinion. His opinion was received on 25th November and on 3rd December 1929 the A. S. P. gave orders to prosecute. The plaintiff was arrested. The three defendants gave evidence at the trial that plaintiff was one of the assailants. The plaintiff was discharged.

The decision of the Magistrate discharging the accused, considered by itself, is not evidence against the defendants of the groundlessness of the prosecution: see *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhary* (1). On the other hand the obligation is not imposed on the plaintiff to prove affirmatively that he was innocent: *Balbhaddav Singh* v. *Badrisah* (2).

It is open to me to adopt the reasons set forth in the judgment of this Court, on its appellate side, in the criminal revision application of Meherali Lalji: see Ex. 9, to the extent that they are applicable to the evidence in this case.

For the reasons so clearly set forth in that judgment, I am of opinion that it is established that defendant 1 and his sons, defendants 2 and 3 failed to identify any of the assailants on the night of 25th October. It was a dark night; there was no moon; the street light was at a considerable distance; there were only two candles in the carriage lamps, the Khoja assailants were disguised as Sindhis and were wearing "ajraks." Had any of the assailants been identified his name would have been mentioned, while the party were driving to hospital, and the boys would have mentioned his name to the police.

Defendant 1, who alleged that he had identified Meherali, clearly told Inspector Arthur, that he had failed to identify any one else, and he explained the reason why. The evidence shows that he was specifically questioned on the point. It was suggested, that defendant 1 was incapable, owing to the injuries which he had received, of giving a correct statement to the Inspector. I am of opinion that this suggestion is incorrect. The statement of defendant 1 to Mr. Arthur (Ex. 5), except as regards his alleged identification of Meherali, was in my opinion substantially a true statement. And the same applies to the statements made by defendants 2 and 3 to the Head Constable on 25th October and to Inspector Arthur on 26th October.

I also agree with the view expressed in the judgment to which I have referred that the three assailants were probably persons who objected to the reforming activity of defendant 1.

The evidence shows that there are two parties in the community. The orthodox party are followers of His Highness the Agha Khan. Plaintiff belongs to this party and his father is a prominent member of it, for he is a member of the council of the Khoja community. Defendant 1 belongs to the party of reform. Before the date of the cowardly attack on him, he was ex-communicated, on the complaint of one Mulji Ghulam Ali, because of his views and because he filed a suit against His Highness and against the council of the Khoja community. So high did feeling run against reformers, that when the father of defendant 1 died, members of the orthodox party actually objected to defendant 1 accompanying his father's body to the burial ground, and put down the corpse on the road. The matter was not settled until defendant 1 agreed to accompany the body only as far as the burial ground, and then return without entering the burial ground. The evidence does not appear to establish enmity on the part of defendant 1 against plaintiff's family. The fact that he filed a suit ten years ago against the plaintiff's father, for a trifling amount, viz. Rs. 20 or so, would not give cause to defendant 1 to

(1) [1872] 11 Beng. L. R. 321=17 W. R. 283 (P. C.).

(2) A. I. R. 1926 P. C. 46=95 I. C. 329=1 Luck. 215=29 O. C. 163 (P. C.).

feel enmity. An attempt was made by plaintiff to prove that defendant 1 was excommunicated on the complaint of plaintiff's father, but this is not established. On the contrary Ex. 23 shows the complaint was made by Mulji Ghulam Ali. There is nothing to show that plaintiff or his father joined in the objection to defendant 1 carrying the corpse of his father. Even if it is true, as plaintiff alleges, that he went to call the police, this would not give cause for enmity to defendant 1. He was doing nothing wrong. It was in his interest, that the police should come, in order that fighting and bloodshed might be averted.

Why then defendant 1 in the subsequent statement he made to the Sub-Inspector on 29th October and in his evidence in the Magistrate's Court implicate the plaintiff? I think the answer is to be found in the fact, that defendant 1 believed that the assailants were members of the orthodox party. Plaintiff is the son of a prominent member of that party; there was also the fact that defendant's son had hit one of the assailants in the face with the carriage whip and plaintiff was seen in those days going about with a mark, on his face. Sub-Inspector Sunderdas noticed the mark but he did not question plaintiff about it, fearing to rouse his suspicion.

My conclusions therefore on the evidence are as follows: Defendant 1 did not set the law in motion against the plaintiff nor did his sons. The police investigation was due to the telephonic message sent by Dr. Khialdas. When questioned by Inspector Arthur in hospital on 25 October defendant 1 made a substantially true statement, except as regards the alleged identification of Meharali. Defendant 2 and defendant 3 also told a true story to the Head Constable on the 25th and to Inspector Arthur on 26th October. None of the defendants implicated the plaintiff. Had the case rested there, no action would have been taken against the plaintiff, but in the course of their investigation the police obtained from one Elias the names of Gul Mahomed and Ali Mahomed. The persons alleged they witnessed the occurrence and both of them implicated the plaintiff. The plaintiff had been seen to bear a mark on his face and the police were informed that defendant's elder son had struck one of the assailants on the face with the carriage whip. In a further statement made by defendant 1 to Sub-Inspector Sunderdas on 29th October and in the evidence given by defendants 2 and 3 in Court they implicated the plaintiff. The statement of defendant 1 to Sub-Inspector Sunderdas and the evidence given by defendants in Court to the effect that they had actually identified plaintiff as one of the assailants was in my opinion false. The false statement and the false evidence however was not in my opinion given in consequence of malice. I am of opinion that defendants believed that their relative the plaintiff was one of the assailants.

The facts established appear to me to come short of the fact, which a plaintiff has to prove, to entitle him to damages for malicious prosecution. It cannot be said in the present case as in *Gaya Prasad Tewari* v. *Bhagat Singh* (3) that defendants were directly responsible for any charge at all being made against the plaintiff. It cannot be said as in that case that they took the principal part in the conduct of the case. Again the facts in this suit are distinguishable from those in *Balbhaddar Singh* v. *Badri Sah* (2) inasmuch as it was not the information given by the defendants to the police, which naturally led to the prosecution of the plaintiff. From the police point of view the evidence available from defendants 1, 2 and 3 against the plaintiff was at the best weak corroborative evidence contradicted by their prior statements to the police. The evidence of defendant 1 was liable to be contradicted by his own allegations in what an appellate Bench of this Court has held to be a first information. The evidence of all the defendants besides was liable to be contradicted, if the accused or their pleader were vigilant enough to exercise their right under the Criminal Procedure Code of requesting the Court to read the statements made by the defendants to the police and to supply the defence with a copy of them. The evidence of Sub-Inspector Sunderdas itself shows that he regarded the information, at best, as corroborative. Knowing the prior statement of defendant 1 he went to hospital on 29th October after having received information from Gul Mahomed and Ali Mahomed, to see whether defendant 1 would corroborate the

(3) [1908] 30 All. 525=35 I. A. 189=3 A. L. 456 (P.C.).

witnesses. In addition to the above facts there was in my opinion an absence of malice on the part of defendants and malice is a necessary ingredient: see *Abdul Shakur* v. *Lipton and Co.*, *A. I. R.* 1924 *Lah.* 1.

No evidence was given as regards the alleged subsequent statements of defendants 2 and 3 to the police. On bshalf of the plaintiff the Court was asked to draw an inference from the written statement that these defendants falsely implicated the plaintiff. The written statement however is not clear on the point. There is a denial of para. 1 and the use of the words "if any" appears to me to negative the suggestion that defendants admitted that they made the statement imputed implicating plaintiff. So far as their evidence is concerned, it is settled law that witnesses cannot be sued for damages in respect of evidence given by them in a judical proceeding: see *Baboo Gunnesh Dutt Singh* v. *Magneeram Chowdhry* (1).

As regards issue 1 there appears to me no force in the plea of misjoinder. The defendants were together at the time of the assault, they all failed to implicate plaintiff when first questioned and they implicated him subsequently. My finding is in the negative.

With regard to Issue 2, the Crown is not a necesssary party in a suit for malicious prosecution. My finding is in the negative.

My finding on issue 3 is that the information given by defendant 1 on 29th October and the evidence given by defendants implicating plaintiff was false and without reasonable and probable cause but not malicious. It is not the case of defendant 1 that he made a complaint to Sub-Inspector Sunderdas against plaintiff believing the information given by Gul Mahomed and Ali Mahomed and influenced by the fact that the surroumding circumstances indicated that members of the orthodox party had been the assailants and by the further fact that plaintiff had a mark on his face. This is not the defence. Both Sub-Inspector Sunderdas and defendant 1 deny that defendant 1 was informed of the statements of Gul Mahomed and Ali Mahomed before his further's statement was recorded.

For the reasons which I have already set forth, my finding on issue 4 is in the negative.

Issue 5 does not arise, but in case my findings on the other issues are wrong, my finding on issue 5 is as follows:

Plaintiff undoubtedly suffered damage. He had to engage a pleader to defend him. He is entitled to legitimate expenses incurred in defending himself: see *Krishna* v. *Corporation of Calcutta* (4). The alleged offence with which he was charged is punishable with seven years rigorous imprisonment. The claim for Rs. 50 for the fees of Mr. Thadani is not pressed. The claim of Rs. 1,000 for the fees of Mr. Partabrai and of Rs. 50 or Rs. 60 for gharry hire and copies appear to me excessive.

In *G. N. Gajapati* v. *Narasing* (5) the High Court of Madras held that the expenses of counsel did not constitute a proper element in damages in a suit for malicious prosecution. There was no necessity in the present suit for plaintiff to engage a pleader whose fee was Rs. 1,000. I am of opinion that Rs. 250 as a pleader's fee and Rs. 25 for out of pocket expenses would be reasonable. As regards the alleged loss in the karkhana no books have been produced, and losses due to the prosecution are not in my opinion proved. Plaintiff's case is that he spent Rs. 3,000 on the business and after four years recovered only Rs. 650 when he was forced to sell donkeys in order to pay lawyer's fees. The ordinary life of a cheap donkey however such as is required for plaintiff's business is only four or five years provided it is well fed. Spades, pickaxes, baskets, buckets and sieves are also subject to wear and tear. In addition to this there was no necessity for plaintiff in my opinion to spend Rs. 1,160 on lawyers and sundry expanses. There was no need for him therefore to have disposed of his donkeys and stock in the manner referred to by him.

With regard to the item "loss of earnings" the evidence shows that there were 10 or 12 hearings of the suit. In addition to this there would be the time spent in instructing his pleader and a criminal prosecution is not conducive to the prosperous conduct of business. On the other hand the evidence shows that it was not

(4) [1904] 31 Cal. 406=8 C. W. N. 329.
(5) [1874] 6 M. H. C. R. 85.

the time of the year when there was much business.

A sum of Rs. 150 would in my opinion be a reasonable amount to allow for loss of earnings. Plaintiff does not press his claim for the cost of medical attendance for his mother. He has claimed Rs. 1,000 for pain of mind and reputation. The Court in a suit for damages for malicious prosecution can take into consideration not only the injury to the reputation of the plaintiff but also the danger to liberty. The offence, the subject of the charge, was punishable with seven years' rigorous imprisonment. The claim of Rs. 1,000 in the circumstances does not appear unreasonable The total damages therefore had the plaintiff established the ingredients necessary to entitle him to damages for malicious prosecution would in my opinion be Rs. 1, 425.

With regard to issue 6 my finding is in the negative. Defendants 2 and 3 made an ambiguous and evasive reply in the written statement. The claim was not in my opinion false and vexatious. All the defendants in my opinion gave false evidence against plaintiff and defendant 1 in his statement on 29th October falsely implicated him. I dismiss the suit but in view of the conduct of the defendants, I make no order as to costs.

P.N./R.K. *Suit dismissed.*

A. I. R. 1932 Sind 28

MILNE, J. C. AND ASTON, A. J. C.

Abdullahkhan—Applicant,

v.

Emperor—Opposite Party.

Criminal Revn. Appln. Nos. 91 and 88 of 1931, Decided on 23rd June 1931.

(a) Criminal P. C. (1898), S. 439—High Court will entertain revision application in special cases even when Sessions Court can do so.

Though the High Court will not ordinarily enteriain revision applications when the Sessions Court has jurisdiction to entertain them, the High Court will do so in special cases : 28 *All.* 268 ; *A. I. R.* 1926 *Nag.* 285 ; 30 *All.* 116; 45 *I. C.* 397 and 36 *Cal.* 643, *Ref.* [P 29 C 1]

(b) Bombay District Police Act (1890), S. 80 (3) –S. 80 (3) covers even prosecutions by Crown.

There is absolutely nothing in the Act to show that any distinction is contemplated between various kinds of complaints and hence S. 80 (3) refers to all prosecutions and covers a prosecution instituted by the Crown ; 13 *Bom.* 389, *Ref.* [P 29 C 1, 2]

(c) Bombay District Police Act (1890), S. 80 (3)—" Act "' includes " omissions."

The intention of S. 80 (3) as expressed is to give protection even to the mala fide acts of a police officer acting as such if proceedings are not taken against him within six months; it would be unreasonable to hold that his mala fide omissions also were not covered. The word " act " should be taken in its usual sense as including " omissions." *A. I. R.* 1928 *Bom.* 352 and *A. I. R.* 1929 *Mad.* 172, *Ref.* [P 29 C 2]

(d) Criminal P. C. (1898), S. 439—High Court and Sessions Court with concurrent jurisdiction—Failure to apply to lower Court bars High Court entertaining application—Application however entertained by High Court can be disposed of on merits.

(Per *Aston, A. J. C.*)—Failure on the part of an applicant to submit his application to a lower Court having concurrent jurisdiction will operate as a bar to the application being entertained by the High Court. Where however an application has been admitted by the High Court even ex parte there is nothing to prevent the High Court from disposing of it on the merits even though no petition has been made to the Sessions Judge. So, too where special circumstances exist : 41 *All.* 587 and *A. I. R.* 1923 *Cal.* 674, *Ref.* [P 31 C 2]

(e) Bombay District Police Act (1890), Ss. 80 (3) and 51—" Under colour or in excess of a duty imposed or authority conferred by the Act "—Meaning explained — Penal Code (1860), Ss. 161 and 384.

The object of the section is to protect Magistrates, police officers and others from stale prosecutions based on the fact, that some duty imposed or authority conferred by a provision of the Bombay District Police Act, or by some rule or order or direction lawfully made or given thereunder had been neglected or misused whether such neglect or misuse was bona fide or mala fide. The section provides that the offence or wrong must be " under colour or in excess of a duty imposed or authority conferred by the Act and this by virtue of S. 51 of the Act, includes duties imposed by other laws for the time being in force. This would not include acts which are obviously offences and in no manner reconcilable with the duties or functions of a Magistrate or police officer. Neither of the offences under Ss. 161 and 384, I. P. C., come within the protection provided by S. 80 (3), Bombay District Police Act : *A. I. R.* 1928 *Bom.* 352 and *A. I. R.* 1927 *P. C.* 176, *Ref.* [P 32 C 1]

Lalchand Navalrai and *Kimatrai Bhojraj*—for Applicant.

C. M. Lobo—for the Crown.

Milne, J. C.—The opponent, a Sub-Inspector of Police, was prosecuted under Ss. 217, 218, 384 and 466, I. P. C. It was alleged that the opponent did not record the first report when a complaint of theft was made to him (S. 217), that he extorted money from the accused (S. 384), that he forged documents showing that

no theft had been committed (Ss. 218 and 466). The learned Magistrate held that the complaints under Ss. 217, 218 and 466 were barred under S. 80 (3), Bombay District Police Act, 1890, the prosecution not having been instituted within six months of the act complained of. The Crown has applied in revision against that order.

Opponent has objected at the outset that this application should have been made to the Sessions Court which has jurisdiction in the matter. He relies on *Gullay* v. *Baker Hussain* (1), *Shafaqatullah* v. *Wali Ahmed Khan* (2), *Emperor* v. *Abdussobhan* (3), *Bajirao* v. *Dadibhai* (4) and *Bepin Behari Mukerji* v. *Emperor* (5) and a circular of this Court A-1550 of 3rd August 1927. But though it has been laid down that the High Court will not ordinarily entertain such applications when the Sessions Court has jurisdiction to entertain them, it has also been laid down that the High Court will do so in special cases. There is a special reason in this case The opponent has applied that the proceedings under S. 384 should be quashed. This is a matter which must come before the High Court and it is therefore expedient that both applications should be heard together.

The Public Prosecutor has on the merits of the application contended in the first place that S. 80 (3) has no application to a prosecution by the Crown. He admits that he has no authority to support his proposition but he contends that it is absurd that a police officer who has been so clever as to escape detection for six months should on that account escape scot free. I can find no warrant for the alleged distinction between Crown cases and others; the contrary is laid down in *Queen-Empress* v. *Murarji Gokaldas* (6). Even if any distinction could be drawn in respect of cases instituted by private complainants, it would be impossible to hold that S. 80 (3) applied only to the latter when there is absolutely nothing to show that any distinction was contemplated between various kinds of complaints. S. 80 (3) refers to all prosecutions. The Public Prosecutor contends that a suit could be filed only by a private person therefore a prosecution must be by a private person. There does not appear to be any reason why the Crown should not sue one of its servants but even if the Public Prosecutor's contention were sound, that a suit contemplated by S. 80 (3) could be brought only by a private person, a prosecution could be instituted either by the Crown or by a private person. I hold therefore that S. 80 (3) covers a prosecution instituted by the Crown. The result may be unfortunate; it is not particularly so in this case as one of the major charges stands. But the section is one which the legislature might well amend.

The second contention raised was that S. 80 (3) refers only to acts and not omissions; the context shows that the section does not apply to omissions. The offence under S. 217 is the alleged omission. It is true that the words "any omission" do not go well with the words "under colour or in excess of any such duty or authority" as aforesaid. The acts of a police officer acting as such in respect of matters which fall within the scope of his duty or authority are clearly covered by the section. There is then no ground for distinguishing between acts and omissions. The intention of S. 80 (3), as expressed is to give protection even to the mala fide acts of a police officer acting as such if proceedings are not taken against him within six months: it would be unreasonable to hold that his mala fide omissions also were not covered. We are not dealing with the case of an officer who refused to function as such: whether the omissions of an officer who so refused would be protected by S. 80 (3) is another question. But where the officer is functioning as such whether bonafide or mala fide and in the present case the officer was, it is clear, acting under colour of his office even if it was for the purpose of lurking the complaint, I would hold that the word "act" should be taken in its usual sense as including omissions.

The learned Public Prosecutor has argued that the opponent did not record the first report which must be done before the investigation starts: there was

(1) [1905] 28 All. 268=3 Cr. L. J. 53=(1905) A. W. N. 279.
(2) [1908] 30 All. 116=7 Cr. L. J. 48=(1908) A. W. N. 25.
(3) [1909] 36 Cal. 643=10 Cr. L. J. 190=2 I. C. 846.
(4) A. I. R. 1926 Nag. 285=91 I. C. 247=27 Cr. L. J. 71.
(5) [1918] 3 Pat. L. J. 302=19 Cr. L. J. 589 =45 I. C. 397.
(6) [1888] 13 Bom. 389.

therefore no investigation : the Sub-Inspector of Police was not acting as a police officer : he was not therefore acting under colour or in excess of his duty or authority so as to get the benefit of S. 80 (3). On this ground *Narayan Hari* v. *Yeshwant Raoji* (7) is distinguished; the statements in that case were recorded in the course of an investigation. It is clear and it was the Sub-Inspector's duty to investigate the offence; he was ostensibly doing so; he went to the scene; the accused was secured ; the stolen property was secured and a mashirnama made; documents were prepared showing that no offence had been committed. He was then acting under colour of his duty and authority; it may be that he was acting mala fide; but as he was dealing with the complaint in his capacity of Sub-Inspector his procedure would have been under the colour of his duty and authority though he had made up his mind from the beginning to hold no real investigation. It is clear that he recorded the alleged false statements of complainant in his official capacity: it was apparently to be part of his official record to show how the matter had ended. In an analogous case, *Sivaramakrishna Ayyer* v. *Seshappa Naidu* (8), it was held that a Judge, fabricating the record of a suit which was wholly false from beginning to end, was purporting to act in the discharge of his official duties.

I am of opinion that the order of the learned Magistrate was correct and would dismiss the application No. 88 of 1931.

The opponent has also applied in Criminal Revision No. 91 of 1931 that the proceedings against him under S. 384 should be quashed. He contends that the words "under colour of" mean "in relation to": that the offence of extortion is alleged to have been committed in relation to the performance of his duty to investigate; and therefore the proceedings under S. 384 are barred under S. 80 (3).

The Sub-Inspector relies, on the ruling *Queen* v. *Sadanand Doss* (9), under S. 170, I. P. C. A person pretending to be a police officer reprimanded some villagers on account of the state of the roads in the vicinity and obtained some money from them: it was held that the act committed had some relation to the office which he pretended to hold The pretended police officer was able to commit the offence under colour of the office which he had assumed. The question whether the office assumed would have entitled the holder to do the act complained of or whether any one was under that impression was not material in that case. The words "under colour of such office" in S. 170 connote two things: the false personation and the act which could not have been done without the false personation. But in the present case the question whether the act complained of could be or was attributed to any duty or authority of the police officer is material. Both sides however knew that the Sub-Inspector of Police had no authority nor was it his duty to commit extortion: both knew that he was committing an offence.

The applicant has relied on certain rulings under S. 197, Criminal P. C. The wording both of the old and the amended section is different from the wording of S. 80 (3). In *re Mangapathi Naidu* (10) it was held that where a village Magistrate uses his authority and position to obtain a bribe sanction was necessary for his prosecution. He was in the words of the old section a public servant accused as such public servant of an offence : cf. also *Emperor* v. *Lala Khanchand* (11). Under the amended section the question whether an offence arising out of abuse of official position by an act not purporting to be official requires sanction is disputed: e. g. a Municipal President threatening injury to the property of a voter to influence his vote or criminal breach of trust by an Official Liquidator. But it would hardly have been contended that the public servant demanded the bribe or committed the other offences stated under the colour of any duty or authority. That is the wording of S. 80 (3), and it would be absurd to contend that the alleged extortion was committed under the colour of any duty or authority.

(7) A. I. R. 1928 Bom. 352=114 I. C. 246=52 Bom. 832 (F.B.).
(8) A. I. R. 1929 Mad. 172=115 I. C. 248=30 Cr. L. J. 396=52 Mad. 347.
(9) [1865] 2 W. R. 29.
(10) 2 Weir 221.
(11) A. I. R. 1922 Lah. 337=72 I. C. 523 = 24 Cr. L. J. 411.

The present case is on all fours with the case reported in *Narayan Hari* v. *Yeshwant Raoji* (7), there the investigating police officers were alleged to have assaulted certain persons in the course of their investigation.

I would therefore dismiss the application No. 91 of 1931.

Aston, A. J. C.—This is an application made by the Public Prosecutor under S. 436, Criminal P. C., for revision of an order of the learned First Class Magistrate, Saddar Station, Larkana, D/- 1st May 1931, dismissing the complaint against the accused under Ss. 217, 218 and 466, I. P. C. The accused has also made an application under S. 439, Criminal P. C., for the revision of the learned Magistrate's order of the same date, that he would inquire into the alleged offence under S. 384, I.P.C.

The facts briefly are that on 18th March 1931, a complaint was filed by Gokaldas Wadhumal, Deputy Superintendent of Police, against the accused, who is a Sub-Inspector of Police charging him with having intentionally omitted to record the first report of a theft made to him on 28th July 1930, by one Ghulam Rasul, with having extorted Rs. 64 from Pherumal, the person accused, through his brother Govind, with having forged a statement, purporting to be that of Ghulam Rasul, showing that no theft was committed, and with having destroyed a mashirnama prepared by a policeman whom he had sent to investigate. The learned Magistrate issued process under Ss. 217, 218, 384, and 466. I. P. C. It was contended at the trial that no prosecution could be entertained or continued against the accused by reason of S. 80 (3), Bombay District Police Act 4 of 1890, since the complaint was filed more than six months after the acts complained of. The learned Magistrate upheld the contention and dismissed the complaint with regard to Ss. 217, 218 and 466, I. P. C. He disallowed the contention with regard to the alleged offence under S. 384, I. P. C., and decided to proceed with the inquiry into that alleged offence.

With regard to the application filed by the learned Public Prosecutor a preliminary objection has been raised by the defence that since S. 436, Criminal P.C., gives concurrent jurisdiction to the Sessions Judges and District Magistrate and no application has been made to the Sessions Judge the High Court will not entertain it. Reliance is placed on *Gullay* v. *Bakar Husain* (1), *Shafaqatullah* v. *Wali Ahmed* (2), *Emperor* v. *Abdus Sobhan* (3), and *Bepin Behari Mukerji* v. *Emperor* 4) and to the circular issued by this Court dated 3rd August 1927. It is a recognized rule of practice no doubt that failure on the part of an applicant to submit his application to a lower Court having concurrent jurisdiction will operate as a bar to the application being entertained by the High Court: see Mitra, 7th Edn. p. 1135. Where however an application has been admitted by the High Court, even ex parte, there is nothing to prevent the High Court from disposing of it on the merits even though no petition has been made to the Sessions Judge : *Emperor* v. *Mansur Husain* (12), and *Abdul Mattab* v. *Nanda Lal Khatel* (13), so too where special circumstances exist. In the present case it will be necessary for the determination of the accused's application under S. 439, Criminal P. C., to consider the validity of the learned Magistrate's order with regard to the alleged offence under S. 384, I. P. C. and the principles of law applicable to the facts complained will have to be consiered. There will be no saving of time in referring the applicant to a Sessions Judg with regard to his application under S. 436 and a rule has been granted. We have decided in the special circumstances of this case to dispose of this application ourselves on the merits.

It is contended by the learned Public Prosecutor that S. 80 (3), Bombay District Police Act, has no application to prosecutions instituted by the Crown and that its object is to protect public servants from stale prosecutions by members of the public In support of this contention, reliance is placed on language in S. 80 having reference to suits, and to the alleged absence of other instances of limitation agaist the Crown. The doctrine *nullum tempus occurit regi* however has been largely qualified by the legislature in modern times: see Broom's Legal Maxims 3rd Edn., p. 62 and the words in " in any case of the alleged

(12) [1919] 41 All. 537=20 Cr. L. J. 347 = 50 I. C. 827.

(13) A. I. R. 1923 Cal. 674 = 77 I. C. 990 = 25 Cr. L. J. 526=50 Cal. 423.

offence the prosecution shall not be entertained," seem to me wide enough to cover not only complaints filed by private individuals, but also complaints filed by the police or by a Public Prosecutor under instructions from a Local Government. It is suggested that it could never have been the intention of the legislature to give so wide a protection to the public servants referred to in S. 80 (3) and that unless the protection is limited to private complaints a public servant has only to conceal a crime for six months to be immune. A reference to the Bombay District Police Act however shows that S. 80 (3) does not provide a six months period of limitation for the prosecution of Magistrates, police officers and certain other persons acting under their orders with regard to all offences.

The object of the section was to protect Magistrates, police officers and others from stale prosecutions based on the fact that some duty imposed or authority conferred by a provision of the Bombay District Police Act or by some rule or order or direction lawfully made or given thereunder had been neglected or misused whether such neglect or misuse was bona fide or mala fide. The section provides that the offence or wrong must be "under colour or in excess of a duty imposed or authority" conferred by the Act and this by virtue of S. 51, Bombay District Police Act, includes duties imposed by other laws for the time being in force: see 52 *Bom.* 867. But since the offence must be "under colour or in excsss of a duty or authority" the act for which protection is given by S. 80 (3) must be an act which appears to be done in the lawful discharge or a duty or in the lawful exercise of an authority conferred by the Bombay District Police Act or other law for the time being in force. This would not include acts which are obviously offences and in no manner reconcilable with the duties or functions of a Magistrate or police officer, such as unprovoked assault: see *Narayan Hari* v. *Yeshwant Raoji* (7) (at p. 867 *of* 52 *Bom.*), though the language might protect a police officer who had used excessive force in making a lawful arrest.

It is suggested on behalf of the accused that the charge if any with regard to the sum of Rs. 64 should be under S. 161, I. P. C., and not under S. 384, I. P. C. But neither of these offences seem to me to come within the protection provided by S. 80 (3), Bombay District Police Act. The taking of bribes is no more reconcilable with the duties or functions of a Police Sub-Inspector than the extortion of money. Neither could in my opinion be regarded as an act committed under colour of a duty or authority. A number of cases have been cited having reference to sections differently worded in the Indian Codes. Such cases have reference to an entirely different class of offence and provide protection of a different character. We cannot properly be guided by them in arriving at the meaning of S. 80 (3), Bombay District Police Act. Nor can we be guided by English authorities on different expressions in English statutes: see *Bhaychand Dagdusa* v. *Secy. of State* (14) cited by Fawcett, J., in *Narayan Hari* v. *Yeshwant Raoji* (7) (at p. 869 *of* 52 *Bom.*). The words "acts" under the Bombay General Clauses Act include omissions where such inclusion is not repugnant to the words in the context.

At first sight the expression "an omission" under colour of a duty or authority" seems perhaps incongruous, but a little reflection shows that an omission to act might well be under colour of a duty. If a complaint, for instance, were made to a police officer of a noncognizable offence, it would be his duty to refrain from taking cognizance, and if a police officer, while ostensibly acting in the discharge of his duties as such, is guilty of illegal omissions, S. 80 (3), Bombay District Police Act, read with the Bombay General Clauses Act, would in my opinion protect him against stale prosecutions instituted more than six months after the alleged omissions. For the reasons above mentioned I am of opinion that the learned Magistrate rightly decided that the alleged offences under Ss. 217, 218 and 466, I. P. C., were covered by S. 80 (3), Bombay District Police Act, and that it was his duty to proceed with the inquiry into the alleged offence under S. 384, I. P. C. I would therefore dismiss both applications for revision.

B.V./R.K. *Applications dismissed.*

(14) A. I. R. 1927 P. C. 176=104 I. C. 257=54 I. A. 338=51 Bom. 725 (P.C.).

* A. I. R. 1932 Sind 33

RUPCHAND, A. J. C.

Chainrai Valiram—Plaintiff.

v.

The Sunday Times, Ltd.—Defendants.

Civil Suit No. 81 of 1930, Decided on 28th August 1931.

***(a) Insolvency—Defamation suit for damages can be lodged by insolvent—Damages do not belong to his trustees—Part of claim referring to injury to his estate — Still suit will proceed — Provincial Insolvency Act (1920), S. 29.**

An insolvent is entitled to sue for defamatory words whether published before or after his adjudication ; and such damages as he may recover will not belong to his trustees. Though in such a suit for damages for defamation of the insolvent a part of the claim refers to injury to the insolvent's estate, the insolvent may still carry on the suit as the right of action for the injury to his character and reputation remains vested in him : *Beckham* v. *Drake*, (1841) 2 *H. L. C.* 579 ; *Exp. Graham*, (1870) 21 *L. T.* 802 ; *Exp. Vine*, (1878) 8 *Ch. D.* 364 and *Wilson* v. *United Counties Bank, Ltd.* (1920) *A. C.* 102, *Rel. on.* [P 33 C 2]

*** (b) Civil P. C. (1908), S. 151 and O. 25—Case not falling within scope of O. 25—Still provisions of S. 151 will apply.**

The mere fact that a case does not fall within the four corners of O. 25 does not prevent the Court from acting under S. 151 ex debito justiciae and to prevent the abuse of its process if there be any occasion for it. It is somewhat difficult to hold that because the legislature has provided for security being ordered in certain specified cases that the legislation thereby intended to deprive the Court of its inherent jurisdiction to make similar orders in cases not specifically provided for : 2 *Cal.* 233 (*P.C.*) and 33 *Cal.* 927, *Ref.*; 14 *Cal.* 533 ; *A. I. R.* 1914 *Cal.* 38 and 27 *Bom.* 100, *Rel. on.*; *A.I.R.* 1924 *Cal.* 251, *Expl. & not Foll.* [P 34 C 1, 2]

(c) Civil P. C. (1908), S. 151 — Inherent powers under S. 151 should be exercised in fitting cases.

Section 151 expressly provides for the exercise of the inherent powers of the Court in befitting cases : 33 *Cal.* 927, *Rel. on.* [P 35 C 1]

(d) Civil P. C. (1908), O. 25, R. 1—Poverty or insolvency of plaintiff is no sufficient ground for ordering him to give security for costs for proceeding with suit—Insolvency.

Mere poverty or insolvency of the plaintiff is not a sufficient ground for ordering him to give security for costs as a condition precedent to his going on with the suit. The case is however different where, in addition to his being a pauper, he is a mere nominal plaintiff and is carrying on litigation for the sole benefit of another person. [P 35 C 1]

Though an insolvent plaintiff can be compelled to hand over the fruits of his suit to the Official Assignee for the benefit of his creditors, he cannot be said to be a nominal plaintiff : *Cowell* v. *Taylor*, (1885) 31 *Ch. D.* 34 and *Cook* v. *Whellok*, (1890) 24 *Q. B. D.* 658, *Rel. on.* [P 35 C 2]

Pahlajsing B. Advani—for Plaintiff.

Isardas Podharam—for Defendants.

Judgment.—This is an application by the defendant company for an order that the plaintiff be directed to give security for costs as a condition precedent to his proceeding with the suit.

His claim is for recovery of Rs. 20,000 damages for defamation. Paras. 6 and 7 of his plaint give the particulars of his cause of action and read as follows :

"6. That in the issues of the said paper among others bearing dates 17th March 1929, 7th April 1929 and 14th April 1929, hereto annexed and marked 1, 2 and 3, articles and letters damaging to the plaintiff, falsely alleging directly and/or with innuendoes and insinuations inter alia to the following effect :

(a) That the plaintiff has become insolvent ;

(b) That the plaintiff was connected with and interested in causing of fires of book depots and bookstalls at various places mentioned in the articles and that the same were the acts of incendiarizm ;

(c) That the concern in Lahore in the name of the Standard Book Depot which had caught fire was really, though not ostensibly, the concern of the plaintiff or one in which he was interested ;

(d) That the Standard Bookstall, Quetta, which had caught fire belonged to the plaintiff.

7. That the statements, innuendoes and insinuations contained in the aforesaid articles, inclusive of those specified above, are false and grossly defamatory of the plaintiff's reputation as a man and as a trader, and constitute a serious attack on his honesty, probity, solvency, credit and his social status and business standing, and the plaintiff has thereby suffered great pain and worry of mind, and loss of custom and credit and confidence of various business houses and banks and fallen in the estimation of others."

Since the institution of the suit the plaintiff has been adjudicated as an insolvent. So far the Official Assignee has not intervened to claim any interest in the claim in suit and hence the present application.

Now, there is a marked difference between the relative provisions contained in the Civil Procedure Code with regard to security for costs in suits, in appeals and in certain other special cases.

Order 41, R. 10, Civil P. C., relates to appeals. It confers a very wide discretion on the Court to order an appellant to furnish security for the costs of the appeal or of the original suit or of both. But as the suit has not reached that stage, this rule has no application.

Order 22, R. 8, Civil P. C., which empowers an assignee or receiver of an insolvent to furnish security, has equally no application. It only applies when the assignee or receiver might maintain the suit for the benefit of his creditors and not otherwise.

It is well settled that an insolvent is entitled to sue for defamatory words, whether published before or after his ad-

judication ; and that such damages as he may recover will not belong to his trustees : *Beckham* v. *Drake* (1), *Exp. Graham, In re Job* (2) and *Exp. Vine, In re Wilson* (3). In the last recited case, James, L. J., has said :

"The same principle holds with regard to a wrong done to him personally, for which the right of action does not pass to the trustee. Why should not the bankrupt sue in such a case? And why should he sue for the benefit of his trustee who cannot himself sue ? There never has been an order to intercept damages recovered against a wrong-doer by an undischarged bankrupt. If he had saved money, and invested and accumulated it, that would be property which would be distributable, but that will not enable the trustee to intercept the money, nor prevent the bankrupt from spending it for the maintenance of himself and his family."

There is no express allegation in the plaint that the defamatory words resulted in injury to the insolvent's estate ; injury to his credit is something different from injury to his estate. But assuming that a part of the claim refers to injury to the insolvent's estate, that is not enough. The insolvent may still carry on the suit as the right of action for, the injury to his character and reputation remains vested in him: *Beckham* v. *Drake* (1) and *Wilson* v. *The United Counties Bank Ltd.* (4). In either case the insolvent is entitled to maintain the present suit.

Order 25, Civil P. C., has likewise no application, as it provides for discretion being exercised by the Court in a pending suit only where the plaintiff does not reside in British India or leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming when required to pay costs, and possesses no sufficient immovable property in British India to meet such costs, or where the plaintiff is a woman.

The learned counsel has argued, and I think rightly, that the mere fact that a case does not fall within the four corners of O. 25, Civil P. C., does not prevent the Court from acting under S. 151 ex debito justiciae, and to prevent the abuse of its process if there be any occasion for it.

In *Ram Coomar* v. *Chunder Canto* (5), while holding that an action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a champertous suit in the absence of malice and probable cause, their Lordships of the Privy Council observed :

"It is the ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay proceedings until it is given."

And later on their Lordships observed :

"It has been a misfortune to the plaintiffs that security was not obtained for the costs in the course of the former suit."

This case was decided under the old Code of 1859 which contained no provision for security for costs. It is indubitably an authority for the exercise of the inherent jurisdiction of the Court to order security for costs in fit cases.

Assenoolla v. *Solomon* (6), *Harinath* v. *Ram Kumar* (7) and *Bomanji* v. *Nusserwanji* (8), are all decisions under the subsequent Civil Procedure Code where the Courts have held that, although a case may not fall under the specific provisions contained in those Codes as to security, a plaintiff may be ordered to give security.

With all respect I am not prepared to accept the view expressed by Cuming, J., in *Bhairabendra Narain Deb* v. *Udai Narain Deb*, *A. I. R.* 1924 *Cal.* 251, at p. 256, where his Lordship has said :

"With great respect, it seems to me that it is very doubtful if the inherent power of the Court can be called in aid in the present case. Had the Code been entirely silent on the point, then possibly the inherent power of the Court might have been involved, but when the Code does make certain provisions for the taking of security for costs from the plaintiff, it seems to me that in those cases only may costs be taken from the plaintiff and that for security for costs to be demanded from the plaintiff, the case must fall within the purview of O. 25, R. 1."

I am afraid these observations lose sight of the fact that the provisions of the Code of Civil Procedure are not exhaustive and do not purport to deal with every possible case, and it is somewhat difficult for me to hold that because the legislature has provided for security being ordered in certain specified cases that the legislation thereby intended to deprive the Court of its inherent jurisdiction to make similar orders in cases not specifically provided for.

In this connexion it will be sufficient to refer to the observations of Woodroffe, J., in *Hukumchand Boid* v. *Kamalanand Singh* (9) at p. 931, where it is said:

(1) [1841] 2 H. L. C. 579=11 M. & W. 315=12 L. J. Ex. 486=13 Jur. 921.
(2) [1870] 21 L. T. 802.
(3) [1878] 8 Ch. D. 364=47 L. J. Bk. 116=38 L. T. 730=26 W. R. 582.
(4) [1920] A. C. 102=88 L. J. K. B. 1033=122 L. T. 76.
(5) [1877] 2 Cal. 233=4 I. A. 23 (P.C.).
(6) [1887] 14 Cal. 533.
(7) A. I. R. 1914 Cal. 38=20 I. C. 703.
(8) [1903] 27 Bom. 100.
(9) [1906] 33 Cal. 927=3 C. L. J. 67.

"In other words, it is contended that the Court has no power in matters of procedure other than those expressly conferred by the Code. This argument assumes that the Code was intended to be exhaustive . . . . . For my part I am always slow to believe that the Court's powers are unequal to its desire to order that which it believes to be just. As was said in *Durga Dihal Das* v. *Anoraji* (10) the Code is not exhaustive; there are cases which are not provided for in it, and to adopt the observations made in that case I decline to believe that those are cases, where this Court must fold its hands and allow injustice to be done. With the exception of a passing observation of Strachey, C. J., in *Habib Bakhsh* v. *Baldeo Prasad* (11), I am not aware of any authority, which has laid down that the Code is exhaustive. The essence of a Code no doubt is to be exhaustive on the matters in respect of which it declares the law. On any point specifically dealt with by it the law must be ascertained by interpretation of the language used by the legislature. In respect of such matters the Court cannot disregard or go outside the letter of the enactment according to its true construction. The Code therefore binds all Courts so far as it goes. It does not however affect previously existing powers, unless it takes them away."

These observations apply with greater vigour to the present Code which gave effect to this and other similar rulings by adding S. 151, Civil P. C., which expressly provides for the exercise of the inherent powers of the Court in befitting cases.

The fact however remains that the defendant has not made out a case which requires the exercise of the Court's inherent jurisdiction.

From the very early times the Courts in England have refused to recognize the mere poverty or insolvency of the plaintiff as a sufficient ground for ordering him to give security for costs as a condition precedent to his going on with the suit. The case is however different where, in addition to his being a pauper, he is a mere nominal plaintiff and is carrying on litigation for the sole benefit of another person: See Halsbury, Vol. 23, para. 271 (1) and the authorities quoted thereunder.

This rule was stated by Bowen, L. J., in *Cowell* v. *Taylor* (12) at p. 38, as follows:

"The general rule is that poverty is no bar to a litigant; that, from time immemorial, has been the rule at common law, and also, I believe in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow. The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest and handed it over to some one else, that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit."

(10) [1895] 17 All. 29=(1895) A. W. N. 190.
(11) [1901] 23 All. 167=(1901) A. W. N. 39.
(12) [1885] 31 Ch. D. 34=55 L. J. Ch. 92=53 L. T. 483=34 W. R. 24.

It is argued that in so far as the plaintiff could be compelled to hand over the fruits of his suit to the Official Assignee for the benefit of his creditors, he was a nominal plaintiff.

A somewhat similar argument was advanced in *Cook* v. *Whellock* (13) at 661, and in dealing with it, Lord Esher, M. R., said:

"It is alleged here that the plaintiff is a mere nominal plaintiff. This cannot be said of him in the usual sense in which it is said in these cases, viz., that he is a person really put forward by some other person behind him to bring an action on behalf of that person. It is said that he is a nominal plaintiff, because if he recovers the money claimed, he will hold it as trustee for his trustee in bankruptcy. I doubt whether this can be said in the proper sense of the words. If he recovered in the action, the only Court I think that could interfere would be the Bankruptcy Court, to which the trustee would have to make an application that the money should be paid to him."

This argument is therefore without any substance.

No other argument has been advanced by the learned counsel which requires special mention.

I hold that no case has been made out for the grant of this application under the exercise of my inherent jurisdiction, and dismiss this application with costs.

B.V./R.K. *Application dismissed.*

(13) [1890] 24 Q. B. D. 658=59 L. J. Q. B. 329=62 L. T. 675=38 W. R. 534.

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* A. I. R. 1932 Sind 35

MILNE, J. C. AND RUPCHAND, A. J. C.

Gagumal Metharam—Appellant.

v.

Allahbux and *others*—Respondents.

Second Appeal No. 43 of 1928, Decided on 28th September 1931.

*** Limitation Act (1908), Art. 144—Decree for possession and ownership breaks continuity of possession of defendant.**

Whether a prior decree to which a defendant is a party operates as breaking the continuity of possession of the defendant or not must necessarily depend on the nature of the decree. Where however the decree is in favour of a plaintiff for possession as owner and is passed against a defendant who is in possession, it would break the continuity of the possession of the defendant and prevent him from relying on his prior possession

for the purposes of limitation under Art. 144 (*Case law discussed*). [P 38 C 2]

Dipchand Chandumal—for Appellant.

Asudomal Rewachand — for Respondents.

Rupchand, A. J. C.—The facts giving rise to this second appeal are hardly in dispute.

In September 1909 one Tikomal purchased a certain property in execution of a mortgage decree passed in Suit No. 153 of 1907 against one Alibux. He failed to obtain possession of the property in execution proceedings, as he was obstructed by certain relatives of the judgment-debtor. On 15th April 1916, he sold the property to one Choithram. On 22nd September 1916, Choithram filed an execution application for possession, but his application was dismissed on certain technical grounds. He then instituted suit No. 31 of 1917 against the heirs of Alibux, who are the present defendants, for possession. On 23rd October 1917, he obtained a decree for possession. In May 1919, he obtained an order in execution proceedings for dispossession of the defendants and took the bailiff with him to the premises. On 6th August 1919, he passed a receipt in favour of the bailiff stating that he had obtained possession through him, and the decree was accordingly noted as satisfied. On 4th February 1922, he sold the property to the plaintiff, and in 1925 the plaintiff filed the present suit against the defendants for possession.

The plot in dispute originally formed part of a bigger plot which had been subdivided into three portions and each portion given a different survey number. The survey number of the property as also its area had been wrongly stated in the civil proceedings and in the sale deeds. But both the Courts have found that the property in dispute is survey No. 787 measuring 391/6 square feet. This point is no longer in issue.

Both Courts have however held that in August 1919 the plaintiff did not obtain actual or physical possession of the property from the defendants as alleged by him and that all that he got through the bailiff was symbolical possession of the property ; and have further held that the property in suit being then in the actual occupation of the defendants, such possession was of no effect and could not be treated as the starting point of limitation. Both Courts have therefore dismissed the plaintiff's suit. It is against that finding that he has now come to us in second appeal.

Now, the effect of obtaining symbolical possession instead of actual possession in execution proceedings has been the subject of conflicting rulings.

In the Full Bench Case of *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1), Garth, C. J., observed :

" In the one case, the delivery of the land is to be made by placing the plaintiff in direct possession. In the other, the delivery is effected by the officer of the Court by going through a certain process prescribed by S. 224, and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendant. This is the only way in which the decree of the Court awarding possession to the plaintiff, can be enforced ; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, we consider that, as against the defendant, the delivery thus given must be deemed equivalent to actual possession."

It is no doubt true that in this case the only possession which the execution-creditor could obtain in the previous proceedings was symbolical possession ; but the Calcutta High Court has however consistently held that delivery of symbolical possession even erroneously given in cases where delivery should be given by actual possession is not a nullity and has as against the judgment-debtor and his representatives the same effect for purposes of limitation as actual possession : *Lokessur Koer* v. *Purgun Roy* (2) ; *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (3), *Hari Mohan Shaha* v. *Baburali* (4), *Bhulu Beg* v. *Jatindra Nath Sen*, *A. I. R.* 1923 *Cal.* 138 ; *Jogindra Krishna* v. *Joy Sahib*, *A. I. R.* 1926 *Cal.* 1172.

In *Hari Mohan Shaha* v. *Baburali* (4), at p. 719, Bannerji, J., said :

" For though actual possession might have been taken by the auction-purchaser in this case, still as he obtained possession in some form, through an officer of the Court, and by process of law, and as the judgment-debtor was, and must be taken to have been, a party to the proceeding relating to the taking of possession, it is not open to the judgment-debtor to say that the whole proceeding should be taken as a nullity, and that the execution purchaser should still be treated as one who has never obtained any possession at all. If, after the date on which symbolical possession was given to the auction-purchaser, the judgment-debtor continued in possession, his possession became that of a trespasser from that date, and gave the auction-purchaser a fresh cause of action, a suit

(1) [1880] 5 Cal. 584=5 C.L.R. 548 (F.B.).
(2) [1881] 7 Cal. 418.
(3) [1885] 11 Cal. 93.
(4) [1897] 24 Cal. 715.

upon which should be governed by Art. 144, Sch. 2, Lim. Act."

Prior to 1912 a somewhat similiar view was taken by several other High Courts. But in that year in the case of *Mahadev Sakharam* v. *Janu Namji Hatle* (5), a Full Bench of the Bombay High Court overruled the previous decisions of that Court reported in *Gopal* v. *Krishnarao* (6) and *Mahadeo* v. *Parshram Bhawanchand* (7), and held that symbolical possession was not real possession nor equivalent to real possession under the Code of Civil Procedure except where the Code expressly or by implication provided that it shall have such effect, and that therefore where an auction-purchaser had obtained symbolical possession against the judgment-debtor who was in actual possession, such symbolical possession did not prevent limitation continuing to run in favour of the judgment-debtor. The judgment of the Full Bench was delivered by Scott, C. J., and consists of a few lines, and his Lordship has not referred to the Calcutta rulings or discussed the principle on which they were based.

In *Radha Krishna* v. *Ram Bahadur* (8), their Lordships of the Privy Council approved the dictum of Garth, C. J., in *Juggobundhu Mukerjee* v. *Ram Chander Bysack* (1), and laid down in very general terms that symbolical possession was sufficient to interrupt adverse possession when the person setting up adverse possession was a party to the execution proceedings in which symbolical possession was given.

In *Govindasami Pillai* v. *Pethaperumal Chetty* (9), the Madras High Court resiled from its previous decisions and took a view similar to the one in *Mahadev Sukharam* v. *Janu Namji Hatle* (5).

In *Jang Bahadur Singh* v. *Hanwant Singh* (10), the Allahabad High Court has taken the same view. In both these cases, no reference has been made to *Radha Krishna* v. *Ram Bahadur* (8), although in the Allahabad case some of the Calcutta rulings have been discussed.

In *Shridhar Madhavrao* v. *Ganpati Punja* (11), at p. 561, Scott, C. J., distinguished the Privy Council case and the case of *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1), referred to above, on the ground that in both those cases the property was in possession of tenants, and that as actual possession could not be given by the Court, the dictum of their Lordships should be limited to those cases only where no actual possession could be granted. A somewhat similar view was taken by Pratt and Kanga, JJ., in *Raghunath Vaman* v. *Kondiba Babaji* (12). But in *Mahadevappa Dundappa* v. *Bima Doddapa* (13), Macleod, C. J., preferred to apply the dictum of their Lordships of the Privy Council to cases where the plaintiff was in a position to obtain actual possession and had only obtained symbolical possession and decided the case on another ground as well by observing :

" In my opinion, in this case, it cannot be said that the question of adverse possession arises in face of the plaintiff's decree of February 1914. That would put a stop to any adverse possession prior to the date of the decree . . . ."

The full effect of these observations becomes very prominent and clear if we consider what article of the Limitation Act applies to a case of this nature.

Either the execution-creditor has obtained effective possession in the previous proceedings or not. If he has, then Art. 142, Lim. Act, applies and the period of twelve years can run only from the date on which he subsequently lost that possession. If he has not obtained effective possession, Art. 144 applies, and before the defendant can succeed on the plea of limitation, he must satisfy the Court that not only was he in possession of the property but that his possession was adequate in continuity, in publicity and in extent to show that it was possession adverse to the competitor : *Radhamoni Debi* v. *The Collector of Khulna* (14) ; *Kuthali Moothavar* v. *Peringati Kunharankutty* (15) ; *Jahandad Khan* v. *Abdul Ghafur Khan*, *A.I.R.* 1930 *P.C.* 281. If a decree has been obtained against him for possession as owner, such decree breaks the continuity of his possession and adverse possession can only commence from the date of the decree. If that be so, it is immaterial to consider the consequences of obtaining symbolical possession where

(5) [1912] 36 Bom. 373=14 I.C. 447 (F.B.).
(6) [1901] 25 Bom. 275=2 Bom. L. R. 1021.
(7) [1901] 25 Bom. 358=2 Bom. L. R. 1087.
(8) A.I.R. 1917 P.C. 197=43 I.C. 268 (P.C.).
(9) [1918] 44 I.C. 839.
(10) A.I.R. 1921 All. 9=63 I.C. 212=43 All. 520 (F.B.).
(11) [1919] 43 Bom. 559=51 I.C. 72.
(12) A.I.R. 1922 Bom. 2=68 I.C. 91=46 Bom. 932.
(13) A.I.R. 1922 Bom. 27=66 I.C. 320=46 Bom. 710.
(14) [1900] 27 Cal. 943=27 I.A. 136=7 Sar. 714 (P.C.).
(15) A.I.R. 1922 P.C. 181=66 I.C. 451=48 I.A. 395=44 Mad. 883 (P.C.).

the proper remedy was to obtain actual or physical possession.

In the suit of 1917, the plaintiff had obtained a declaration of his title as owner and an order for possession. This decree was passed against the defendants and broke the continuity of their possession, and in our opinion, the adverse possession of the defendants, if any, commences from the date of the decree.

Our attention has been invited to several decided cases where the prior decree relied upon was not for possession. These rulings are clearly distinguishable : In *Singaravelu Mudaliar* v. *Chokkalinga Mudaliar* (16), the article of limitation which applied was Art. 124, and the observations of Venkatasubba Rao, J., are therefore obiter. It will also appear that his Lordship was not referred to any decided cases in which a decree in favour of the owner for possession has been held not to break the continuity of prior possession for the purpose of Art. 144. On the contrary the observations at p. 534 (of 46 *Mad.*) show that the case of *Ayissa* v. *Lakshmana Prabhu* (17), referred to by his Lordship, is to a certain extent an authority in support of the contrary view.

The case of *Subbaiya Pandaram* v. *Mohamed Mustapha Marcayar* (18), was a case where the former decree had only declared the validity of the trust and their Lordships very pertinently observed at p. 755 (of 46 *Mad.*) :

"At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been subject to a trust disposition, and therefore ought not to have been seized, did not disturb or affect the quality of his possession ; it merely emphasized the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late."

The case of *Mohamed Ibrahim* v. *Shadia Mohamed*, *A. I. R.* 1930 *Lah.* 297 is likewise a case of a mere declaratory decree and the observations of Sir Shadi Lal, C.J., at p. 299 are, as stated therein, limited to the facts of that case.

The case of *Sunderdas* v. *Mohamed Akrams*, *A. I. R.* 1930 *Lah.* 384 and 385, to which also Sir Shadi Lal, C. J., was a party, is a case where delivery of symbolical possession was held to be the starting point of limitation. In that case, Hilton, J., said :

" If on the other hand Shahbaz was in 1914-15 a tenant-at-will under the plaintiff (as recorded in the settlement record of 1905) or a trespasser who had less than 12 years adverse possession at his credit, then the formal ejectment of Shahbaz and the formal delivery of possession to the plaintiff in 1915 would have the effect either of terminating the tenancy (in which case adverse possession of the defendants did not begin until 1916) or else of interrupting the adverse possession of Shahbaz. In *Radha Krishna* v. *Ram Bahadur*, *A. I. R.* 1917 *P. C.* 197, it was held by their Lordships of the Privy Council that symbolical possession avails to dispossess those persons who were parties to the proceedings in which it was ordered and given. The doctrine is wide enough to cover the facts of the present case."

Whether a prior decree to which a defendant is a party operates as breaking the continuity of possession of the defendant or not must necessarily depend on the nature of the decree. Where however the decree is in favour of a plaintiff for possession as owner and is passed against a defendant who is in possession it would in our opinion, break the continuity of the possession of the defendant, and prevent him from relying on his prior possession for the purposes of limitation under Art. 144.

We are not at present concerned with the plea that a second suit for possession on the same cause of action is not competent or that it is not open to a plaintiff to file a second suit when he has allowed his remedy by way of execution of the decree passed in his favour to get statute barred. There is no plea to that effect in this case, and the plaintiff had admittedly executed his decree within the time allowed. We would therefore refrain from expressing any opinion upon that question.

As the present suit was instituted within eight years of the prior suit, it is also not necessary for us to consider whether the starting point for the purposes of limitation is the date of the decree or the date of the subsequent order granting symbolical possession or whether such order is a nullity or not.

We accordingly allow this appeal and decree the plaintiff's suit on the ground that the former decree broke the continuity of the possession of the defendants and that the period of limitation ran from that date.

With regard to costs, we think that the plaintiff was to blame to a certain extent. He delayed in filing his second suit for eight years, and a certain amount of costs

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(16) A.I.R. 1923 Mad. 88=70 I.C. 994=46 Mad. 525.
(17) [1911] 9 I.C. 795.
(18) A.I.R. 1923 P.C. 175=74 I.C. 492=50 I.A. 295=46 Mad. 751 (P.C.).

have been unnecessarily incurred in the trial Court in consequence of a wrong survey number having been shown in the plaint. We accordingly order that each party should bear his own costs of the suit in the trial Court, but that the plaintiff should recover his costs of both the appeal Courts from the defendants.

K.N./R.K. *Appeal allowed.*

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* A. I. R. 1932 Sind 39

WILD, J. C. AND RUPCHAND, A. J. C.

Heerji Jivraj—Appellant.

v.

Firm of Valabram Mulji — Respondents.

First Appeal No. 68 of 1928, Decided on 21st November 1930, from order of Additional Judicial Commissioner, Sind.

*** Provincial Insolvency Act (1920), Ss. 61 (4), 79 and 5—Creditors of firm as well as creditors of each individual partner have to prove their debts—Firm adjudicated insolvent—No rules framed under S. 79 and private creditor not proving his debts—Such failure to frame rules does not override provisions of law exempting insolvent of his liability to pay debts on discharge—In absence of such rules provisions of Civil Procedure Code apply in view of S. 5.**

An order passed in the insolvency proceedings against a firm is an order passed against each individual partner in that firm. It is not only incumbent on the creditors of a firm which has been adjudicated as insolvent but also on the creditors of each individual partner to prove their claims in the insolvency proceedings and it would be unfair to an insolvent whose property has vested in the Official Receiver for the benefit of his creditors to be harassed again by one of such creditors merely and solely because the order of adjudication was not passed in an application directed against him but against a firm in which he was partner or because for the sake of convenience the Court passes an order against the firm and does not pass a specific order against each individual partner in such firm. The fact that a private creditor could not prove his debt on account of the failure of the Court to frame rules under S. 79 cannot override the provisions of the law which exempt an insolvent from his liability of his debts prior to the date of his insolvency on his obtaining a discharge. In the absence of such rules the provisions of the Civil Procedure Code apply to insolvency proceedings in view of S. 5.

[P 39 C 2, P 40 C 1]

L. P. Ferro—for Appellant.

Kimatrai Bhojraj—for Respondents.

Judgment.—This appeal arises out of execution proceedings.

The appellant Heerji Jivraj worked at one time as a partner in the firm of Rawji Hirji. That firm was adjudicated insolvent in Insolvency Case No. 3 of 1921. On 2nd June 1925, the learned Judicial Commissioner Mr. Kennedy passed an order of discharge which reads as follows:

"I discharge the firm of Rawji Hirji (Rawji Jethabhai and Hirji Jivraj) insolvents."

The firm of Jivraj Lakhamsi had obtained a decree in Suit No. 19 of 1915 against the firm of

"Hirji Jivraj said to consist of more than one partner and carrying on business in Karachi by their managing partner Hirji Jivraj."

It appears that this firm did not prove their claim against Hirji Jivraj in the insolvency proceedings. But by an award made between the firm of Jivraj Lakhamsi and Messrs. Valabhram Mulji a charge was created in favour of the latter on the decretal amount due to the firm of Jivraj Lakhamsi in the suit of 1915 from the firm of Hirji Jivraj. On the strength of that award Messrs. Valabhram Mulji applied for execution of the decree in favour of Jivraj Lakhamsi against Hirji Jivraj by arrest of Hirji Jivraj. He objected to his arrest on two grounds: first that the award creating a mortgage in favour of Messrs. Valabhram Mulji did not amount to an assignment of the decree so as to enable them to apply for execution of the decree; and secondly that as he was a discharged insolvent he could not be arrested in respect of debt due by him prior to his insolvency. The learned Additional Judicial Commissioner disallowed both these objections and ordered a warrant of arrest to issue. It is against that decision that the appellant has come to us in appeal.

In dealing with the second objection the learned Additional Judicial Commissioner has said:

"It is further contended that the judgment-debtor has filed his insolvency application and has been discharged. The firm of Rawji Hirji, in which the judgment-debtor was a partner, was declared insolvent; and later the partners were discharged. The judgment-debtor firm in the present proceedings is however a different firm; the debts of the present firm would not have been provable in the insolvency proceedings of the other firm in which the judgment-debtor was a partner."

With all respect we are afraid, we cannot accept this view to be correct.

A partnership has in law no corporate personal existence distinct from that of its individual partners; and the firm name is a mere expression, not a legal entity, per Farwell, L. J. in *Sadler* v. *Whiteman* (1). An order passed in the insolvency proceedings against a firm is an order passed against each individual partner in that firm: re. the firm of *Hiralal Shiv-*

(1) [1910] 1 K. B. 868.

narain (2). When an order of adjudication is passed either under the Provincial or the Presidency Towns Insolvency Act against a firm, not only does the property of the firm vest in the Official Receiver or assignee as the case may be, but also the property of each individual partner vests in him. Both these Acts provide for the procedure which the Official Receiver or assignee, as the case may be, is required to follow for dealing with such property. He is required to apply the partnership property in discharge of the partnership debts and likewise to apply the private property of each individual partner in discharge of his private debts in the first instance, and it is only when there is a surplus of either kind of property that he has power to apply it in payment of the other debts. It is not only incumbent on the creditors of a firm which has been adjudicated as insolvent but also on the creditors of each individual partner to prove their claims in the insolvency proceedings, and it would be unfair to an insolvent whose property has vested in the Official Receiver for the benefit of his creditors to be harassed again by one of such creditors merely and solely because the order of adjudication was not passed in an application directed against him but against a firm in which he was a partner or because for the sake of convenience the Court passed an order against the firm and did not pass a specific order against each individual partner in such firm.

Mr. Kimatrai has argued that in 1921, when an order of adjudication was passed against the firm of Rawji Hirji this Court had not framed rules as required by S. 79, Prov. Insol. Act, that in the absence of those rules the private creditors of each individual partner in an insolvent firm were not served with notice of insolvency and that there was no procedure under which such creditors could prove their claims. But the obvious answer to that argument is that the failure of the Court to frame rules cannot override the provision of the law which exempts an insolvent from liability of his debts prior to the date of his insolvency on his obtaining a discharge. In the absence of such rules the provisions of the Civil Procedure Code applied to insolvency proceedings in view of S. 5 of the Act.

For these reasons we think that the appellant was exempt from arrest in execution of this decree.

Under the circumstances it is not necessary for us to go into the other question, namely, whether the respondent is an assignee of the decree or not. We accordingly allow this appeal but make no order as to costs.

P.N./R.K. *Appeal allowed.*

(2) A. I. R. 1927 Sind 18=97 I. C. 446=21 S. L. R. 280.

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* A. I. R. 1932 Sind 40

MILNE, J. C. AND ASTON, A. J. C.

Haji Ali Mahomed and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Appln. No. 150 of 1931, Decided on 18th November 1931, against order of Sub-divl. Magistrate, Shahbunder.

*** Criminal P. C. (as amended in 1923), S. 337—Pardon tendered to accused—If accused is not on bail, Court is bound to retain approver in custody till termination of trial.**

The word "already" refers to the time when the Magistrate tenders a pardon. He has power under sub-S. (1) to S. 337 to tender a pardon at any stage of the trial or investigation. If the accused to whom he tenders a pardon is already on bail there is no necessity for the approver to be remanded to custody thereafter; if he is not on bail, the Magistrate is bound by the provisions of sub-S. 3 to retain the approver in custody until the termination of the trial: *A. I. R.* 1927 *Sind* 173, *Appr.*; 37 *Bom.* 146 and *A. I. R.* 1931 *Lah.* 476 *Ref.* [P 41 C 2]

Nehchaldas T. Vazirani—for Applicants.

C. M. Lobo—for the Crown.

Aston, A. J C.—This is an application for the revision of an order of the learned Sub-divisional Magistrate, Shahbunder, directing that the approver to whom a pardon had been tendered under the provisions of S. 337, Criminal P. C., should be released on bail.

The facts briefly are as follows:

Applicants were challaned under S. 397, I. P. C. On 5th August 1931 Haji Bidu was arrested: 11 days later, on 16th August he was produced in custody before the District Magistrate, Karachi, and a pardon was tendered on condition that he made a full disclosure under S. 337, Criminal P. C. The learned District Magistrate recorded the statement of the approver: about a fortnight later, on 2nd September 1931, the Police Inspector moved for the release of Haji Bidu on bail. This application was rejected. Subsequently a fresh application for bail on behalf of the approver was made by the Deputy

Superintendent of Police and on this application the learned Magistrate passed the following order:

"Heard Mr. Gopaldas, Deputy Superintendent, Shahbunder, investigating officer.

"Read S. 337 (3). The wording does not appear to me very clear, but I accept the argument that the sub-S. 3 applies only after sub-Ss. (1) and (2) have come into effect. "Such persons' refer to the approver after he has been committed under sub-S. (2). Bail is permissible and under the circumstances desirable. Mr. Nichaldas, defence pleader, has objected as an officer of the Court. I over rule his objection. Bail in the sum of Rs. 500 is permitted."

The applicants contend that under sub-S. (3), S. 337, Criminal P. C., the learned Magistrate had no power to release an approver on bail after the tender of pardon and when he was not on bail at the time the pardon was tendered. The present section is somewhat differently worded to the old section. Sub-S, 3 of the old Criminal Procedure Code reads was follows:

"Such person if not on bail shall be detained in custody until the termination of the trial by the Court of Session or High Court as the case may be."

It has been held by the Bombay High Court in *Emperor* v. *Intqa Sakabhat Khan* (1) that sub-S. 3, S. 337, Criminal P. C., 5 of 1898, contemplated only a case where a commitment had been made by the Magistrate to the Court of Sessions or the High Court. The High Court there held that the meaning of the sub-section was that the approver should not be set at large until the judicial proceedings pending against the accused were finished. The present sub-S. (3) under the Criminal Procedure Code, as amended in 1923, contains the additional word "already:"

"Such person unless he is already on bail shall be detained in custody until the termination of the trial."

It was contended before us on behalf of the Crown that sub-S. (3) is a provision similar to S. 220, Criminal P, C., and has reference to the stage where the accused have been committed to the Court of Sessions or to the High Court. This appears to have been the view taken by the learned Magistrate. Certain reasons which seem to me lend force to this view are that sub-S. 3 immediately follows sub-S. 2 (a), and if the word "already" in sub-S. 3 dated back to the moment when a pardon is tendered, no provision exists in S. 337 for releasing an accused person on bail when a pardon has been tendered to him during the early stages of the investigation if he has not already been released on bail. On the other hand, if the word "already" in sub-S. 3 contemplated the stage where the accused are committed to the Sessions Court, there is no provision in S. 337 requiring the Court to keep persons, who have become approver to whom a pardon has been tendered, in custody or on bail up to the period when the committal order is made. There would be nothing to prevent such a person who had become an approver from contending that it was illegal to remand him to custody or to release him on bail prior to commitment. Taking all the circumstances into consideration I am of opinion that the word "already" refers to the time when the Magistrate tenders a pardon. He has power under sub-S. (1), S. 337, Criminal P. C., to tender a pardon at any stage of the trial or investigation. If the accused to whom he tenders a pardon is already on bail there is no necessity for the approver to be remanded to custody thereafter; if he is not on bail the Magistrate is bound by the provisions of sub-S. 3 to retain the approver in custody until the termination of the trial. This was the view which appears to have been taken by my brother Rupchand in *Mahomed Abdul Majid* v. *Emperor*, *A. I. R.* 1927 *Sind* 173.

For the reasons I have mentioned I would set aside the order of the learned Subdivisional Magistrate, Shahbunder, and direct that the approver Haji Bidu be detained in custody until the conclusion of the trial.

Milne, J. C.—I concur. The learned Subdivisional Magistrate has held that sub-S. 3, S. 337, Criminal P. C., applies only after sub-Ss. 1 and 2 have come into effect and that "such person" refers to the approver after he has been examined under sub-S. 2. The learned Magistrate has used the word "committed," but as there is no committal under sub-S. (2), the word has probably been used by mistake. The person to whom a pardon has been tendered is defined in sub-S. (1). It does not appear that there are any provisons in the following sub sections further defining the word "person." The reference in sub-S. (2) applies to every person accepting a tender of pardon under the section. The sub-section lays down that he should be examined as a witness in the Court of the Magistrate. In sub-S. (2-A) it is laid down that in certain circumstances the ac-

(1) [1913] 37 Bom. 146=13 Cr. L. J. 842=17 I. C. 714.

cused shall be committed for trial to the Sessions or High Court. These circumstances are where a person has accepted the tender of a pardon and has been examined under sub-S. (2). This merely states certain circumstances: there is no intention of defining any person. There does not appear to be any sufficient ground for holding that the reference to "such person" in sub-S. 3 means not only a person who has accepted the tender of a pardon but who has also been examined under sub-S. 2. Sub-S. (3) would therefore operate as soon as the person accepted the tender.

In the matter of the detention of the approver, *Khairati Ram*, In re (2), it was held by the learned Chief Justice of the Punjab High Court that as soon as a pardon is granted with a view to obtaining a person's evidence he becomes a witness *qua* the case in which he is to be examined and continues to hold that rule unto the time when his failure to comply with the condition causes a forfeiture of the pardon. During that period he is only a witness and cannot be viewed as an accused; further there was no warrant either in principle or in statute for detaining a witness as such in police custody: it was accordingly provided by sub-S. (3), S. 337 that unless he is already on bail he should be detained in custody until the termination of the trial. Some restraint has to be imposed on his liberty until he has satisfied the condition on which he has obtained the pardon.

If then this is the correct view of the provisions of S. 337, it would follow that the provisions of sub-S. (3) must apply from the time that the person having accepted a tender under S. 337 has accepted the position of approver and has become a witness in the case. There must be legal authority for his detention from that stage. I therefore concur in the order passed by my learned brother.

B.V./R.K. *Order accordingly.*

(2) A. I. R. 1931 Lah. 476=1931 Cr. C. 700=32 Cr. L.J. 913=132 I. C. 519=12 Lah. 635.

A. I. R. 1932 Sind 42

RUPCHAND AND MILNE, A. J Cs.

Sardar Mahomed Tahir—Appellant.

v.

K. B. Mian Pirbux—Respondent.

First Appeal No. 1 of 1927, Decided on 18th January 1931.

Part Performance—Applicability—Grant of sanad to *P* of land by Collector—*P* requested to execute private agreement at the time with *K* to convey to him half of the land under certain circumstances obligation to convey being no condition of grant—*P* executing such agreement with *K*—After happening of the circumstance *K* requesting *P* to convey to him land and on his failure approaching Collector who cancelled grant in *P's* favour and re-granted land to *K*—Suit by *P* against *K* for possession—*K* pleading agreement to convey and his possession—*P* also without at any time raising plea that it was open to him to sue for specific performance at date of suit contending after period of limitation for claiming specific performance had expired that it was open to him to resist ejectment by proving his subsisting right to enforce specific performance at date of suit—Doctrine of part performance held did not apply—Even if it was open to *K* to counter-claim for specific performance he could only do so if at date when he counter-claimed his suit for such relief was in time.

At the time *P* was granted sanad of certain land by Collector *P* was requested to execute a private agreement with *K* to sell him half of the land under certain circumstances, but the obligation to convey the land to *K* under those circumstances was not a condition of the grant. *P* executed such an agreement in favour of *K* and on the happening of those circumstances *K* requested *P* to convey the land in terms of the agreement and on his failure instead of suing for specific performance of the agreement approached the Collector who cancelled the grant in favour of *P* and regranted the land to *K*. In a suit brought by *P* against *K* for possession *K* pleaded that *P* had agreed to convey the land to him and as possession was with him he could not be legally ejected. Further *P* without raising the plea that it was open to him to sue for specific performance of the agreement at the date of suit contended after the period of limitation for claiming specific performance had expired that it was open to him to resist ejectment by proving that he had a subsisting right to enforce the specific performance of the agreement at date of suit.

Held, that *K* did not take possession of the property in part performance of the agreement to sell the land executed in his favour, but obtained it from the Collector under a grant made by him after he had wrongfully terminated the grant in favour of *K* nor was there any consent or acquiescence on the part of *P* to possession being taken or retained by *K* and consequently the doctrine of part performance did not apply to the case. [P 45 C 1]

Held further that even if it was open to *K* to counter-claim for specific performance of agreement, he could have done so, if at the date when he counter-claimed, his suit for such relief was in time and that it was hardly arguable that a person seeking specific performance of an agreement could get round the plea of limitation by obtaining wrongful possession of the land and then pleading the agreement as a defence when his suit is barred by limitation. (*Case law referred.*) [P 46 C 1]

Mulchand S. Pahlajani—for Appellant.

Kimatrai Bhojraj—for Respondent.

Rupchand, A. J. C.—The facts connected with this case are hardly in dispute.

The plaintiff-appellant and defendant 2 (respondent) applied to the Collector of Sukkur for grant to them of Survey No. 197 in deh New Sukkur, measuring about 2 acres and 2 ghuntas for building purposes.

On 25th February 1919, Mr. Rothfold, the then Collector of Sukkur, passed an order that the southern half be granted to the plaintiff on payment of Rs. 700 per acre as malkano or occupation value, subject to the following three conditions:

(a) That the ground rent to be charged will be equal to ten assessments; (b) that the buildings will be constructed within two years according to plan to be approved by the Collector which should be submitted within one month from the date of the agreement, (c) that the Sardar (the plaintiff) should be requested to execute a private agreement with K. B. Pirbux (defendant 2), to sell him his half of the land at cost price if he gets permission to go to Quetta by the middle of May next.

The plaintiff executed an agreement in favour of defendant 2 in terms of Cl. (c) above, and thereafter on payment of the malkano obtained from the Collector a sanad of the southern half of the land. Defendant 2 paid for his northern share of the land and got a sanad for the same likewise. The plaintiff submitted a building plan within the time allowed by the grant, obtained the necessary sanction and commenced to build upon it.

On 5th June 1919, the plaintiff received a letter dated 23rd May 1919, but issued from the office of the Collector and Political Agent, Afgan Refugees, on 1st June 1919. That letter reads as follows:

"Sardar Mohamed Tahir Khan, Afgan Refugee, Sukkur, is informed that he is allowed by Government to return to Quetta provided he undertakes to hold himself absolutely aloof from all political movements. The date of his departure to Quetta should be reported."

Shortly after the receipt of the above letter, the plaintiff left for Quetta. He was requested by defendant 2 to convey the southern half of the land to him in terms of the written agreement between the parties, but he avoided doing so.

Instead of filing a regular suit for specific performance of that agreement, defendant 2 approached the Collector for relief, who cancelled the grant of land to the plaintiff and re-granted the southern half to defendant 2, on his depositing with the Collector a certain sum of money for payment to the plaintiff.

The plaintiff appealed to the Commissioner in Sind against the said order of cancellation but to no effect.

He then instituted the present suit against the Secretary of State for India and against defendant 2 for possession of his land and for mesne profits.

The Secretary of State for India filed the following defence:

"This defendant does not wish to contest the suit. He leaves the suit to be defended by defendant 2."

Defendant 2 pleaded that the action of the Collector was legal, that the plaintiff had no right to the property in suit and could not recover possession. He also raised several other technical pleas which are incorporated in the following issues:

(1) Whether this Court has no jurisdiction?
(2) Whether the suit is within time?
(3) Whether the suit is properly stamped?
(4) What were the conditions of the grant?
(5) If the agreement as to the private conveyance to defendant 2 is not a condition of the grant, then is such an agreement inadmissible for want of registration, and whether this Court cannot go into this question?
(6) Did the plaintiff get permission by the middle of May or within the time specified in the written statement, Ex. 60, to live in Quetta permanently within the meaning of the said agreement?
(7) Whether the order cancelling the grant is illegal and void?
(8) Whether defendant 2 is entitled to get anything as alleged in para 13 of his written statement?
(9) What decree be made?

These issues were raised on 25th October 1922.

Three years later, an application was made by defendant 2 for leave to amend his pleadings by the addition of the following as para 14:

"That this defendant further pleads that as plaintiff has agreed to convey the plot to this defendant and as possession is with him he could not be legally evicted."

That application was granted by the Court, and the following further issue was raised:

"5-A. What is the effect of such agreement upon the present suit."

The learned Judge below was of the opinion that the action of the Collector in cancelling the grant could not be maintained but he gave effect to the plea incorporated in this new issue on the strength of certain rulings which proceed on the equitable doctrine of part performance recently recognized by the Legis-

lature by the addition of S. 53-A. T. P. Act, by Act 20 of 1929.

This doctrine is discussed in White and Tudors' Equity Cases Vol. 2 at pp. 410 to 424 (Edition. of 1928), under the leading case of *Lester* v. *Foxcroft* (1). In that case specific performance of a parol agreement to grant a lease was decreed notwithstanding the Statute of Frauds after acts of part performance on the part of the lessee by pulling down an old house and building new houses according to the terms of the agreement. There was evidence to show that the lessee had spent large sums of money in rebuilding the premises and had submitted a lease duly engrossed to the lessor for execution which was duly approved by the lessor but was not executed by him at that time as he wanted the mistake in his name to be corrected by the person who had engrossed the deed, but before this was done, he died, and his executors refused to recognize the lease. In the notes on this case, it is said at p. 414 as follows:

"The principle upon which the equitable doctrine of part performance rests, was stated by Lord Selborne, L. C. in *Maddison* v. *Alderson* (2) at pp. 475-6 as follows. In a suit founded on part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself .... The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or if possible, just), and completing what has been left undone."

Again at p. 515, it is said:

"To be an answer to the Statute, it is necessary. (1) That the acts of part performance are unequivocally referable to the alleged agreement. "Part performance", to take a case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement and by force of the agreement (2 H. L. Cases 158). (2) The acts must be done by the plaintiff and be such that it would amount to fraud in the defendant to take advantage of the contract not being in writing (L. R. 2 H. L. 127); hence the acts must be acquiesced in or done with the knowledge of the other party (Fry, 6th Edn., p. 281). (3) The parol agreement must be of such a character that the Court would be able to decree specific performance thereof if it were in writing. (4) The parol evidence must prove the agreement."

And at the same page it is pointed out:

"The acts merely introductory to and done previous to an agreement cannot be presumed to be done in pursuance of it, and cannot therefore be considered as acts of part performance."

At p. 417, it is said:

"It is essential that possession should be delivered according to the contract; if obtained otherwise it will not be treated as an act of part performance."

Then follows a passage which shows that the result would be the same if the possession of the defendant has been acquiesed in by the plaintiff as having been continued in pursuance of such an agreement.

In England this doctrine applies equally to suits for specific performance and to defences raised in suits for possession.

In India there is no occasion for a plaintiff who institutes a suit for specific performance to rely upon this doctrine, as there is no statutory provision similar to the Statute of Frauds requiring an agreement to sell, mortgage or lease property to be in writing. The Limitation Act however provides that a suit for specific performance must be brought within the prescribed period; and if it is not brought within that period, it must be dismissed.

This doctrine however applies in suits for possession against a defendant who has got possession or retained, with the acquiescence of the plaintiff, possession under an agreement of this nature; and if it is pleaded as a defence merely for the purpose of non-suiting the plaintiff, no question of limitation can possibly arise.

This doctrine was given effect to as a defence by their Lordships of the Privy Council in the case of *Mohamed Musa* v. *Aghore Kumar Ganguli* (3) and subsequently in several decisions of the Indian High Courts.

There was a divergence of judicial opinion as to the extent to which this doctrine could be applied as a defence. That divergence has now been set at rest by the provisions of S. 53-A, T. P. Act, 20 of 1929, which reads as follows:

"53-A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person

(1) [1701] Colles' P.C. 108.
(2) [1883] 8 A. C. 473=52 L. J. Q. B. 737=49 L. T. 303=31 W.R. 820=47 J. P. 821.
(3) A. I. R. 1914 P. C. 27=28 I. C. 930=42 I.A. 1=42 Cal. 801 (P.C.).

claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract.

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof".

In the present case the defendant did not take possession of the property in part performance of the agreement to sell the land executed in his favour. On the contrary, he obtained possession from the Collector under a grant made by him after he had wrongfully terminated the grant in favour of the plaintiff. Not only there was no consent or acquiescence on the part of the plaintiff to possession being taken or retained by defendant 2, but there was a strong protest on behalf of the plaintiff against his eviction, and it was followed by the present suit. The plaintiff's possession was not under or in pursuance of the agreement, but de hors the agreement. This doctrine could not therefore be any valid defence to the present suit.

It has however been urged that at the date of suit it was open to the defendants to sue for specific performance of the agreement; he could equally plead in his defence that the Court should decree specific performance of the contract in his favour and the Court having held that the defendant was entitled to specific performance, we should not interfere with that finding.

No such relief was prayed for either in the original written statement or in the subsequent application for amendment, nor has the Court granted such prayer. All that the Court has done is that, after a vague discussion of the nature of the rights of the parties, it has ordered that the plaintiff's suit be dismissed. It is therefore impossible to give effect to the judgment and decree of the Court as it stands.

In the course of arguement a vague attempt was made to show that it was not necessary for defendant 2 to claim specific performance of the agreement, and that it was equally open to him to resist ejectment by proving that he had a subsisting right to enforce specific performance of the agreement at the date of suit.

In support of this argument reliance was placed on the observation of Mukerji, J., in *Ariff* v. *Jadu Nath Majumdar* (4) (at p. 104) where it is said:

Somewhat akin to the principle of *Maddison* v. *Alderson* (2), and owing its source to the same fountain head of equity in the doctrine enunciated in the cases of which *Walsh* v. *Lonsdale* (5) is the type. Shortly put, it may, in the case of an action in ejectment, be said to be this: that an enforceable right on the part of the defendant to specific performance of a contract entitling him to remain in occupation is a good defence to the action. The doctrine was approved by Cotton, L. J., in *Lowther* v. *Heaver* (6) p. 264, and explained by Lord Esher in *Swain* v. *Ayres* (7) p. 293 and *Foster* v. *Reeves* (8)."

In *Walsh* v. *Lonsdale* (5), Jessel M. R., said:

"There is an agreement for a lease under which possession has been given. Now, since the Judicature Act, the possession is held under the agreement. There are not two estates, as there were formerly, one estate at Common law by reason of the payment of the rent from year to year and another state in equity under the agreement. There is only one Court and the equity rules prevail in it. The tenants hold under an agreement for a lease. He holds therefore under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted."

The result of this decision and the other decisions referred to in *Ariff's* case (4) has been summed up in Smith's Leading Cases Vol. 2 (Edn. 1929), p. 116, under the case of *Doe'd. Rigge* v. *Bell* (9) as follows:

"From the above cases, it now appears that the rule, in all Courts possessing sufficient equitable jurisdiction, is that when a tenant has entered under an agreement, which is void as a lease, the matter is to be dealt with as if the lease had been actually granted, if either party elects to insist on that equity and shows that he is entitled to specific performance.

Indeed it would seem that as stated by Field, J. in Re *Maugham* (10) at p. 958, there is no distinction between a lease and an agreement to lease. . . . . This rule is however confined to cases where specific performance of the agreement could and would be enforced if applied for: *Gray* v. *Spyer* (11)."

Ariff's case (4) was also a case between a landlord and tenant. The observations

(4) A. I. R. 1929 Cal. 101=112 I. C. 865=55 Cal. 1090.
(5) [1882] 21 Ch. D. 9=52 L. J. Ch. 2=46 L. T. 858=31 W. R. 109.
(6) [1888] 41 Ch. D. 248=58 L. J. Ch. 482=60 L. T. 310=37 W. R. 465.
(7) [1888] 21 Q. B. D. 289=57 L. J. Q. B. 428=36 W. R. 798.
(8) [1892] 2 Q. B. 255=61 L. J. Q. B. 763=67 L. T. 537=40 W. R. 695.
(9) [1793] 5 T. R. 471=2 R. R. 642.
(10) [1885] 14 Q. B. D. 956.
(11) [1922] 2 Ch. 22=91 L. J. Ch. 512=127 L. T. 277=66 S. J. 387.

of his Lordship which were obiter dicta he being of the opinion that the defendant's claim to specific performance of the agreement was barred at the date of suit (see p. 1105) were limited to the facts of that case, and his Lordship was not called upon to apply his mind to a case like the present where the defendants had not obtained or retained possession under the agreement relied upon by him and was required to perform certain acts before he could specifically enforce it.

In England a case like the present would fall, not under S. 24 (2), but under S. 24 (3), Judicature Act, 1873, which permits of a counter claim being entertained for specific performance of an agreement, and confers very wide powers on the High Courts in England to grant such relief in one and the same suit.

How far these provisions can be availed of here, in view of the very limited provisions of the Civil Procedure Code as to defences by way of set off and counter-claim, or if they could be availed of in the mofussil Courts without affixing to the counter-claim the necessary court-fee are matters which need not be gone into at present, as no counter-claim for specific performance of the agreement was pleaded either in the original or in the amended written statement.

It is sufficient to observe that if it was open to defendant 2 to counter-claim for specific performance of agreement, he could have only done so if at the date when he counter-claimed, his suit for such relief was in time. It is hardly arguable that a person seeking specific performance of an agreement can get round the plea of limitation by obtaining wrongful possession of the land in suit, and then pleading the agreement as a defence when his suit is barred by limitation.

No counter-claim could have been entertained when the application for amendment was made; much less can it now be permitted.

Perhaps the reason why defendant 2 thought of asking for an amendment of his pleading in the manner he has done was that he was afraid of being met with a plea that no amendment could be allowed permitting the defendant to claim specific performance of the agreement after the period of limitation.

Defendant 2 has to thank himself if on account of resorting to the Collector for relief instead of taking a straightforward course of filing a suit within the period of limitation for specific performance of the agreement on payment of the necessary court-fee, he finds that he cannot get the land. Under the circumstances it is not necessary to go into the question whether defendant 2 was entitled to specific performance or not.

The issues as to the maintainability of the suit and the order of the Collector being ultra vires have been decided in favour of the plaintiff and have not been pressed before us.

The only other questions which require our consideration are what compensation, if any, defendant 2 should get for improvements made by him on the land, and what mesne profits, if any he should be made to pay to the plaintiff.

It is not seriously disputed that under S. 41, T. P. Act, the compensation which defendant 2 can claim is not to be based on what he has spent on completing the building, but what is the present value of the structures raised by him.

With regard to mesne profits again it would appear that the plaintiff cannot get all the profits the completed building has yielded to defendant 2, as such profits have accrued partly due to the structures raised by defendant 2. The fairest course would be to divide the rents realized by defendant 2 in proportion to the amount spent by the plaintiff on the purchase of the land and the construction made by him on the one hand and the amount spent by defendant 2 on the construction made by him.

We therefore set aside the decree of the lower Court, and pass a decree in favour of the plaintiff for possession, and we order that the compensation payable to defendant 2 for improvements to be ascertained as on this date, and also the mesne profits payable to the plaintiff from the date of dispossession to the date on which he is put into possession both being ascertained in the manner stated above, be determined in execution proceedings.

As there are very few equities in favour of the plaintiff, and he succeeds more owing to the failure of defendant 2 to take proper and timely proceedings to enforce his legal rights, we think that each party should bear his costs throughout.

Milne, A. J. C. — This is an appeal against the decision of the learned District Judge, Sukkur, in a suit for possession of

the southern half of S. No. 197 in deh New Sukkur. The plaintiff Sirdar Mohomed Taher is a political pensioner who in 1919 was residing in Sukkur; he had been made to reside there some time before the suit transaction and was anxious to return to Quetta. On 25th February 1919 he was granted the suit land by the Collector; the other half of the same survey number was granted at the same time to defendant 2, K. B. Pirbux, a retired Deputy Collector. The Collector requested the plaintiff to execute a private agreement with K. B. Pirbux to sell to him plaintiff's half of the land at cost price if the plaintiff got permission to go and reside in Quetta by the middle of May following. The plaintiff executed the agreement with K. B. Pirbux on 25th March 1919. On or about 1st June the plaintiff was informed that he was permitted to go to Quetta provided he undertook to keep himself aloof from all political movements. Plaintiff left for Quetta on 4th June, he was thereafter called upon to execute a conveyance in favour of defendant 2, but he refused to do so. The Collector of Sukkur treated the refusal as a violation of the terms of the lease granted to the plaintiff and cancelled the same in December 1920; the plaintiff was evicted and thereafter defendant 2 was granted the land by the Collector.

Exhibit 42 is the order of the Collector granting the land to the plaintiff; under Cl. 2 of this order the plaintiff was requested to execute a private agreement with K. B. Pirbux to sell him his half of the land at cost price if he got permission to go to Quetta by the middle of May following. The agreement entered into by plaintiff with Government is Ex. 48; it contains no mention of the private arrangement with K. B. Pirbux; this is plaintiff's formal agreement with Government prior to his occupation of land. Ex. 57 is the formal grant; it contains no mention also of the private arrangement. It is clear then that the view taken by the learned District Judge that the obligation to convey the land to defendant 2 under certain circumstances was not a condition of the grant is correct. Plaintiff did agree with the Collector that he would execute the agreement to convey the land to defendant 2 under certain circumstances and he did execute that agreement. In the event of the failure of plaintiff to carry out this agreement with defendant 2, defendant 2's remedy was by a suit for specific performance of the agreement. The order of the Collector then in cancelling the grant to the plaintiff on the ground that he had failed to comply with one of the terms of the grant was not justified. The suit was not defended by Government.

The lower Court has held that defendant was entitled to raise the defence of part performance. This defence was raised at a late stage in the case though on facts pleaded at the outset and appellant has contended that it was not open to the Court to allow the defendant to amend his pleadings and raise this defence. It appears that the plea does not raise any disputed question of fact but is one of law pure and simple; but as I am of opinion that the defence is not open to the defendant, it is perhaps unnecessary to consider the question whether the amendment should have been allowed or not.

It is laid down in Story on Equity, para 762, that the acts relied on should appear to be done solely with a view to the agreement being performed. The fact relied on by defendant 2 is that he was in possession of the property; he was not however put in possession by plaintiff but was put in possession by the Collector after the plaintiff had been unjustly evicted. It is stated more specifically in para. 763 of the same volume that

"mere possession of land contracted for will not be taken as a part performance, if it be obtained wrongfully by the vendee or would be wholly independent of the contract."

In the present case the possession was obtained wrongfully: defendant 2 claims under defendant 1 who wrongfully evicted the plaintiff. Plaintiff has done nothing in the matter so that any action of his should be referred to the contract. In *Mahomed Musa* v. *Aghore Kumar Ganguli* (12), at p. 818 (of 42 *Cal.*), it is clearly laid down that the equity results from acts done in execution of the contract; the bargain should be acted upon to some extent before the equity arises. In *Bapu Apaji* v. *Kashinath Sadaba* (13) the defendant had taken possession under the agreement. In *Ramappa* v. *Yellappa* (14) at p. 312 (of 52 *Bom.*) it was held that possession coupled with the agreement to sell, wit

(12) A. I. R. 1914 P. C. 27=28 I. C. 930=42 I. A. 1=42 Cal. 801 (P. C.).
(13) [1917] 4 Bom. 438=39 I. C. 103 (F.B.).
(14) A. I. R. 1928 Bom. 150=109 I. C. 532=52 Bom. 307.

ordinarily be a good defence even if the agreement at the time of the defence is not capable of specific performance. In that case the agreement was between mortgagors and mortgagee.

Defendant 2 contends that his possession must be referred to the contract; it was on the strength of that contract that the Collector acted and evicted the plaintiff. But it would be too far-fetched to hold that plaintiff's eviction and the giving possession of the land to defendant 2 were acts done in pursuance of the contract. In *Venkatesh Damodar* v. *Mallappa Bhimappa* (15), the case relied on by the learned District Judge the defendants were already in possession; the fact that they were allowed to continue in possession may be referred to the contract. But in the present case there is absolutely nothing that can be said to have been done in pursuance of the agreement between plaintiff and defendant; therefore the doctrine of part performance does not apply.

Defendant 2 further contends that apart from agreement and part performance, he is entitled to remain in possession as he has or had at the time of the institution of the suit a right to specific performance by plaintiff of his agreement to convey the land to defendant 2.

The principle in question has been considered in *Ariff* v. *Jadu Nath* (4). The two conditions laid down are: (1) there must be a contract of which specific performance can be obtained at the time the suit is filed, (2) the title acquired by specific performance would give a good cause of action or a good defence. The English cases on which the doctrine is founded are dealt with in *Ariff* v. *Jadu Nath* (4). In *Walsh* v. *Lonsdale* (5) it was held that a tenant holding under an agreement for a lease is on the same terms is equity as if a lease had been granted, it being admitted that the relief was capable of being given by specific performance: the landlord's action in proceeding against the tenant on the same footing as if lease has been granted was upheld without the lease being executed. In *Swain* v. *Ayres* (7) at p. 293 Lord Esher, M. R., opined that where such a state of things exists that a Court of equity would compel specific performance of an agreement for a lease by execution of the lease, the case should be treated as if such a lease had been granted and was actually in existence. In *Lowther* v. *Heayer* (6). at p. 264, *Walsh* v. *Lonsdale* (5), was approved: a tenant holding under an agreement for a lease of which specific performance would be decreed stands in the same position as if the lease had been granted being entitled to equity to have a lease granted, the tenant's rights ought to be dealt with in the same way as if a lease had been granted and do not depend on its having been actually granted. In *Manchester Brewery Co.* v. *Combs* (16), it was held that the plaintiff being clearly entitled to specific performance of the agreement under which defendant was in possession of an hotel, could sue in the same manner as if the original agreement had actually been executed.

Now even if this proposition be accepted, it would appear that in *Ariff* v. *Jadu Nath* (4), Mukerji, J., was apparently of opinion that it would be necessary to claim specific possession:

> "Maddison and Alderson gives him higher rights making it unnecessary for him to have specific performance of the contract, at p. 1103."

The question whether in an ejectment suit the defendant can counter-claim specific performance of an agreement to execute a registered transfer was considered in *Saya Bya* v. *Mg. Kyaw Shun* (17). It was held that there is nothing to prevent a Judge treating the counter-claim as the plaint in a cross suit and hearing the two together if he is so disposed and if the counter-claim is properly stamped.

On the reasoning however in that case the two suits are separate suits; and the cases in which an amendment of pleading was allowed to admit of a plea barred by limitation do not help the defendant. It is not open to defendant to claim specific performance now. Defendant however is in the circumstances entitled to compensation. I concur therefore in the order proposed by my learned brother.

P.N./R.K. *Order accordingly.*

(15) A. I. R. 1922 Bom. 9=66 I. C. 868=46 Bom. 722.

(16) [1901] 2 Ch. D. 608=70 L. J. Ch. 814.

(17) A. I. R. 1924 Rang. 346=82 I. C. 721=2 Rang. 276.

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* A. I. R. 1932 Sind 48

MILNE, A. J. C.

Mt. Zenab Bai—Plaintiff.

v.

Secy. of State—Defendant.

Suit No. 331 of 1929, Decided on 8th January 1931.

*** (a) Income-tax Act (1922), S. 67 — Suit for refund of income-tax refused by income-tax authorities is not barred.**

Though the procedure for grant or refund of income-tax is ordinarily made part of the assessment procedure, it does not become a question of assessment. Consequently a suit for refund of income-tax refused by the income-tax authorities is not barred by S. 67. [P 49 C 2]

*** (b) Income-tax Act (1922), S. 48 (2)— Transferee of profits under will of deceased partner accruing due before his death is not entitled to refund of income-tax paid in respect of such profits.**

Section 48 (2) applies to an assessee of the year for which the assessment is made or a person who would have been an assessee if his own income apart from that of the firm reached the minimum and does not apply to a person who dies before the assessment on his own income is made.

K, a partner of the firm bequeathed to his widow *P* his share of the profits of the firm and subsequently died in December 1926. The firm's profits were taxed for the income-tax year 1927-28 the accounting period being from October 1925 to October 1926. *P* applied for the refund of the tax payable on the profits which she received from *K*. Her application was refused.

Held: that *K* or his estate was at no time entitled to a refund: (a) because he was not a person who paid the assessment on the firm for 1927-28 nor was he liable to pay that assessment or any part of it, having died in December 1926; (b) as he could not himself have been an assessee in the assessment year 1927-28 and consequently *P* was not legally entitled to any refund: *A. I. R.* 1927 *Cal.* 518, *Rel. on.* [P 50 C 1]

Kimatrai Bhojraj—for Plaintiff.

C. M. Lobo, Government Pleader — for Defendants.

Judgment.—This is a suit by the plaintiff for recovery of a refund of income-tax paid, which refund has been refused by the income-tax authorities.

The facts are as follows:

There was a firm of Messrs. Kadirbhoy Karimji doing business as timber merchants at Karachi; in December 1926 the senior partner of the firm, Kadirbhoy, died, and the partnership was dissolved. The firm was assessed for their own financial year from October to October; thus for the income-tax year April 1927-28, the firm's accounting period was October 1925 to October 1926. Kadirbhoy bequeathed to his widow, the plaintiff, his share of the profits of the business. The firm was treated as a registered firm and the firm's profits were taxed for the income-tax year 1927-28 at the maximum rate of 18 pies. The partners under S. 48 of the Act applied for a refund of the tax, the rate at which their individual incomes were liable being less than the maximum rate. Plaintiff also applied as a partner for a refund of the tax payable on the profits which she received under her deceased husband's will. This application was refused on the ground that she was not a partner in the firm and was not entitled to a refund under S. 48 of the Act. Two issues have been tried as preliminary issues. The first is: (issue 7 of the issues framed).

"Is the suit as framed competent?

And the second is: (2nd part of issue 3 of issues framed).

"Has the plaintiff any claim to refund?"

On the first of these issues, I hold in the affirmative and on the second, in the negative.

On the first preliminary issue, the defendants rely on S. 67, Income-tax Act, which bars any suit to modify or set aside any assessment made under the Act. Defendant contends that the Act is complete in itself, that the Act gives all the necessary remedies and S. 67 bars access to the civil Courts.

Plaintiff, on the other hand, contends that Ss. 30, 32 and 33 are limited in their scope; they apply to appeals against assessments made; they do not apply to the grant of refunds or to refusals to grant refunds. There is no provision made in the Act for appeals against a refusal to give a refund under S. 48 and the suit does not raise any question of assessment so as to be barred by S. 67.

The Government Pleader on behalf of the defendant replies that under Rr. 36 and 37 the procedure in the case of refunds is practically the same as the procedure for assessment, and the question of refund and assessment is dealt with in one proceeding and under one form, and that assessment is determined after deciding whether a refund is or is not due.

I cannot hold however that because the procedure for grant or refund is ordinarily made part of the assessment procedure, that therefore it becomes a question of assessment. The provisions for assessment and the provisions for granting refund are in the Act entirely separate. A person who is not an assessee may be entitled to a refund. S. 67 refers to assessment. There does not appear to be any provision for appeal against an order refusing a refund. I hold that S. 67, which refers only to assessment does not bar the suit. The second preliminary issue is whether plaintiff is legally entitled to any refund. Under S. 3 the profits of a firm

are liable to income-tax. Under S. 26, as it stood in March 1928, the assessment was to be made on the firm as constituted at the time the assessment was made; the assessees were the members of the firm as constituted at the time the assessment was made. Thus plaintiff's husband was not liable for the assessment or any part of it payable by the firm for the year 1927-28, the assessment having been made in March 1928, and plaintiff's husband having died in December 1926.

Further the estate of a dead person cannot be assessed to income-tax: *Mitchell* v. *McNeil and Co.* (1). The income-tax authorities were not represented in that case, but the Government Pleader has accepted the proposition laid down therein. S. 48 (2) applies in the case of a member of a firm when the rate of income-tax applicable to his private income is less than the rate at which his firm is assessed. It applies then to an assessee of the year for which the assessment is made or a person who would have been an assessee if his own income, apart from that of the firm, reached the minimum, that is, it cannot apply to a person who died before the assessment on his own income is made. There was no rate of income-tax applicable to plaintiff's husband for the year 1927-28 as he or his estate was not liable to income-tax for that year.

Plaintiff's husband or his estate was at no time entitled to a refund: (a) because he was not a person who paid the assessment on the firm for 1927-28 nor was he liable to pay that assessment or any part of it; (b) as he could not himself have been an assessee in the assessment year 1927-28. Plaintiff then cannot claim as heir to, or constructive owner of, any refund.

The only provision of law which plaintiff has put forward is S. 48, Income-tax Act, and it is clear that plaintiff was not a partner in the firm so as to be entitled to the benefit of the provisions of that section. She was merely entitled under the will of her deceased husband to certain profits which had accrued to the deceased. Mr. Kimatrai has argued that there has been a change in the constitution of the firm, and that defendant has detained one-seventh of the refund due to the firm which belonged to the deceased partner and the plaintiff is entitled to that refund. There is however no question of detention of part of the refund; the refund is payable to each individual partner if his total income is assessable at a rate less than the maximum. There is no question of a lump refund to be divided amongst the partners. Plaintiff's suit is therefore dismissed with costs.

P.N./R.K. *Suit dismissed.*

(1) A. I. R. 1927 Cal. 518=103 I. C. 120.

A. I. R. 1932 Sind 50

MILNE, J. C.

Official Assignee—Applicant.

v.

Mt. Parameshwaribai—Opponent.

Misc. Judicial Case No. 209 of 1930, Decided on 29th June 1931.

(a) Presidency Towns Insolvency Act (1909), S. 7—Sale by insolvent of half of his undivided one-sixth share to his wife—Sale deed mentioning that other half belonged to his sons—Official Assignee applying under S. 7 challenging sale under S. 53, T. P. Act, and also contending that he has disposing power over son's interest—Application lies against wife—But son's claim cannot be dealt with under S. 7.

The insolvent sold half of his undivided 1/6th share in immovable property to his wife in consideration of an alleged debt due and further alleged in the sale deed that the remaining 1/12th belonged to his sons. The Official Assignee applied under S. 7 challenging the sale under S. 53, T. P. Act, and further contending that he had disposing power over the son's interest as being liable for payment of the father's debt.

Held : that the application as against the wife could be entertained as the Official Assignee claimed a higher title than the insolvent's but that the son's claim could not be dealt with under S. 7 as the Official Assignee did not claim a higher title than the insolvent : *A. I. R.* 1926 *Cal.* 597 ; *A. I. R.* 1929 *Sind* 94 and *A. I. R.* 1929 *Sind* 135, *Rel. on.*; *A. I. R.* 1929 *Mad.* 705, *not Foll.* [P 51 C 1]

(b) Interpretation of Statutes—English decisions—Provisions of English Act repeated — Interpretation by English decisions should be followed.

If provisions of an English Act are repeated in practically the same terms in an Act of the Indian Legislature and those decisions had in England been interpreted in a long course of decisions in a particular manner, the Indian Legislature should be deemed to have intended that the interpretation should be followed. [P 51 C 1]

Pahlajsing B. Adwani—for Applicant.

Chabaldas Rochiram—for Opponent.

Order.—This is an application by the Official Assignee under S. 7, Presidency Towns Insolvency Act, made in the following circumstances. On a petition presented on 12th September 1928, one Atmaram Rijhumal, husband of opponent 1, and father of opponents 2 and 3, was adjudged insolvent. The insolvent owned an undivided 1/6th share in immovable property in Shikarpur. The in-

solvent in April 1926 sold half of this share, i. e. 1/12th to opponent 1 his wife, in consideration of an alleged debt due. The insolvent further alleged in the sale deed that the remaining 1/12th belonged to his sons, opponents 2 and 3. The Official Assignee challenges the sale to opponent 1 under S. 53, T. P. Act, as being made with intent to defeat and delay the creditors of the husband. The Official Assignee further contends that he has a disposing power over the sons' interest as being liable for payment of the father's debts. The Official Assignee prays that the sale to opponent 1 be set aside and for a declaration that the Official Assignee has a disposing power over the whole 1/6th share for the benefit of the creditors of the insolvent. An initial objection has been taken that the application does not lie under S. 7. That objection cannot be upheld in respect of the application against the wife of the insolvent ; here the Official Assignee claimed a higher title than the insolvents : *Jnanendra Bala Debi* v. *Official Assignee of Calcutta* (1).

The application against the sons is on a different footing. The Official Assignee does not claim in this respect a higher title than the insolvent. The Official Assignee relies on certain rulings to show that such an application lies under S. 7 and it is clear that that view is taken by the Madras High Court. It was so held in *Ram Chandra Iyer* v. *Official Assignee of Madras* (2). The learned Judges who decided that case were of opinion that their ruling was in accordance with the English law of Bankruptcy, relying on the case of *Morly* v. *White* (3). In *Official Assignee of Madras* v. *Narasimha Mudaliar* (4), in which the same question arose, it was held that the English practice was to the contrary but that in view of the different conditions in India a different construction should be put on S. 7, Presy. Towns Insolvency Act.

Now that section was enacted in almost the same terms as S. 72, Bankruptcy Act, 1869 and the parallel provisions of the Acts of 1883 and 1914. I would have no difficulty in holding that if the provision of an English Act were repeated in practically the same terms in an Act of the Indian legislature and those provisions had in England been interpreted in a long course of decisions in a particular manner that the Indian legislature intended that that interpretation should be followed : *Jay* v. *Johnstone* (5).

No other High Court has finally pronounced on the subject. In *Haridas* v. *Lallubhai* (6), the parties appear to have submitted to the jurisdiction of the Court. In *Anand Prakash* v. *Narain Das Dori Lal* (7), it does not appear that the question of the jurisdiction of the Court was raised. In *Anwar Khan* v. *Mohamad Khan* (8), *Official Receiver* v. *Tirathdas Mewaram* (9) and *Atmaram Udhavdas* v. *Dayaram* (10), the Official Receiver claimed a better title than the insolvent.

It seems to have been the general opinion that under the English Act of 1869 as a general rule the assignees or trustees in bankruptcy having a demand at law or in equity against a stranger to the bankruptcy, could not claim that that demand should be prosecuted in the bankruptcy Court, unless the trustees claimed by a higher or better title than the bankrupt or the stranger submitted to the jurisdiction of the Bankruptcy Court : Williams' Law and Practice in Bankruptcy, Edn. 13, pp. 393 to 396. The exceptions noted on pp. 394 and 395 can be explained on the grounds stated in *Jnanendra Bala Debi* v. *Official Assignee of Calcutta* (1), the Court has jurisdiction to entertain the question but as a rule would not entertain a proceeding against a third person against whom the Official Assignee claimed no higher title than the insolvent. There seem to have been special circumstances in the exceptions quoted. In *Ex parte Anderson* (11), the assignee applied that the sale was as against him void ; *cf.* also *Ex parte Cohen* (12) and *Ex parte Macdonald* (13). The cases *Morly* v. *White* (3) and *Ex parte Gordon* (14) seem to have been decided on the ground of convenience.

(1) A. I. R. 1926 Cal. 597=54 Cal. 251.
(2) A. I. R. 1931 Mad. 317=54 Mad. 739.
(3) [1878] 8 Ch. 214 = 42 L. J. B. K. 76.
(4) A. I. R. 1929 Mad. 705=118 I. C. 506 = 52 Mad. 717 (F. B.).
(5) [1893] 1 Q. B. 25.
(6) A. I. R. 1931 Bom. 50=55 Bom. 110.
(7) A. I. R. 1931 All. 162 =135 I. C. 119 = 53 All. 239 (F. B.).
(8) A. I. R. 1929 All. 105 =113 I. C. 819 = 51 All. 550 (F. B.).
(9) A. I. R. 1927 Sind 66=97 I. C. 321.
(10) A. I. R. 1929 Sind 94=115 I. C. 330.
(11) [1877] 5 Ch. 473 = 39 L. J. B. K. 32.
(12) [1878] 7 Ch. 20 = 41 L. J. K. B. 17.
(13) [1871] 24 L. T. 475=19 W. R. 717.
(14) [1878] 8 Ch. 555 = 42 L. J. B. K. 41.

The proviso added to S. 102, Bankruptcy Act, 1883 would not therefore imply any change in the jurisdiction of the Bankruptcy Court or in the principles on which it exercises that jurisdiction. The Court had under the Act of 1869 unlimited jurisdiction but did not as a rule entertain proceedings against strangers to the bankruptcy. Under the Act of 1883 the powers of county Courts were limited in one respect : they could not entertain a claim in respect of a stranger when the amount was over £200 unless the parties consented. The fact that county Courts were not allowed to exercise jurisdiction in respect of claims over £200 in value unless with consent would not imply that any change in the principles on which the High Court was to exercise its jurisdiction was intended : the High Court had as before unlimited jurisdiction : the question whether it should exercise that jurisdiction was still a question of its discretion.

The position would appear to be the same under S. 7, Presidency Towns Insolvency Act. The discretion of the Court is recognized in *Ram Chandra Iyer* v. *Official Assignee of Madras* (2) already quoted : though the principle is stated conversely :

"discretion being reserved to the Court to decline to exercise jurisdiction in unsuitable cases."

In *Official Assignee of Madras* v. *Narasimha Mudaliar* (4) Coutts Trotter, C. J., was content to leave the matter to the discretion of the Judge whether in any given case he should deal with such a claim in the Insolvency Court or refer it to the machinery of an ordinary suit. Beasley, J., relied on the statement of law of Rankin, J., in *Jnanendra* v. *Official Assignee of Calcutta* (1), above referred to. There does not appear to be any real difference of opinion as to the legal position.

I cannot however find any ground for holding that Courts in India should exercise jurisdiction under S. 7 in cases where English Courts would not. Beasley, J., I may note, was of opinion that only simple cases capable of easy and speedy proof should be dealt with under S. 7. I can find little ground of convenience for taking the view adopted in *Official Assignee of Madras* v. *Narasimha Mudaliar* (4). If the matter is simple it can be dealt with as a short cause and a speedy decision obtained. If it is a complicated matter, the authorities are agreed that the procedure should be by suit. I therefore hold that the sons' claim cannot be dealt with under S. 7.

As regards the wife's claim, there is the fact that the sale to her was made about the time the husband's property was to be attached in a pending suit. It was a suit for account against the husband. The preliminary decree, Ex. 13, was passed on 30th November 1925. The sale to opponent 1 took place on 3rd April 1926. Ex. 14 of 7th May 1926, is the plaintiffs' application for attachment in that suit : he stated that the Commissioner after examination of the accounts had reported in his favour and that the defendant was therefore endeavouring to dispose of his property. It is clear from Ex. 11, the insolvent's schedule of debts, that the debts which caused his insolvency were incurred in 1925 and 1926. In the sale deed to his wife the insolvent emphasized the fact that the remaining half-share belonged to his sons : the document is really a warning to creditors to keep their hands off his property. The consideration for the sale was loans from his wife. No attempt has been made to prove the loans. The reason given by the insolvent for not producing his books is disproved by Ex. 12. The insolvent's statement in respect of these loans (Ex. 8 lines 10—16) is contradicted by his statement before the Official Assignee : Ex. 9.

The insolvent's wife has not contested the claim. In the circumstances little more than formal proof would have been required but there are substantial grounds for holding that the sale by the insolvent to his wife is void under S. 53, T. P. Act and I hold accordingly.

It is contended that the application is time barred. The sale is dated 3rd April 1926. The present application was made on 6th May 1930. Opponent relies on Art. 91, Limitation Act, but limitation does not run till the plaintiff knows the facts entitling him to have the instrument concelled. Presumably the Official Assignee did not know of the facts till the insolvency proceedings commenced in 1928. The insolvent was adjudged on 12th September 1928. It was held in *Official Receiver* v. *Dayaram* (10) that an application under S. 4, Provincial Insolvency Act, could be made within the longer period of limitation prescribed for an ordinary suit to claim the relief which

could be claimed in an ordinary suit instituted under S. 53, T. P. Act.

It was also contended that the Court has no jurisdiction as the property was situated outside the jurisdiction of the Court, but the ruling in *Official Receiver* v. *Jankibai* (15) is against that contention.

I therefore set aside the sale in favour of opponent 1 and declare that the same is bogus and void; that the applicant is entitled to the property sold for the benefit of the creditors. Opponent 2 and 3 to bear their own costs remaining costs on opponent 1.

P.N./R.K. *Order accordingly.*

(15) A. I. R. 1929 Sind 135=114 I. C. 112.

A. I. R. 1932 Sind 53

MILNE, J. C.

Jethanand—Applicant.

v.

Partabrai—Opponent.

Criminal Revn. Appln. No. 5 of 1931, Decided on 31st August 1931 from an order of Special First Class Magistrate, Karachi.

(a) Penal Code (1860), Ss. 477-A and 465—Firm—Partners *A* and *B*—*A* writing account books—Deposit by *A* but entry in name of third person *C*—Firm sustaining loss—*C* recovering from firm amount in his name in small cause suit—*B* charging *A* under Ss. 477-A and 465—*A* admitting having made change in name of depositor but giving no proper explanation—No charge made by *B* against *A* in small cause suit—Yet *A* should not have been discharged—Further inquiry held to be necessary.

There was a firm consisting of two partners *A* and *B*. *A* was in charge of the account books and used to keep accounts. He made a deposit with the firm but the entry in the account books was made in the name of a third person *C*. The entries in katcha rokar and in the pacca rokar showed that the deposit was really made by *A* but were entered in the account books proper as made by *C*. *A* admitted having changed the name of the depositor from *A* to *C* but could not give proper explanation for it. *C* had in the meantime recovered the amount standing in his name from the firm in a small cause suit. In that suit *B* had made no allegations against *A*. Subsequently *B* filed a criminal complaint against *A* under Ss. 477 and 465. The complaint was dismissed as the Magistrate thought that the same question could not be tried again, having been considered in small cause suit.

Held: that under the circumstances of the case even if complainant *B* was lax in his conduct of the case in the Small Cause Court if as matter of fact there had been falsification of the accounts, it was still open to him to lodge a criminal complaint on the facts alleged. It might be a difficulty in his case that he did not raise that contention in the civil proceedings But so far as the present complaint was concerned, there were plain alterations in the complainant's books of account which the accused admitted were made by him which showed that a certain deposit was first shown as made by the accused and the entry was subsequently altered to show that the deposit was made by *C*. No reasonable explanation had been given why this change in the account was made and the accused should not have been discharged until the Magistrate had had before him some satisfactory explanation of the change in the accounts. [P 54 C 2]

(b) Penal Code (1860), Ss. 477-A and 463—Not S. 477 but S. 463, Penal Code, is governed by Criminal P. C. (1898), S. 195 (1) (c).

The provisions of S. 477-A, Penal Code are not covered by the provisions of S. 195 (1) (c) S. 195 (1) (c) refers in the first place to offences punishable under S. 463 (forgery), Penal Code, and that would no doubt include the various offences of which forgery was an element. The definition of forgery is given in S. 463 and would cover the various sections in which the word "forgery" is used. But S. 477-A does not contain any reference to forgery. It contains its own definition of the offences enacted therein: 5 *I. C.* 879, *Dist.* [P 54 C 2]

Motiram Idanmal—for Applicant.

Tarachand Khimandas—for Opponent.

C. M. Loho, Public Prosecutor—for the Crown.

Judgment. — The complaint in this case was lodged against the accused under Ss. 465 and 477-A, I. P. C. Process was issued under S. 477-A. It was alleged that accused was first a servant and subsequently became a partner of the complainant. It was accused's part to write up the books of account. In Sambat 1985 aecused was asked to complete the books. But instead of doing so he left the partnership. The complaint against him is that he falsified an entry in the firm's books relating to a deposit made by himself on 13th Akhar 1985 so as to make it appear that the deposit was made in the name of his brother-in-law Udernomal. The firm had suffered losses and if the deposit remained in the name of the accused he would not have been able to recover the money. The allegation is that he falsified the books to show that the deposit was made by his brother-in-law. His brother-in-law Udernomal sued the firm and recovered this deposit in addition to another deposit made by him. The accused was discharged by the learned Special First Class Magistrate, Karachi, and the complainant has now come to this Court in revision.

The complaint is based on three entries; Exs. 2-B, 1-C, and 1-D in the complainant's books relating to the deposits made

by the accused on the 13th Akhar. The entry Ex. 2-B is made in the yadasht which does not appear to be a regular account book but simply a note book kept of entries to be made in the katcha rokar. The entry in the yadasht shows that the deposit of Rs. 200 was made by the accused and so does the entry in the katcha rokar. Ex. 1-C and in the pacca rokar Ex. 1-D. The entry Ex. 1-D was however subsequently written over the name of Udernomal, being written over. This is a transaction which obviously requires explanation. The deposit which was originally shown as having been made by the accused was subsequently shown in the pacca rokar as a deposit made by Udernomal. The accused admits that he made this correction and the explanation given by him is that the deposit was really made by Udernomal that complainant's brother Hemandas told him that Udernomal had asked for the amount and Hemandas had written to him promising to pay the amount, that when payment was made Udernomal said that the chit had been lost and the accused accordingly made the change at Hemandas' request so that Udernomal should not claim the amount a second time. But it would have been a simple matter for Hemandas to have taken a receipt from Udernomal clearly stating the facts of the transaction when the repayment was made so that there could have been no possibility of Udernomal's producing the letter in support of a claim for any repayment a second time. No reasonable ground has been urged why this simple ordinary procedure should not have been followed instead of making the false entry in the complainant's book the purpose of which has not even now been clearly explained.

The learned Special First Class Magistrate has held that the allegations now made were not made when Udernomal sued in the Small Cause Court for the return of both the deposits. Ex. 1-F is the written statement of the defendant (not complainant) in the Small Cause Court suit. In para. 3 he made allegations of bad faith against his partner Partab Rai. He did not specifically allege the falsification of accounts, the subject of the present complaint. The finding in the Small Cause Court suit was that both the deposits were made by Udernomal. The learned Magistrate was of opinion that the Court was precluded from trying the same question again. But even if complainant was lax in his conduct of the case in the Small Cause Court if as a matter of fact there had been falsification of the accounts it is still open to him to lodge a criminal complaint on the facts alleged. It may be a difficulty in his case that he did not raise that contention in the civil proceedings. But so far as the present complaint is concerned there are plain alterations in the complainant's books of account which the accused admits were made by him which show that a certain deposit was first shown as made by the accused and the entry was subsequently altered to show the deposit was made by Udernomal his brother-in-law. No reasonable explanation has been given why this change in the account was made and the accused should not have been discharged until the Magistrate had had before him some satisfactory explanation of the change in the accounts. It may be noted that the explanation given by the accused in his statement to the Court was not put to the witness Hemandas; it was the accused's case that the change was made under instructions from Hemandas.

A further point has been taken that the sanction of the Small Cause Court is required for this prosecution. The Small Cause Court suit was a suit against the firm in which, according to the complaint accused is a partner. Accused was examined as a witness in the case and produced the entries complained of. The opponent relies on *Teni Shah* v. *Bolahi Shah* (1) in which it was held that S. 463, I. P. C. referred to in S. 195 (c), Criminal P. C. covers forgery of the description for which a penalty is provided under S. 467, I. P. C. Applicant contends in the first place that opponent was not a party to the suit he was not served as a party nor did he appear as a party. But without going into this question I would hold that the provisions of S. 477-A are not covered by the provisions of S. 195 (1) (c). S. 195 (1) (c) refers in the first place to offences punishable under S. 463 (forgery) and that would no doubt include the various offences of which forgery was an element. The definition of "forgery" is given in S. 463 and would cover the various sections in which the word "forgery" is used. But S. 477-A

(1) [1909] 11 Cr. L. J. 280=5 I. C. 879.

does not contain any reference to forgery. It contains its own definition of the offences enacted therein and the ruling *Teni Shah* v. *Bolahi Shah* (1) would therefore not apply.

I hold therefore that the accused has given no reasonable explanation of the admittedly false entries in the complainant's books which he admits have been made by him. I am of opinion that he was improperly discharged and I therefore direct the District Magistrate by himself or by any Magistrate subordinate to him (I would suggest a Magistrate other than the Magistrate who has tried the case) to make further inquiry into the complaint against the accused.

B.V./R.K. *Order accordingly.*

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* A. I. R. 1932 Sind 55

MILNE, J. C. AND ASTON, A. J. C.

Nawat Kamal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 289 of 1931, Decided on 19th November 1931.

*** (a) Evidence Act (1872), S. 24—Zamindars connected with investigation are persons in authority.**

Where zamindars are directly connected with the investigation by the direction of the police then they are clearly persons in authority within the meaning of S. 24, and any confession made to them by an accused person under an inducement offered to him is inadmissible in evidence. [P 57 C 1]

(b) Criminal Trial—Identification — Value of—Prosecution witness discreditable — No value should be given to identification by him.

It is difficult to rely on a witness who identified the accused but who according to the story of the prosecution is not a creditable witness. Much value cannot be attached to his identification of the accused. [P 58 C 1]

Gobindram Jaichandrai — for Appellant.

C. M. Lobo, Public Prosecutor—for the Crown.

Milne, J. C.—The appellant Nawat and one Safar were charged with having committed robbery of Rs. 395-13-0 and using deadly weapons, namely hatchets in the commission of the offence. The offence is alleged to have been committed on 23rd January 1931.

The prosecution story is that Isarmal left his village Abjee for Naushahro Feroz to attend the Sub-Judge's Court there. He took letters from the headmasters of Abjee and Mithiani schools to the headmaster of Naushahro school to bring the pays of their respective schools. Having finished his work at Naushahro and having obtained Rs. 385 as the pay of the schools, Isar was returning to his village; he intended to go to the village of Burera, 8 miles distant, to visit his sick brother-in-law. After he passed the village of Vagan he met the two accused from whom he inquired the way to Burera village which was pointed out to him. The two accused subsequently came upon him telling him that they had returned as they had to give intimation of a marriage in that direction. The three proceeded about a mile, and when they came to a deserted part of the road the two accused who were armed with hatchets ordered him to get down from his donkey and hand over his property. As he hesitated to do so the accused threatened him with their hatchets, pulled him down from his donkey and deprived him of whatever property they could find on him. Isar came to Burera in the evening and informed the villagers of the incident. Next morning a search party went to the scene and searched the prints as far as Vagan. Issar then went to Naushahro and lodged the first report at 5 p. m. The police inquiries were unsuccessful: the investigations were temporarily suspended and the Sub-Inspector left the scene with instructions to the zamindars and informants to get him some clue.

The Sub-Inspector took up the investigation again on 28th February 1931 and went to Jaffer Shah's village; about the same time the witness Jam received information that the accused Nawat was concerned in the affair and on 28th February he went from his village through Jaffer Shah's village to the village of Nawat. He did not ascertain that the police were in Jaffer Shah's village that morning. Nawat admitted his connexion with the offence and agreed to produce a dhoti, a part of the property still with him. Jam then set out for his village passing on his way the village of Jaffer Shah where he learnt that the Sub-Inspector was putting up; he told the Sub-Inspector what he had ascertained. The Sub-Inspector commissioned the Jamadar Mahomed Saleh to go to Nawat's house and obtain the property in question. Mahomed Saleh accompanied by Jam and Kandero went to accused's village next day. They passed the night of the 28th at Deparja which is one mile from accused's village. Accused's vil-

lage is six miles from the village of Jaffer Shah. They got to the accused's village at noon and at 4-30 p. m. Nawat produced one dhoti which has been identified by the complainant as part of the stolen property. Isar also picked out appellant in an identification test.

That is the evidence so far as it concerns the present appellant except that on the 2nd March he was sent to the First Class Magistrate, Naushahro, who recorded his confession that day.

The evidence then against the accused is his extra-judicial confession to Jam; his judicial confession to the First Class Magistrate, Naushahro; and production by him of a dhoti from a box in his house; the identification by the accused of the witness Issarmal, who picked him out at the identification test.

As regards the first piece of evidence the extra judicial confession it has been attacked on the ground that it is inadmissible under S. 24, Evidence Act, as it was caused by an inducement having reference to the charge against the accused, proceeding from a person in authority. In his evidence Jam (Ex. 26) states that he went to Nawat and told him that the Bania had lost only Rs. 5-12-0 and that he had made a complaint of theft of very much larger sum, and that Nawat should speak the truth so that the Bania might be sent up for making a false report. Jam says that he did not tell the accused that he had been sent by the police, but he admits that he did tell him that he would get him a pardon from the Sub-Inspector of police.

Now this is undoubtedly an inducement of the nature referred to in S. 24. The question remains whether it proceeded from a person in authority as contemplated in that section.

The witness Jam admits that he was one of the persons who was asked to make inquiries, to get a clue as to who were the persons who had committed the offence.

The appellant therefore relies on the case of *Emperor* v. *Loung* (1) that where zamindars are directly connected with the investigation by the direction of the police then they are clearly persons in authority within the meaning of S. 24. The learned Public Prosector has contended that this case has no application to the facts of the present case. The police officers had temporarily abandoned the investigation. The Zaminder Jam was not acting directly under their orders. They had left the locality. He was pursuing his investigation independently. The lapse of time of one month, in which the police had not been near the scene of the offence, it is contended, distinguishes this case from the case above referred to. But without going into that question we would hold on the facts of the present case that there is sufficient reason to hold that on the 28th Jam had been in touch with the police and was acting directly under their instructions. The story of Jam is that he was informed by some one in his village that Nawat was concerned in the offence; two or three days after this he went to Nawat's village to inquire. On the way he had to pass the village of Jaffar Shah, but he did not ascertain that the police were there at the time. He reached Nawat's village at 2 or 2-30 p. m. He got information from Nawat, and was returning to his own village, when on reaching Jaffer Shah village he learnt that the Sub-Inspector was there and informed him of what had happened. The Sub-Inspector sent him with the Jamadar Mahomed Saleh to secure the property which they did the next day.

Mahomed Saleh (Ex. 38) tells practically the same story. He was called by the Sub-Inspector to Vagan and reached there at 4 p. m. The village of Vagan and the village of Jaffar Shah appear to be the same. The Sub-Inspector ordered him to arrest Nawat and secure the property; he went with Jam and Kandero to carry out the orders, doing so on the 1st March.

The story of the Sub-Inspector is entirely different. The Sub-Inspector (Ex. 39) states that Jam came to him at 10 or 11. a. m. On the morning of the 28th the Sub-Inspector recorded his statement. He sent him with the Head Constable Mahomed Saleh to secure Nawat accused. Mahomed Saleh returned on the 28th the same day, bringing Nawat with the dhoti (Ex. 2). The next day the complainant Isar identified accused Nawat from amongst five or six persons. As a matter of fact the date on the mashirnama is 2nd March. Now it is possible that the Sub-Inspector may have been mistaken in his account as to what happened on 28th February and 1st March. But it may be

(1) [1916] 10 S. L. R. 140=18 Cr. L. J. 58=31 I. C. 42.

noted that all these facts were again put to him in cross-examination ; he was given a second opportunity to state the real facts; he again stated that he reached Jaffer Shah's village at 9 a. m. on 25th February 1931, that Jam came to him about 11 a. m. to give him news about Nawat ; that Mahomed Saleh left Jaffer-shah village to secure Nawat at 11 a. m. or 12 noon, that Mahomed Saleh came back with Nawat at 6 p. m. It is a matter for surprise that neither the prosecution in the lower Court, nor the Court itself took any steps to clear up these discrepancies. We think it is clearly a case in which the Sub-Inspector should have had an opportunity to correct his recollection by study of his papers.

It is also peculiar that these discrepancies have not been dealt with in the judgment. But even supposing that the Sub-Inspector did make certain mistakes as to what happened on the 28th and 1st March it is quite clear from his evidence that he went to the village of Jaffer Shah on the morning of the 28th. It is hardly probable that Jam passing through that village would not become aware of the fact. It is a very peculiar coincidence that Jam, having received the information two or three days before he visited Nawat's village, should suddenly spring to activity on the very day on which the Sub-Inspector arrived at Jaffer Shah's viilage. It is true that Jam denies that he told the accused that he had been sent by the police. But it seems the more reasonable view to take that on the morning of the 28th Jam had met the police; that he had gone to Nawat's village under their instructions and in making his inducement to the accused, he did make it clear to him that he had been sent by the police ; his promise to get the accused a pardon cannot therefore be regarded as a mere empty promise.

We would therefore hold that there was inducement offered to the accused to make this confession and that it did proceed from a person in sufficient authority and therefore the extra-judicial confession must be discarded.

The appellant has next contended that the judicial confession before the First Class Magistrate, Naushahro, was recorded on 2nd March before the impression af the inducement above referred to had worn off. It may be noted that the inducement offered was rather a cunning one ; Jam put it to the accused that the Bania had told a false story and if the accused would speak the truth he would be protected and the Bania would get into trouble, for making a false report. It is quite reasonable to hold that the accused would still be under the influence of that inducement when he made his confession before the First Class Magistrate, Naushahro. The confession it may be noted includes the story about the dhoti which for reasons to be given hereafter is a part of the prosecution story which we are unable to accept. That would be an additional reason for holding that the confession to the First Class Magistrate was an untrue confession made by the accused in view of the inducement given him by the zamindar Jam.

The third piece of evidence is the production of a dhoti by the accused from a box in his house. There are certain minor discrepancies as to the circumstances in which this was produced but we need not dwell upon those. The learned pleader for the appellant has correctly laid emphasis on the fact that it is highly improbable that the accused should have kept with him for such a period so entirely useless an article. It would appear from the mashirnama (Ex. 27) that what was produced was a torn old white dhoti. Accused is said to have produced this from a box in his house. It is hardly likely that the accused would take the trouble to preserve an article of absolutely no use to him, the only purpose which it could have served would be to create evidence against himself.

The story as to what happened on 1st March is not very convincing. Mahomed Saleh and his party passed the night of 28th February and 1st March at Deparja Thana which is a mile from the village of Nawat accused ; they reached Nawat's village at noon ; yet according to the prosecution evidence the dhoti was not produced till 4-30 p. m. on 1st March. If Nawat had voluntarily confessed the offence on the 28th and was still willing on 2nd March to make a voluntary confession before the First Class Magistrate, it is very strange that so much time should have been taken in the production of this piece of cloth on the first.

We must come to the conclusion that a good deal more happened on 1st March in the accused's village than the prosecution have disclosed.

The final piece of evidence against the accused is the identification test in which Isarmal the complainant identified the accused. That of course adds very little to his own evidence that the accused is the man who committed the offence ; the test was held to corroborate that statement. Isarmal is not a very reliable witness. It is the prosecution case that he has made away with the bulk of the money received by him from the Head Master, Naushahro for the school masters of Abjee and Mithiani and falsely alleged that he had been robbed of a large amount while as a matter of fact he had been robbed of a very small sum. The circumstances in which the identification test was held were not wholly satisfactory. The witness was called from Abjee for the identification test. He reached the village of Vagan in the evening. The identification test was held next morning when the sun was rising. At night he met the Sub-Inspector who directed him to come in the morning. As the witness spent the night in the village of Vagan he could, if he so desired have had an opportunity to see who the accused person was. There is of course no allegation of enmity between this witness and the accused but it would be perhaps difficult to rely on a witness who according to the prosecution story itself is not a creditable witness.

For these reasons therefore we are not satisfied that the case against the accused has been fully proved. We therefore reverse the conviction and sentence and acquit the accused.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Sind 58

MILNE, J. C. AND RUPCHAND, A. J. C.

Hashim Moosa—Applicant.

v.

Mrs. G. Booth—Opponent.

Criminal Revn. Appln. No. 87 of 1931, Decided on 14th September 1931.

Criminal P. C. (1898), Ss. 200 and 203—Words "if any" in S. 203 show that there need not be any examination on oath other than that provided by S. 200.

Cases may be conceivable where something may transpire in the course of the evidence of the complainant's witnesses which requires an explanation and in that case it might perhaps be arguable that the Magistrate should have examined the complainant further in order to enable him to explain what was said by the witnesses. But the words "if any" in S. 203 clearly show that there is no necessity for the Magistrate to examine the complainant on oath in addition to his examination under S. 200 unless he considers it desirable to do so :*A.I.R.* 1924 *Bom.* 341, *Expl.* and *Dist.* [P 58 C 2]

P. K. Vaswani—for Applicant.

Rupchand J. Vaswani—for Opponent.

C. M. Lobo—for the Crown.

Milne, J. C.—This is a complaint filed under S. 420, I. P. C., by the applicant against one Mrs. Booth who had purchased certain goods from the applicant. The applicant held six pro-notes executed by the accused. The accused had been pressing for a further loan of Rs. 400 to which the applicant agreed provided that her husband joined in the execution of the pro-note for the entire amount of Rs. 1,300 including the previous advances.

The accused agreed to this. The complainant went to her house. The accused showed him a pro-note which she said was signed by her husband and asked the complainant to hand over the previous pro-notes. The applicant insisted on the accused also signing the pro-note. He then delivered to the accused the six previous pro-notes and paid her the sum of Rs. 400. The accused and her husband subsequently denied the execution of the pro-note. They repeated their denial through their pleaders when called upon by the applicant's pleader to pay the amount.

The complainant was examined;he verified his complaint. A preliminary inquiry was held by the Magistrate who examined the complainant's witnesses who did not give any evidence in support of the charge, and the complaint was dismissed under S. 203 as there was no evidence to prove that the accused had committed any criminal offence.

The ground which the applicant has taken in this Court is one of law. It is his proposition that he should have been examined on oath under S. 203 in addition to his examination under S. 200 before his complaint could be dismissed. For this proposition he relies on the case of *In re Ningappa Rayappa* (1). There Macleod, C. J., refers to the Magistrate as being bound to examine the complainant under S. 203 but it appears from the judgment of Shah, J., that the complainant was not examined at all in that case.

The complainant has been examined in this, and it appears from the use of the words "if any" in S. 203 that there is no

(1) A. I. R. 1924 Bom. 321 = 81 I. C. 608 = 25 Cr. L. J. 960=48 Bom. 360.

necessity for the Magistrate to examine the complainant on oath under that section unless he considers it desirable to do so. We therefore dismiss this application.

Rupchand, A. J. C.—The learned counsel has argued that the learned Magistrate should not only have examined the complainant on oath at the time the complainant was presented by him as required by S. 200, but that he should have examined him further after he had recorded the evidence of the witnesses cited by the complainant. In support of his argument he has urged that the expression "statement on oath" in S. 203 is something different from the examination on oath of the complainant under S. 200 of the Code. He has however lost sight of the words "if any" in S. 203, Criminal P.C. These words clearly show that there need not be any examination on oath by the complainant other than that provided by S. 200.

In *In re Ningappa Rayappa* (1) the complainant had been referred by the Magistrate to the police for investigation and it is not clear either from the editorial note or from the judgment of the learned Chief Justice if the Magistrate had examined the complainant on oath as required by S. 200 before he sent the papers to the police for investigation. It is true that the learned Chief Justice has said:

"The Magistrate without examining the complainant as he was bound to do under S. 203, Criminal P.C., dismissed the complaint."

But it is possible that reference to S. 203 in the above passage is a mistake for S. 200, because in his concurring judgment Shah, J., has said:

"The order dismissing it under S. 203, Criminal P. C., is clearly wrong as the complainant was not examined at all."

As the complainant had not been examined at all, there was no occasion for their Lordships to decide if it was incumbent on the Magistrate to examine the complainant a second time.

I can quite conceive of cases where something might transpire in the course of the evidence of complainant's witnesses which requires an explanation and in that case it might perhaps be arguable that the Magistrate should have examined the complainant further in order to enable him to explain what was said by the witnesses. But there is no such allegation in the present case, as the witnesses who were examined on behalf of the complainant have said nothing which requires any further explanation from the complainant. There is therefore no substance in this argument, and I accordingly concur with the learned Judicial Commissioner that this application should be dismissed.

P.N./R.K. *Revision dismissed.*

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* A. I. R. 1932 Sind 59

RUPCHAND AND MEHTA, A. J. Cs.

Haji—Applicant.

v.

Mt. Fatma—Opposite Party.

Criminal Revn. Appln. No. 158 of 1931, Decided on 18th November 1931.

*** Criminal P. C. (1898), Ss. 488 and 489 —Order under S. 488 varied in revision—Still application under S. 489 may be entertained by trial Court.**

The provisions of S. 489 are comprehensive and empower a Magistrate having jurisdiction to vary the amount of allowances fixed under the preceding section not only by himself but by his predecessor-in-office; and more so to vary his own order which has been corrected on revision.

[P 59 C 2]

Hasomal M. Gurbuxani — for Applicant.

C. M. Lobo—for Opposite Party.

Rupchand, A. J. C.—In this case the learned Magistrate has declined to exercise jurisdiction under S. 489, Criminal P. C., on the sole ground that the previous order passed by him under S. 488 was varied by this Court in revision. He has accordingly referred the applicant for redress to this Court.

We think that in so doing the learned Magistrate was clearly in error. The provisions of S. 489, Criminal P. C., are comprehensive and empower a Magistrate having jurisdiction to vary the amount of allowances fixed under the preceding section not only by himself, but by his predecessor in office; and more so to vary his own order which has been corrected on revision. In dealing with an application under S. 489, Criminal P. C., he will not be reviewing or interfering with the order of this Court, but will be dealing with the changed circumstances if any which have come into existence since that order for the purpose of determining whether the amount fixed as monthly allowance should or should not be reduced. We accordingly set aside the order passed by the learned Magistrate and direct him to proceed with the application under S. 489, Criminal P. C., on its merits.

B.V./R.K. *Order accordingly.*

* A. I. R. 1932 Sind 60

RUPCHAND AND MILNE, A. J. Cs.

Kodulal—Applicant.

v.

Beharilal—Opponent.

Civil Revn. Appln. No. 84 of 1928, Decided on 11th February 1931, against decision of Joint Sub-Judge, Shikarpur.

* (a) **Registration Act (1908), S. 2 (6)—Immovable property—Definition is not exhaustive and includes hereditary offices classed as "nibandhas" by Hindu law—Hindu law, Religious office.**

The definition of "immovable property" given in the Registration Act is not exhaustive. It only refers to some of the things which are "included" in that expression, and therefore reference to hereditary allowances does not exclude hereditary offices classed as "nibandhas" from falling within the purview of this comprehensive definition of immovable property, provided they are so treated by Hindu law. [P 61 C 1]

(b) Transfer of Property Act (1882), S. 105—Applicability — Transfer of "Yajaman Vritti" for limited period is not lease according to S. 105.

In order to come within the purview of a lease, it should be a transfer of a right to the enjoyment of immovable property.

A "Yajman Vritti" primarily denotes an obligation imposed upon the Purohit or family priest to perform certain religious rites, the performance of which no doubt carries with it certain emoluments. It is not immovable property in the proper sense of the word, although it is treated as such, and the transfer of the duties or obligations attached to the status of a Purohit cannot possibly be said to be a transfer of rights to enjoy immovable property so as to amount to a lease within the meaning of the Act. [P 61 C 2]

(c) Registration Act (1908), S. 49—Collateral purpose—Unregistered lease is admissible to calculate compensation for use and occupation.

Section 49 is in no way a bar to the owner of immovable property demised by him under an unregistered lease from recovering damages for use and occupation of the demised premises and for this purpose the unregistered lease is admissible in evidence: 11 *I. C.* 23; *A. I. R.* 1926 *Oudh* 304 ; *A. I. R.* 1923 *All.* 603 ; *A.I.R.* 1930 *Patna* 110 ; 17 *Mad.* 456 ; 45 *I. C.* 217 and 30 *I. C.* 258, *Rel. on.* [P 61 C 2]

(d) Registration Act (1908), S. 17— Mere memorandum of delegation of "Yajaman Vritti"—Registration is not compulsory.

A Purohit granted to another the right to act for him as a priest at Sidhpur, collecting the offerings of the Yajmans for a period of two years describing the written agreement as theeka.

Held : that the agreement between the parties was more in the nature of a memorandum of the delegation of the obligations for a period of two years which carried with it the necessary result of perquisites being received than a lease, and as such was not inadmissible for want of registration. [P 62 C 1]

(e) Hindu Law—Religious office — Temporary delegation of "Yajman Vritti" is not against public policy if not objected to by the Yajamans—Transfer of Property Act (1882), S. 6, Construction.

There is nothing in the Hindu Texts to prevent the temporary delegation by a Purohit of duties attached to his "Yajman Vritti", to his own relative who is in no way unfit to perform such duties and more so when the Yajmans do not object. There is nothing in such delegation as may be held to be against public policy. There is a broad distinction between such delegation and a permanent alienation of personal services against the wishes of the Yajmans : 5 *S. L. R.* 107, *Dist.* [P 62 C 1,2]

Srikishendas H. Lulla—for Applicant.

J. L. Bhojwani—for Opponent.

Rupchand, A. J. C.—The plaintiff-applicant is a Brahmin and is related to the defendant. He lives at Shikarpur, but possesses inter alia the "yajman vritti" at Sidhpur, and is not able to attend to it personally. He entered into an agreement with the defendant under which the defendaut was to officiate on his behalf as a priest at Sidhpur and to collect the offerings from the yajmans for a period of two years. Instead of accounting to him for the offerings collected by him and charging him reasonable remuneration for services rendered, he agreed to pay him a lump sum of Rs. 120.

The plaintiff instituted this suit for recovery of the stipulated sum in the Small Cause Court, Shikarpur, and in support of his case produced along with the plaint the written agreement between the parties.

On the pleadings of the parties, the learned Judge raised the following issues :

(1) Can the suit lie on the document in question ?

(2) Is the lease invalid ?

(3) Has this Court jurisdiction ?

(4) Has the consideration failed, and if so, what is the effect ?

(5) What should the decree be ?

On issues 1 and 2, the learned Judge held in favour of the defendant. On issue 3 he held that the Court had jurisdiction. In view of his finding on issues 1 and 2, he did not record evidence on issue 4 and nonsuited the plaintiff. The plaintiff has now come to us in revision.

Now, it is no doubt true that a "yajman vritti" which is "nibandha" or hereditary is classed by Hindu text-writers as "sthavar" which literally means "fixed and motionless property" ; see Jolly on "Hindu Law and Custom," p. 211. As such it has been treated as immovable property within the meaning of S. 2, Cl. 6, Registration Act : *Krishna-*

bhat v. *Kapabhat* (1); *Balvantrao Bapaji* v. *Purshotam Sidheshvar* (2). Their Lordships of the Privy Council considered these cases in *Fattehsangji* v. *Kallianraiji* (3) and observed at p. 50 as follows:

"The rule is shortly this, viz., that inasmuch as the term 'immovable property' is not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immovable, although not such in the ordinary acceptation of the word. To the application of this rule within proper limits, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immovable property, or of an interest in immovable property; and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose. Thus, in the two cases on which the appellant relies, Hindu texts were legitimately used to show that, in contemplation of Hindu law, hereditary offices in a Hindu community, incapable of being held by any person not a Hindu, were in the nature of immovables. And those decisions receive additional support from S. 1, Bombay Regn 5 of 1827, which expressly declares hereditary offices to be immovables, an enactment which, inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act 14 of 1859, and to stand unrepealed in the presidency of Bombay."

An attempt was made to show that these rulings have no application at present on the ground that there was no definition of immovable property in the old Registration Act, while a definition is given in the present Act which refers to : "hereditary allowances as immovable property, but makes no mention of hereditary offices as such."

But the definition of immovable property given in the present Act is not exhaustive. It only refers to some of the things which are "included" in that expression, and therefore reference to hereditary allowances does not exclude hereditary offices from falling within the purview of this comprehensive definition of immovable property, provided they are so treated by Hindu law.

The expression used in the agreement between the parties is "theeke" which literally means a contract, or bargain. It has been interpreted by the learned Judge below as a lease of immovable property, and therefore inadmissible for want of registration. It is difficult to see how a bargain of this nature can be treated as a lease of immovable property within the meaning of S. 105, T. P. Act.

(1) [1869] 6 Bom. H. C. A. C. 137.
(2) [1872] 9 Bom, H. C. R. 99.
(3) [1873] 1 I. A. 34=21 W.R. 178=10 B.H.C. 281=3 Sar. 306 (P.C.).

In order to come within the purview of a lease, it should be a transfer of a right to the enjoyment of immovable property.

A "yajman vritti" primarily denotes an obligation imposed upon the Purohit or family priest to perform certain religious rites, the performance of which no doubt carries with it certain emoluments. "Yajman vritti" is not immovable property in the proper sense of the word, although it is treated as such, but the transfer of the duties or obligations attached to the status of a Purohit cannot possibly be said to be a transfer of rights to enjoy immovable property so as to amount to a lease within the meaning of the Transfer of Property Act.

Even if it be assumed that the agreement between the parties amounts to a lease of immovable property, and therefore requires registration, it does not follow that the plaintiff cannot therefore recover the amount payable to him in respect of such lease.

All that S. 49, Registration Act, prohibits is that an unregistered lease of immovable property which is required to be in writing and registered under the Transfer of Property Act, shall not (1) affect such property and (2) be received as evidence of any transaction affecting such property, vide Cls. (a) and (c) of the section. This section is in no way a bar to the owner of immovable property demised by him under an unregistered lease from recovering damages for use and occupation of the demised premises. In several decided cases, it has been held that an unregistered lease may be received in evidence for certain collateral purposes, for instance, ascertaining the fair amount of damages for use and occupation : *Swaminatha* v. *Sivigami Achi* (4), *Rajah of Venkatagiri* v. *Narayana Reddi* (5), *Narainsingh* v. *Kaiwan Bahu*, *A. I. R.* 1926 *Oudh* 304 or proving the relationship of landlord and tenant, *Raghoba* v. *Palhoba* (6) or proving the date of possession, *Abdullah Khan* v. *Muhammad Maqbul Husain* (7) or proving the circumstances under which possession was delivered, *Ram Sarup* v. *Suraj Din* (8) or for the purpose of explaining the posses-

(4) [1911] 11 I.C. 23.
(5) [1893] 17 Mad. 456=4 M.L.J. 198 (F.B.).
(6) [1918] 45 I.C. 217.
(7) A.I.R. 1923 All. 603=74 I. C. 822=45 All. 565.
(8) [1915] 30 I.C. 258.

sion of the defendant; *Banamali* v. *Gayaram*, *A. I. R.* 1930 *Patna* 110.

On the same analogy, it would appear that it was open to the plaintiff to sue for damages for enjoyment of the perquisites by the defendant less reasonable charges for services rendered by him, and to rely upon the alleged lease for the collateral purpose of proving the quantum of damages claimed by him. If necessary, the plaintiff could have been permitted to amend his plaint to make it clear that he was not relying upon the agreement as the basis of his suit.

We however think that the agreement between the parties is more in the nature of a memorandum of the delegation of the obligations by the plaintiff to the defendant for a period of two years which carried with it the necessary result of perquisites being received by the defendant than a lease, and as such, was not inadmissible for want of registration.

With regard to the finding that a hereditary "yajman vritti" is inalienable, again it might be observed that there is nothing in the Hindu texts to prevent the temporary delegation by a Purohit of such duties to his own relative who is in no way unfit to perform such duties during such time as he cannot personally attend to them, and more so, when the yajmans do not object to such delegation.

In Colebrook's Digest of Hindu Law, Book 2, Ch. 3, S. 2, p. 42 it is said:

"The sacrificer who forsakes the officiating priest and the officiating priest who abandons the sacrificer, each being able to do his work, and guilty of no grievous offence, must each be fined a hundred panas."

This and other passages in the Hindu text-writers do support the view taken by Crouch, A. J. C., in *Manghirmal* v. *Vithalram* (9), that a temporary delegation by a Purohit of his obligations to perform religious rites which is objected to by the yajmans is void as being opposed to public policy. Our attention has not been invited to any text which prohibits temporary delegation not objected to by the yajmans. On the contrary, the whole of S. 2 in Ch. 3 of Book 2, Colebreok's Digest of Hindu Law, which deals with partnership among priests, indicates that temporary delegation for just cause and with the consent of the yajmans would not be against public policy.

Question 32 propounded in West and Buller's Hindu Law, Book 1, Ch. 2, S. 6-(A), p. 388, Edn. 4, shows that a widow can be the possessor of a "yajman vritti" as a part of her inheritance, and in such cases, it cannot be gainsaid that she may not employ a delegate on her behalf to perform ceremonies which she being a woman cannot herself attend to and to recover the offerings for her, provided of course such delegate is a member of the family, and is otherwise fit to perform religious ceremonies.

There is a broad distinction between delegation of duties which is not objected to and a permanent alienation of personal services against the wishes of the yajmans and the dictum of Crouch, A. J. C., in *Manghirmal* v. *Vithalram* (9), qualified as it was by the learned Additional Judicial Commissioner, has no application.

We are not now concerned with the question whether the yajmans, if any, had refused to recognize the defendant or that they had refused to pay him any perquisites. These questions are the proper subject-matter of issue 4 which has been left undecided. But so far as issue 2 is concerned, it would appear that the temporary delegation by the plaintiff of his rights to the defendant, if not objected to by the yajmans, was not against public policy so as to disentitle him to recover the amount agreed to be paid to him.

We therefore set aside the decree of the lower Court and remand the case for disposal according to law after recording the evidence on issue 4. Costs to be costs in the cause.

W.D./R.K. *Case remanded.*

(9) [1911] 5 S.L.R. 107=13 I.C. 225.

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* A. I. R. 1932 Sind 62

FERRERS, J. C. AND RUPCHAND, A. J. C.

Dharamdas Thawardas—Applicant.

v.

F. O. Hukumchand Mirimal—Opponent.

Civil Revn. Appln. No. 34 of 1929, Decided on 22nd December 1931.

(a) Insolvency— Adjudication of firm affects every partner.

An order of adjudication against a firm is an order of adjudication against each individual partner of the firm: *A. I. R.* 1927 *Sind* 18 and *A. I. R.* 1932 *Sind* 39, *Rel. on.* [P 63 C 2]

*** (b) Provincial Insolvency Act (1920), S. 28 (4) (7)—Payments made by debtors to insolvent subsequent to presentation of application for adjudication are void as against Official Receiver unless made bona fide and without knowledge of petition—Debtors ab-**

sent—Insolvent stating that debtors were not aware of petition—Court is not justified in giving credit to the payments made by debtors.

Any payment made by debtors of the insolvent to him subsequent to the date on which the insolvency application is presented are void as against the Official Receiver unless the debtors prove that they had made the payments bona fide and without knowledge of the insolvency petition having been filed in the Court.

Where the debtors fail to appear before the Court and thus do not raise any such contention the Court is not justified in giving credit to the payments made by them to the insolvent and reducing the claim of the Official Receiver only on the statement by the insolvent that when the debtors made the payments they were not aware of the petition for adjudication and that they made the payments bona fide. The belief if any entertained by the insolvent cannot be of any avail to the debtors who are ex parte.

[P 63 C 2]

Pahlajsing B. Advani—for Applicant.

Judgment.—This revision application arises out of a suit instituted by the Official Receiver for recovery of a sum of Rs. 925-5-9 said to be due by the defendants-respondents to the firm of Javharmal Banwarilal.

The defendants have not appeared in the lower Court or in this Court and are ex parte.

In the trial Court the Official Receiver examined the insolvent Dwarkadas for ex parte proof. Dwarkadas stated that the defendants had made three payments to him as under: Rs. 350 on 11th November 1925; Rs. 200 on 22nd February 1926 and Rs. 150 on 5th June 1926.

He further stated that at the time when the defendant made these payments they were not aware that he had been dragged into insolvency and that they had made bona fide payments. Accepting that evidence the learned Judge gave credit to the defendants for these terms and passed a decree in favour of the Official Receiver for the balance. The Official Receiver has come to us in revision.

Now, there can be no dispute that on 29th October 1925, the application to adjudicate the firms of Javharmal Harkishendas and Javharmal Dowlatram and their partners as insolvents was filed and on 26th March 1926, an order was passed adjudicating both these firms and their partners as insolvents. As Dwarkadas denied that he was a partner in the insolvent firms, he was not adjudicated as an insolvent on that date and after a further inquiry into the matter on 24th November 1926, he was held to be a partner and adjudicated as an insolvent. It is no doubt true that at the time when the creditors made an application to have Harkishendas and Dwarkadas adjudicated as insolvents they were not aware that the insolvents carried on business also in the name of Javharmal Banwarilal and therefore they did not ask for that firm also being adjudicated as an insolvent firm. But that is immaterial. The order of adjudication against the firms of Javharmal Harkishendas and Javharmal Dowlatram was an order of adjudication against each individual partner of those firms: *Re firm of Hiralal Shivnarain* (1) and *Herji* v. *Valabram* (2).

There is no allegation, much less proof that there were any other partners besides Harkishendas and Dowlatram in the firm of Javharmal Banwarilal, and the order of adjudication applied equally to the business done by the insolvents or any one of them in that name.

Although there was delay in passing an order of adjudication against Dwarkadas that order relates back to the date on which the petition was made as provided by S. 28, Cl. (7), Provincial Insolvency Act. That being so any payment made by his debtors to him subsequent to the date on which the insolvency petition was presented was void as against the Official Receiver unless the debtor proved that they had made the payment bona fide and without knowledge of the insolvency petition having been filed in Court. The defendants had failed to appear and had not raised any such contention. The insolvent who was probably in collusion with them could not possibly give direct evidence with regard to the knowledge or intention of the debtors at the time of the alleged payments. The belief if any entertained by the insolvent could not be of any avail to the debtors who were ex parte and the learned Judge was in error in reducing the claim of the Official Receiver.

We accordingly pass a decree in favour of the Official Receiver for Rs. 925-5-9 with interest from date of suit to payment and costs throughout.

R.M./R.K. *Decree passed.*

(1) A. I. R. 1927 Sind 18=97 I. C. 446=21 S. L. R. 280.
(2) A. I. R. 1932 Sind 39=25 S. L. R. 422.

* A. I. R. 1932 Sind 64

RUPCHAND AND MEHTA, A. J. Cs.

Emperor

v.

Attursing—Accused.

Criminal Acquittal Appeal No. 321/5 of 1931, Decided on 22nd January 1932.

*** (a) Criminal P. C. (1898), Ss. 234 and 235—Single trial for charges of criminal breach of trust and falsification of accounts in respect of three items on different dates within space of one year is not legal.**

A single trial for charges of criminal breach of trust and of falsification of accounts in respect of three items on different dates within the same space of one year is not permissible under the law. The offences of embezzlement and falsification of accounts are not offences of the same kind within the meaning of S. 234 nor are three different acts of embezzlement and falsification of accounts committed at different times so connected as to form part of the same transaction within the meaning of S. 235 : *A. I. R.* 1926 *Bom.* 110, *Rel. on.* [P 65 C 1]

(b) Criminal Trial—High Court—Retrial.

It is open to the High Court to order retrial from any stage of a criminal proceeding it thinks fit. [P 65 C 2]

*** (c) Evidence Act (1872), S. 24—Manager of company is person in authority.**

A manager of the local branch of a limited company is a person in authority within the meaning of S. 24 and confession made by a clerk in the company who is being tried for embezzlement is not admissible in evidence : 9 *B. H. C. R.* 358, *Rel. on.* [P 66 C 1]

*** (d) Evidence Act (1872), S. 24—Court can under S. 24 form its own opinion as to whether inducement, threat or promise was sufficient to lead accused to believe that he would benefit from making confession.**

Section 24 leaves it entirely to the Court to form its opinion as to whether the inducement, threat or promise held out in any particular case was sufficient to lead the accused to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing.

Where the manager of a company said to the accused who had committed the offences of embezzlement and falsification of accounts, that it would be in his interest if he made a clean breast of the whole affair and gave the substance of what he (accused) told him in writing, and insisted on having something in writing from the accused the same day and the accused complied with the demand :

Held : that the manager did hold out a sort of inducement and threat to the accused and the accused had reason to believe that he would gain by making the confession. [P 66 C 1]

C M. Lobo, Public Prosecutor—for the Crown.

Partabrai D. Punwani—for Opponent.

Rupchand, A. J. C.—The facts connected with this appeal which is against an order of acquittal are briefly as follows :

The accused worked as a store-keeper of the Karachi branch of the Bombay Telephone Co. Ltd. for a period of three years. Towards the end of August 1930 he was suspected of having embezzled certain stores, particularly wire. Mr. Norfolk who was then the local manager, went into the accounts and discovered certain alterations and manipulations in them which confirmed his suspicion. After getting a sort of a confession, both oral and in writing, from the accused, he reported the case to his head office, and then to the police who filed the present prosecution.

On 6th November 1930 the learned Magistrate framed a charge against the accused for three offences of embezzlement of wire on three different dates. The charge reads :

"That you between 11th June 1929 and 4th February 1930 .... committed criminal breach of trust with respect to the said property as detailed below:

(1) On or about 11th June 1929 committed criminal breach of trust with regard to 100 yards of lead wires valued at Rs. 30. (2) On or about 1st February 1930 committed criminal breach of trust with regard to 10 yards of lead wires valued at Rs. 3. (3) On or about 4th February 1930, committed criminal breach of trust with regard to 10 yards of lead wires valued at Rs. 3. And thereby committed three different offences within the period of 12 months punishable under S. 408, I. P. C., and within my cognizance."

Five days later, he yielded to the request of the Crown Prosecutor and framed the following further charge in respect of three more offences of falsification of accounts in respect of the three acts of embezzlement complained of which reads:

"2. That you further falsified account books of the Bombay Telephone Co. as detailed below:

(a) That you with the intention of defrauding the Bombay Telephone Co. falsified the indent slip books of the Bombay Telephone Co. on or about, 11th June 1929, by adding the figure '1' to the figure 59 in original slip No. 20917, Ex. 14, and thus made the entry of figure "59" read as "159"

(b) that you with the object of defrauding the said company, falsified the indent slip books of the Bombay Telephone Co. on or about 1st February 1930, by altering the figure "2" in the figure, 24 in the original slip No. 23514 Ex. 17 to figure 3 and thus made the entry to figure "24" read as "34"

(c) that you with the object of defrauding the said company falsified the indent slip books of the Bombay Telephone Co. on or about 4th February 1930 by adding the "figure" I to the figure '7' in original slip No. 23527, Ex. 20, and thus made the entry of '7' read as "17."

And thereby committed three offences within 12 months under S. 477-A, I. P. C. and within my cognizance."

At the end of the trial the learned Magistrate came to the conclusion the

the alleged confession was inadmissible in evidence, that there was no legal proof that the accused had either embezzled the wire or falsified the accounts on any of these three occasions and acquitted the accused. He arrived at this conclusion mainly on the grounds that the system of work in the company's office was faulty, that the store room and the account books were accessible to others besides the accused, that the falsification of the accounts consisted of alterations or additions of figures, and it was difficult to say who had made the alterations and when, and that although there was a suspicion that the accused, in complicity with other members of the staff had probably embezzled certain quantity of wire, it was not sufficient to warrant a conviction on the charges framed against him.

Now, on the very threshold, the learned Public Prosecutor is met with an insurmountable difficulty in his way of getting a conviction on the record as it stands, and of which he was not aware up to now, and that difficulty is that the charges framed in this case contravene the provisions of law and render the whole trial illegal. A single trial for charges of criminal breach of trust and of falsification of accounts in respect of three items on different dates within the same space of one year is not permissible under the law. The offences of embezzlement and falsification of accounts are not offences of the same kind within the meaning of S. 234, Criminal P. C., nor are three different acts of embezzlement and falsification of accounts committed at different times so connected as to form part of the same transaction within the meaning of S. 235 of that Code. In this connexion, it will be sufficient to refer to the observations of Fawcett, J., in *Emperor* v. *Manant K. Mehta* (1) at p. 900 (of 49 *Bom.*) where it is said:

"Therefore I think there is no sufficient ground for our taking a different view from that taken not only by the Calcutta, Madras and Allahabad High Courts, but also by this Court in *Emperor* v. *Nathalal* (2). No doubt this view provides rather a trap for Magistrates. In the case of alleged embezzlement, there is generally evidence of falsification of accounts to conceal that embezzlement, and unless the Magistrate knows, or has his attention drawn to, rulings of the Court about the illegality of joining three charges of embezzlement with three charges of connected falsification of accounts, he not unnaturally thinks, they can be the subject of one (trial which certainly is convenient) and is very likely to fall into the error that has occurred in this case."

In that case his Lordship suggested that the attention of Government might be drawn to the trap in which the trying Magistrates are likely to fall with a view to its being considered whether the provisions of S. 234 of the Code should not be amended to cover such cases. But so far nothing has been done in that behalf by the legislature. This trial being therefore illegal, we cannot, even if we hold the charges to be proved, accede to the prayer of the learned Public Prosecutor to convert the order of acquittal to one of conviction.

It is no doubt open to us to order a retrial from any stage of the proceedings we deem fit : and at first the learned Public Prosecutor suggested that we should order a retrial in respect of one of the two sets of charges. He however admitted that on the face of the evidence he could not fairly ask for a retrial in respect of the alleged falsification of accounts, but urged that there was a prima facie case in respect of the charges of embezzlement. In support of his argument he mainly relied on the alleged confession of the accused which had been excluded by the learned Magistrate from consideration. The learned Public Prosecutor again frankly conceded that the alleged written confession contained in Exs. 6 and 7 was rightly excluded from consideration in view of the provisions of S. 24, Evidence Act.

Mr. Norfolk was indubitably "a person in authority" within the meaning of that expression.

In *Reg.* v. *Navroji Dadabhai* (3) the confession was made by the accused who was a booking clerk of the G. I. P. Ry. Co. to Wainwright, travelling auditor of the company. It was argued that a "person in authority" meant a person who had the control over the prosecution of the accused, and as Wainwright had no such control, and was merely a fellow clerk of the accused, his duties being merely to check the accounts of the accused and to report to his and the accused's common superior he was not a person in authority. But Sargeant, C. J. refused to give effect to this argument, and at p. 369 said:

(1) A. I. R. 1926 Bom. 110=92 I. C. 689=27 Cr. L. J. 305=49 Bom. 892.

(2) [1902] 4 Bom. L. R. 433.

(3) [1872] 9 Bom. H. C. R. 358.

"Under these circumstances, it appears to me impossible unless a very restricted and literal meaning is to be given to the expression "person in authority" to hold that Wainwright was not a person in authority. He would clearly be so, I think, according to English authorities. The test would seem to be had the person authority to interfere with the matter; and any concern or interest in it would appear to be held sufficient to give him that authority as in *Queen* v. *Warringham* (4), where Parke Baron, held that the wife of one of the prosecutors and concerned in the management of their business, was a person in authority; and we find the rule so laid down in Archibold's Criminal Practice,"

These observations apply with a much greater force in the present case. Mr. Norfolk was not a mere fellow clerk, but was the head of the local branch and was the officer who actually suspended the accused in exercise of the authority vested in him.

Again, it is in evidence that Mr. Norfolk did hold out some sort of inducement or threat to the accused. In his examination-in-chief he has admitted that he said to the accused that it would probably be in the interests of the accused if he made a clean breast of it and gave the substance of what the accused had told him in writing, and that he insisted upon having something in writing from the accused that evening before he went home. In cross-examination he has explained this. At line 430 he has said:

"I meant that the company would be more inclined from my point of view to take a more lenient view of the whole case than if they were given no assistance ....."

And at line 500 he has said:

"At first the accused was reluctant to give anything in writing. I told him I would not go home until I got something in writing and it was my intention to keep him also in the office until he gave me something in writing, but had he continued to refuse to do so, I should most certainly have let him go, but I did not tell him to that effect ..... And when he gave the writing to me I let him go. It was about 6-30 m. The usual office time is 5-30 p. m. All the other clerks had left at 5-30 p. m.

Section 24 leaves it entirely to the Court to form its own opinion as to whether the inducement, threat or promise held out in any particular case is sufficient to lead the accused to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing. On this evidence the learned Magistrate has come to the conclusion that the accused had reason to suppose that he would gain by making the confession, and in the circumstances of this case there can be no doubt that the learned Magistrate was perfectly right in doing so.

The learned Public Prosecutor has attempted to argue that the oral admission by the accused which preceded Exs. 6 and 7 was not obtained by inducement or threat or promise and should therefore have been taken into consideration. On this point there is a good deal to be said on either side, and perhaps before the oral admission is held to be excluded by S. 24, it would mean taking further evidence. But assuming that the oral admission was not so obtained, it is of very little or no probative value so far as the present charges for embezzlement go. There are specific charges of embezzlement on three particular occasions. Mr. Norfolk is not very clear about what the accused said orally and all that he remembers is that the accused "admitted having taken a quantity of wire." He admits at line 450 that this was in answer to a question for "an explanation generally and not in respect of any particular items." This confession was no admission by the accused that he embezzled any wire on any of these occasions or even during that period.

It is in evidence that the locks of the store room were provided with duplicate keys, that one bunch of the keys was kept on the key-board in the switch room and and that on several occasions other employees had access to the store room in the absence of the accused. It is also in evidence that wire was not supplied to gangmen in small cut lengths as and when required, but was issued in complete rolls, on suspense account, and that it was subsequently accounted for by the issue of triplicate slips by the Foremen or other responsible officer of the company. Two copies of these slips were sent to the storekeeper who entered in both these copies in a column provided for the purpose the quantity issued by him against a particular slip. He retained one of the copies for his file and returned the other to the office.

Now, the quantity of wire shown in these slips as being indented for or issued on a particular day was neither indented for nor issued on that day. All that was really done was that a certain quantity used by gangmen out of the roll given to them on suspense account was on that day appropriated to a certain work carried out by them. In these three instances

(4) 2 Den. C. C. 447 n.

the duplicate receipts returned by the store-keeper to the Foreman after filling in the column which he was required to fill are correct. But it is said that the copies retained by the store-keeper were subsequently manipulated by the addition or alteration of figures and similar manipulations were made in the store-ledger cards.

In view of the admission by the learned Public Prosecutor that there is no convincing evidence that these manipulations had been made by the accused, it is difficult to see how in the absence of any further evidence the accused can be held to have embezzled these three particular items on those particular days.

No useful purpose can therefore be served in ordering a retrial in respect of these particular alleged acts of embezzlement.

In the end the learned Public Prosecutor asked us to order a retrial for embezzlement not in respect of these three items, but in respect of the total quantity alleged to have been embezzled by the accused during one of the three years that he was in service.

But it is neither necessary nor expedient for us to do so. The acquittal of the accused on charges of embezzlement between 11th June 1929 and 4th February 1930 does not prevent another prosecution being filed for embezzlement for the period of one year either prior to 11th June 1929 or subsequent to 4th February 1930. If notwithstanding what has transpired in the present case the officers of the Crown feel sufficiently strong to establish their case in respect of other acts of embezzlement, it is for them to collect the necessary material and to file a fresh prosecution. But it is hardly proper that the Crown should be permitted to convert this case into a different case altogether.

For these reasons we would dismiss this appeal.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Sind 67

MILNE, J. C.

Tayabally—Plaintiff.

v.

Bibi Fatma and *others*—Defendants.

Suit No. 103 of 1930, Decided on 23rd June 1931.

(a) Civil P. C. (1908), S. 16 and O. 7, R. 10—Court seised of case does not cease to have jurisdiction to entertain it though it is subsequently found that no property in suit was situate within its jurisdiction.

Order 7, R. 10, applies only when it is found that the suit as originally framed was wrongly instituted but it does not apply when it is found at the trial on the evidence led that the Court has no jurisdiction.

A person brought a suit in the Court at Karachi for his share in the property of his deceased father against his stepmother and others. Part of the immovable property covered by the suit was situate in Karachi, but it was found that that property belonged to the stepmother and not to the deceased. But it was also found that there was a bona fide claim by the plaintiff as regards the property situate at Karachi.

Held: that the plaintiff was entitled to bring his suit in Karachi and that the Court had jurisdiction to entertain it, though it was found that no part of the property was situate in Karachi; *A. I. R.* 1930 *Nag.* 189 and *A. I. R.* 1930 *Sind* 252, *Foll.* [P 69 C 1]

(b) Mahomedan Law—Succession—Grandchildren come in only in absence of children.

In each class of heirs the nearer degree excludes the more remote. That is, there being children and other lineal descendants alive, the children exclude the grandchildren. The principle of representation applies only amongst those in the same degree of proximity. [P 69 C 1]

(c) Benami—Proof of—Source from which money comes is important.

The source from which the money comes is an important consideration to determine if the transaction is benami: *A. I. R.* 1915 *P. C.* 96; 32 *I. C.* 267 and *A. I. R.* 1925 *P. C.* 181, *Ref.* [P 69 C 2]

(d) Transfer of Property Act (1882), S. 6—Scope.

A release by Mahomedan of a spes succession is not valid. [P 70 C 1]

Sujanlal Hasanand—for Plaintiff.

D. N. O'Sullivan—for Defendants.

Judgment.—This is a suit by plaintiff Tayabally, son of K. S. Seth Sullemanji Ismailji, for his share in the property of his deceased father. Defendant 1 is plaintiff's stepmother; defendants 2, 3, 4 and 5 are daughters of defendant 1; defendants 6 and 7 are brothers of plaintiff; defendants 8 and 9 are daughters of the deceased by his first wife: defendant 10 is the daughter: and defendants 11 and 12 are the sons, of a daughter of the deceased by his first wife. Defendant 1, it is alleged, took exclusive possession of the entire property on the strength of the will of the deceased of 24th June 1927, with codicils of July and August 1928. None of the other heirs however consented to the said will after the death of the testator and the will is therefore not valid. The moveable property is said to be worth Rs. 1,83,000 and the immovable property Rs. 1,90,000.

Defendants 6 to 12 support plaintiff. Defendant 1 for herself and her minor daughters defendants 4 and 5, her other daughters defendants 2 and 3 being ex parte, denies that defendants 10 to 12 are in any circumstances heirs of the deceased. Defendant 1 claims three of the immovable properties, a building in Karachi and two properties in Quetta, as her own property purchased by her with moneys gifted by her husband: the jewellery mentioned in the plaint was also defendant 1's own property; the property of her deceased husband belonged to her (subject to some legacies) under the will of the deceased and the codicils thereto. She has further contended that defendants 6 and 7 for themselves and for their brother plaintiff received certain moneys from the deceased and agreed to claim no further interest in his estate: they are therefore estopped from claiming any further share and that in any case, if they are allowed any share in the estate of the deceased, the amount received by them from the deceased should be deducted therefrom.

The following issues were framed:

1. Has the Court no jurisdiction to try the suit ?

(Issue framed subject to particulars being supplied within 21 days, otherwise the issue to be struck off).

2. Are defendants 10 to 12 not heirs of K. S. Seth Sullemanji and not entitled to any share in his estate ?

3. Do properties marked Nos. 2 to 4 in list B annexed to the plaint form part of the estate of K. S. Sullemanji or are they the property of defendant 1 on the ground that they have been purchased by her with moneys gifted to her by her husband ?

4. What is the value of the jewellery referred to in list A annexed to the plaint and does it form part of the estate of K. S. Sullemanji or is it the property of defendant 1 ?

5. What was the value of the remaining property mentioned in lists A and B annexed to the plaint and was it bequeathed to defendant 1 by K. S. Sullemanji ?

6. Are the said will, codicils and the bequest in favour of defendant 1 valid to any extent ? If so what ? (covers paras. 5, 6 and 7 of the plaint).

7. Are the plaintiff and defendants 6 to 12 estopped from objecting to the validity of the will and codicils ?

8. Are the plaintiff and defendants 6, 7 and 8 estopped from getting any share from the estate of K. S. Sullemanji for reasons alleged in para. 6 of the written statement of defendant 1 ?

9. What, if any, are the shares of the parties to the suit in the estate of K. S. Sullemanji ?

10. Should anything, if so, what, be deducted from the share of the plaintiff and defendants 6, 7 and 8 on account of the amounts alleged in para. 7 of the written statement ?

Findings.

Issue 1.—The Court has jurisdiction.

Issue 2.—They are not heirs and are not entitled to any share in the estate.

Issue 3.—The properties do not form part of the estate of the deceased. They are the properties of defendant 1, having been purchased by her with moneys gifted to her by her husband.

Issue 4.—Rs. 2,500; it is the property of defendant 1.

Issue 5.—To be ascertained by the Commissioner. It was bequeathed to defendant 1 but the bequest is not valid.

Issue 6.—The will is valid only to the extent of bequests in favour of the parties who are not heirs, and in respect of the expense incurred by defendant 1 in taking out probate.

Issue 7.—This issue was dropped.

Issue 8.—No.

Issue 9.—Defendant 1's share is 1/8th, the share of each son is 7/48 and of each daughter 7/96.

Issue 10.—Any amount received by plaintiff and defendants 6 and 7 under Exs. 13 and 19 to be considered as part of the assets of deceased and taken into consideration in determining the share of plaintiff and defendants 6 and 7 in the estate of deceased.

Issue 1.—In the particulars given by defendant 1 the jurisdiction of the Court was challenged on two grounds: that probate of the will and codicils was granted to defendant 1 by the District Judge, Quetta, Pishin, and this Court therefore had no jurisdiction to cancel the grant; and that no part of the estate of K. S. Sullemanji is situated within the jurisdiction of this Court. The first ground was not pressed: there is no prayer in the suit to have the grant cancelled. As regards the second, I have found that no part of the estate is situated within the jurisdiction of this Court. Plaintiff relies on *Faizuddin* v. *Mir Yusuf Ali* (1) in which it was ruled that since the Court was seised of the case, though it was found that there was no property in suit within its jurisdiction, the Court should proceed. Plaintiff further relies on *Goverdhandas Vishindas* v. *Righibai* (2), in which it was held that O. 7, R. 10 ap-

(1) A. I. R. 1930 Nag. 189=124 I. C. 703=26 N. L. R. 103.

(2) A. I. R. 1930 Sind 252=130 I. C. 554=25 S. L. R. 63.

plies only when it is found that the suit as originally framed was wrongly instituted, but it does not apply when it is found at the trial on the evidence led that the Court has no jurisdiction to grant the relief prayed. In the present case there was, in my opinion, a bona fide claim by plaintiff. He was sericus in his claim to the property situated in Karachi, though I have found that that was the property of defendant 1 and not of deceased. That question, as a matter of fact, has been the principal question in issue between the parties. Defendant 1 alleges that plaintiff has brought this suit in Karachi though most of the property is situate in Quetta and most of the witnesses come from Quetta merely to harass her. But I am of opinion that it was a bona fide claim; that plaintiff was entitled to bring his suit in Karachi, and that in the circumstances of the present case the Court has jurisdiction to entertain the suit.

Issue 2.—The heirs claiming in the suit are with the exception of defendants 10 to 12, the widow of deceased and his sons and daughter: defendants 10 to 12 represent the heirs of a deceased daughter. Defendant 1 relies on the proposition stated in para. 75 of Mulla's Principles of Mahomedan Law, Edn. 9, that in each class of heirs the nearer degree excludes the more remote; that is to say, that there being children and other lineal descendants alive, the children exclude the grandchildren. The plaintiff relies on para. 80; on the principle of representation, that the descendants of a deceased represent the son; but it is clear from other passages in the chapter that the principle of representation applies only amongst those in the same degree of proximity. Between grandchildren the descendants of one son or daughter would take the share of that son or daughter. It is clear from Illus. (d) to para. 75 that the daughter excludes the son's son: vide also the note to para. 80 in which it is stated that grandsons by a predeceased son do not inherit with sons and that granddaughters by a predeceased daughter do not inherit with the daughters. It is clear also from para. 83, sub-para. (v) that grandchildren come in only in the absence of children.

Issue 3 raises the question whether properties Nos. 2 to 4, the house in Karachi and the two properties in Quetta, belong to the estate of the deceased or are the property, of defendant 1. (After discussing evidence, the judgment proceeded:) Plaintiff has laid particular stress on the evidence of Ex. 22 as showing that the possession of the Karachi property remained with the deceased. But in view of the power-of-attorney granted by defendant 1 to her husband, the fact that in his books Ex. 22 showed his dealings with the property as dealings with deceased does not go far to show that the purchase in the name of defendant 1 was really a benami purchase and that the possession remained with the deceased. Many rulings on the question of benami have been quoted but these depend so much on the fact of each particular case that it would be difficult to rely on any. The source from which the money came is an important criterion: *Bilas Kunwar* v. *Desraj Ranjit Singh* (3) and *Upendra Nath* v. *Bhupendra Nath* (4), but though the money was originally deceased's there is adequate proof that he did make presents of large sums of money. Plaintiff relies on *Lakshmi Chetty* v. *Kothandarama Pillai* (5) for the proposition that a purchase in the wife's name should be deemed benami. But in the present case there is the evidence of plaintiff's own witnesses and the documentary evidence to show that the deceased did make certain gifts to his wife, that he was anxious to give her all his property and that there was absolutely no reason for his entering into any benami transaction. It is admitted that he was an honest man and that he was a wealthy man, there was no question of screening his property from his creditors, there was no secrecy about the matter. The presumption relied on by plaintiff would be rebutted by the evidence in the present case.

It is clear that deceased was not on very friendly terms with his sons and that he was anxious to make substantial gifts of property to his wife. Defendant 1 admits that her husband's name was lettered on the building but she explains that this was done on sentimental grounds. I hold therefore that plaintiff has failed to

(3) A. I. R. 1915 P. C. 96=30 I. C. 299=42 I. A. 202=37 All. 557 (P.C.).
(4) [1916] 32 I. C. 267.
(5) A. I. R. 1925 P. C. 181=88 I. C. 327=48 Mad. 605=52 I. A. 286 (P.C).

prove that these three properties were purchased by the deceased for himself though in the name of his wife and really belong to the estate of the deceased. I hold on the contrary that defendant 1 has proved that they were purchased by her from the moneys gifted to her by her husband.

Issue 4.—There is only the vague evidence of the plaintiff (Ex. 10) that deceased owned jewellery worth Rs. 40,000. Defendant 1 states that the value of the jewellery is Rs. 2,500 and that it is her own property purchased from her own moneys gifted by her husband, This is highly probable in the circumstances and I accept her story.

Issue 5.—This is by consent to be left to the Commissioner. The property was bequeathed by deceased to defendant 1 but the bequest is invalid.

Issue 6.—It is admitted by defendant 1 that the will so far as it relates to the heirs is invalid. There was no consent of the heirs. There was at most a release and the release by a Mahomedan of a spes successionis is not valid. The bequest is of practically the whole of the property to the widow. But there is one legacy of Rs. 2,000 to Santram who is not an heir which is valid. The will is therefore valid to that extent and defendant 1 is entitled on that account to her costs in taking out probate.

Defendant 1 contends that the expenses incurred by her on the marriage of her daughter should come out of the will as provision was made in the will for this expenditure. But this is a bequest to an heir and is in the circumstances invalid. The expenditure for this purpose after the death of the testator should come out of the share of the daughter.

Issue 7—This was dropped.

Issues 8 and 10.—These two issues were argued together for defendant 1. She did not press her contention that plaintiff and defendants 6, 7 and 8 were estopped: but defendant 1 contended that certain property given to plaintiff and these defendants in consideration of their giving up their claim to any share in the estate of deceased should .be taken into account in distributing the estate of deceased. Defendant 8 does not appear to have been given any property in this way.

Defendant 1 relies principally on Exs. 13 and 19. Ex. 13 is a partition deed of 1916, between deceased and his brother Muhammadali. They had each a half-share in the partnership business. The business was valued at 80,000 tomans. Deceased was to get 40,000 of which he took 10,000 in cash he gifted the remaining 30,000 to his 3 sons, leaving it to his sons to take their share in cash or join the business as partners with Muhammadali. It is plaintiff's case that this arrangement was not acted on.

A fresh arrangement was made in 1919 embodied in Ex. 19. This states that deceased again joined the business after the dissolution of partnership in 1916. But in Ex. 19 the partnership reverted to the position established by Ex. 13. Ex. 19 states that Muhammadalli and his sons and the sons of deceased are to be deemed the sole partners in the firm since 1916. In that document deceased definitely separated from the business managed by his brother, his nephews and his sons. His sons retained the share given them in 1916. Ex. 19 is practically a re-statement of Ex. 13 but marks the final disappearance of deceased from the partnership. In the P. S. to Ex. 19 deceased made it clear that his intention was that his sons were to have no further claim on his estate nor he nor his wife defendant 1 on the estate of his sons. This arrangement was not valid and plaintiff and defendants 6 and 7 are not estopped thereby. Plaintiff states that the arrangement of 1916 was not acted on. If he and defendants 6 and 7 accepted the arrangement of 1919 and took the benefit thereof they cannot disclaim the condition and retain the benefit. The gift by deceased to his sons of the major share of his interest in the partnership business was not gratuitous but was intended to be in full satisfaction of their claims to his estate. The property given to the sons by Exs. 13 and 19 must be considered as part of the estate of deceased if plaintiff and defendants 6 and 7 disclaim the conditions on which the gift was made. Plaintiff denies all knowledge of Ex. 19 but if he and his brothers took no benefit under the deeds of 1916 and 1919, the position is the same the property of the deceased (which according to those documents went to the sons) remained the property of deceased and is part of his estate. Ex. 59 testifies to the

transaction having been carried out and I have no doubt that it was.

Issue 9.—On the finding on issues 2 parties are agreed that their shares are as stated in the finding on this issue.

Order.—Preliminary decree as follows: Shares of parties as stated above. Court Commissioner to ascertain what was the estate of deceased and the value thereof and the possession thereof. Costs of suit on plaintiff as he failed on the major contested issue.

P.N./R.K. *Order accordingly.*

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* A. I. R. 1932 Sind 71

FERRERS, J. C. AND RUPCHAND, A. J. C.

Gurmukhdas Rangalmal—Applicant.

v.

Hassomal Tharumal and *others*—Opponents.

Revision Appln. No. 58 of 1929, Decided on 19th January 1932.

*** Provincial Insolvency Act (1920), S.78 (2) — Debtors filing application as well as obtainingadjudication order under old Act —Old Act applies and creditors cannot obtain annulment of order of adjudication under new Act nor can they claim exemption under S. 78 (2)—Provincial Insolvency Act (1907)—Interpretation of Statutes, Retrospective effect.**

Every statute which takes away or impairs vested rights acquired under the existing law or creates a new obligation or attaches a new disability in respect of transactions already passed, must be presumed to be intended not to have a retrospective effect.

The provisions of the new Act have no retrospective effect. Consequently where a debtor files his insolvency petition under the old Act (1907) and secures an order of adjudication in his favour the order confers certain rights upon him which cannot be divested by the new Act. The old Act applies to such a case and the creditors cannot obtain the annulment of the order of adjudication under the new Act nor can they claim exemption under S. 78 (2): *In re School Board Election for Parish of Pulborough, Bourke* v. *Nutt*, (1894) 1 *Q. B.* 725; *A. I. R.* 1922 *Bom.* 80; *A. I. R.* 1921 *Mad.* 272; *A. I. R.* 1923 *Mad.* 462; *A. I. R.* 1923 *Mad.* 487; *A. I. R.* 1924 *Sind* 122; *A. I. R.* 1926 *Mad.* 310 and *A. I. R.* 1928 *Cal.* 224, *Rel. on.*; *A. I. R.* 1926 *Mad.* 123, *Expl.* and *Dist.* [P 72 C 1, P 73 C 1]

G. A. Kikla—for Applicant.

Pahlajsing B. Advani—for Opponents.

Order.—The facts so far as material are as follows: On 21st February 1919, the applicant Gurmukhdas and opponent 2, Gobindomal obtained an ordinary money decree against opponent 1, Hassomal. Shortly thereafter Hassomal was adjudicated as an insolvent under the provisions of the Provincial Insolvency Act of 1907. That Act was repealed and replaced by Act 5 of 1920 which is now in force. Hassomal failed to apply for a discharge and on 21st November 1922, the insolvency Court purporting to act under the old Act ordered that the insolvency proceedings be sent to the record room.

On 21st December 1922 Gurmukhdas applied to the Court in the exercise of its ordinary jurisdiction for execution of the decree passed in his favour and in favour of Gobindomal by arrest of Hassomal. He treated the order passed by the insolvency Court on 21st November 1922, as an order annulling the adjudication and relied upon S. 78, Cl. (2) of the present Act as saving limitation. He however dropped that application and on 17th November 1928 he repeated the present execution application upon the same grounds and relied upon the prior execution application of 1922 as extending the period of limitation under Art. 182, Lim. Act. It was objected to on two grounds: first, that the old Act applies, that the order of adjudication could not be and had not been annulled and that therefore no execution application could lie without the leave of the insolvency Court, and secondly that the execution application was out of time.

The learned Subordinate Judge Mr. Ghulam Dastagir Agha overruled both these objections. He held that the order of November 1922 was an order of annulment of adjudication, that even otherwise the execution application was competent and that it was within time in view of the provisions of S. 78, Cl. (2) of the present Act. With regard to the objection that the old Act applied, he observed:

> "The old Act has been superseded by the Act now in force. There is no provision that proceedings commenced under it are saved from the operation of the new Act."

It is somewhat difficult to follow what the learned Subordinate Judge exactly meant by the observations quoted above. On appeal the learned District Judge Mr. N. N. Master, rightly interpreted the order of November 1922, but evidently proceeded on the same assumption that the present Act applied although he did not expressly say so and held that before the judgment creditors could obtain execution for the arrest of Hassomal, they should get the order of adjudication annulled by the insolvency Court. He accordingly

set aside the order passed by the learned Subordinate Judge and remanded the case to the trial Court with directions that it should be stayed pending the annulment of the order of adjudication by the Insolvency Court.

Both the Courts below were in error in assuming that the provisions of the Act of 1920 applied to the circumstances of this case that the order of adjudication passed under the old Act could be annulled under the present Act for failure by the debtor to apply for discharge or that time could be extended under the provisions of S. 78, Cl. 2 of the present Act in a case where an order of adjudication had been passed under the old Act.

It is a fundamental rule of construction that every statute which

"takes away or impairs vested rights acquired under existing law, or creates a new obligation or attaches a new disability in respect of transactions already past must be presumed to be intended not to have a retrospective effect: per Lopes L. J. *In re School Board Election for Parish of Pulborough Bourke* v. *Nutt* (1)."

This rule forms the foundation of S. 6, General Clauses Act. *Laxmi Bank Ltd. Poona* v. *Ramchandra* (2), *P. Hanmayya* v. *Ramayya* (3), *Aiyaparaju* v. *Venkatakrishanayya* (4), *Natesan Chettiar* v. *Annamallai Chettiar*, *A. I. R.* 1923 *Mad.* 487, *Menghraj Nevanram* v. *Virbhandas Sirumal* (5), *Solayappa* v. *Shunmuga Sundaram*, *A. I. R.* 1926 *Mad.* 510; *Mohirnissa* v. *Pran Nath Podder*, *A. I. R.* 1928 *Cal.* 224 are some of the cases where different High Courts in India including our own Court have given effect to the above rule and have repeatedly held that the provisions of the present Act have no retrospective effect.

In the case of *Hanmayya* (3) it was held that S. 78 of the present Act had no retrospective effect. In the case of *Solayappa*, *A. I. R.* 1926 *Mad.* 510 a case somewhat similar to the present it was held that an application for execution of a decree against an undischarged insolvent who was adjudicated as insolvent under the old Act was barred by the provisions of S. 16 of that Act. Both these cases are in point.

The case of *Perachan* v. *Kuttiali* (6) which was also referred to in argument stands on a different footing. In that case the present Act had come into operation immediately after the presentation of the insolvency petition and before any order of adjudication was passed. The insolvency Court had dealt with the petition according to the procedure laid down by the present Act. Their Lordships while reiterating the principle that orders passed uuder the old Act or rights obtained thereunder were unaffected by the present Act observed that in that case neither of those considerations applied and that the insolvency Court had rightly applied the procedure laid down by the present Act although the petition was presented under the old Act. It is possible to support this decision on the strength of another equally well established canon of construction that no person has a vested right in any course of procedure and that an alteration in procedure is always retrospective unless there is some good reasen against it: *Republic of Costa Rica* v. *Erlanger* (7), *James Gardner* v. *Edward* (8), *Kimbray* v. *Draper* (9). But it is not necessary for us to go into the merits of that particular case for the purpose of satisfying ourselves whether the altered procedure applied by the insolvency Court affected any vested rights and whether there was any good reason for holding that such altered procedure should not have been given retrospective effect in the circumstances of that case. The stage at which the altered procedure was applied in that case was long past so far as the present case is concerned. Not only had the debtor in the present case filed his insolvency petition under the old Act but he had secured an order of adjudication in his favour. That order conferred certain rights upon him which could not be divested by the present Act unless the present Act expressly said so.

Not only is there no provision under the present Act to warrant the inference that it has a retrospective effect but the scheme of the two Acts so far as the point now in issue is concerned are different. Under the old Act there was no

(1) [1894] 1 Q. B. 725=63 L. J. Q. B. 497=70 L. T. 639=1 Manson 172=9 R. 395=42 W. R. 388=58 J. P. 572.
(2) A. I. R. 1922 Bom. 80=67 I. C. 238=46 Bom. 757.
(3) A. I. R. 1921 Mad. 272=64 I C. 270.
(4) A. I. R. 1923 Mad. 462=72 I. C. 488.
(5) A. I. R. 1924 Sind 122=76 I. C. 250=17 S. L. R. 300.
(6) A. I. R. 1926 Mad. 123=91 I. C. 144.
(7) [1876] 3 Ch. D. 62.
(8) [1878] 3 A. C. 603.
(9) [1878] 3 Q. B. 750.

obligation upon a creditor to prove his claim in the insolvency proceedings. He could wait until the debtor obtained an order of discharge and then realize his claim in full from the after-acquired property of the debtor.

It was equally open to a debtor to defeat his creditor who declined to prove his claim by delaying in making an application for his discharge until the period of limitation for enforcement of such claim had become statute barred. There was no provision in the old Act empowering the Court to fix a time limit within which the debtor should apply for his discharge or to annul the order of adjudication for failure to comply with such an order. There was likewise no provision in that Act enabling a creditor to apply for annulment of an order of adjudication on that ground. The absence of these provisions enabled a debtor to compel by indirect means his creditors to prove their claims in the insolvency proceedings and to receive their dividends pro rata before their claims became stale.

On the one hand an order of discharge passed under the present Act puts an end to all debts incurred by a debtor prior to his adjudication as an insolvent except such of them as are specifically protected under the Act and on the other hand the present Act confers a right on the creditors of compelling a debtor to apply for discharge within a reasonable time so as to afford to them an opportunity of opposing the discharge and confers upon them a further right of having the order of adjudication annulled if no application for discharge is made within the time allowed and on such annulment of obtaining leave of the Court to enforce their claims by ordinary process.

These altered provisions are not and could never have been intended to be retrospective.

If the old Act applies the applicants cannot obtain the annulment of the order of adjudication under the present Act nor can they claim exemption under S. 78, Cl. (2) of the Act.

The execution application filed by the appellants therefore fails and is dismissed with costs throughout.

P.N./R.K. *Application dismissed.*

1932 S/10 & 11

* A. I. R. 1932 Sind 73

RUPCHAND, A. J. C.

Tyabali A. Mandviwalla and *another*—Plaintiffs.

v.

Parpatibai, (wife of Changomal) and *others*—Defendants.

Suit No. 195 of 1930, Decided on 11th September 1931.

*** (a) Court-fees Act (1870), S. 7 (5)—Suit for possession of house — Defendant in possession of some rooms on upper floors — Relief can be valued at 12 times monthly rent which the portion in occupation would yield.**

Where in suit brought for possession of a house property defendant is in possession only of the rooms on the upper floors, the value of possession which the plaintiff seeks is not the value of the whole property and the plaintiff can value the relief at 12 times the monthly rent which the portion in the occupation of the defendant would yield : *A. I. R.* 1927 *Sind* 248, *Foll.* [P 75 C 1]

(b) Registration Act (1908), S. 17—Letter confirming equitable mortgage does not require to be stamped and registered.

Letter given by mortgagors read as follows :

"With reference to our conversation regarding loan of Rs. 1,00,000 (rupees one lac) only, to our firm : We confirm the said terms and in pursuance of which we have duly executed a demand pro-note for the above amount in your favour and have already deposited with you title-deeds of the following properties as per schedule hereinbelow by way of equitable mortgage as security for repayment of the amount due to you with interest on the said pro-note."

Held : that such confirmatory letter did not require to be stamped and registered : *A. I. R.* 1931 *P. C.* 36, *Foll.* [P 75 C 2]

(c) Presidency Towns Insolvency Act (1907), Sch. 2, R. 12, Proviso — Official Assignee failing to redeem within time allowed by proviso to R. 12—Property vests in mortgagee by operation of law.

On the failure of the official assignee to elect to redeem the property within the time allowed by the proviso to R. 12 the equity of redemption of the debtor which was vested in the official assignee vests by operation of law in the mortgagee. No conveyance or assignment is necessary to complete the vesting of the equity of redemption in mortgagee. In fact on the failure of the official assignee to elect, his rights in the equity of redemption are gone and neither he nor the debtor is competent to execute a conveyance or an assignment in favour of the mortgagee : *In re Mercer and Moore's Contract*, (1869) 14 *Ch. D.* 287, *Ref.* [P 76 C 2 ; P 77 C 1]

Dingomal Narainsing—for Plaintiffs.

Fetehchand Dharamdas, Chandiram Thaverdas and *P. Fonseca* — for Defendants.

Judgment. — This is a suit filed by Tayabali A. Mandviwalla who claims to be the mortgagee of certain property referred to in the suit, and by the official assignee of this Court in whom the estate

of the firm of Messrs. Khushaldas Mangatram and its partners has vested.

Defendants 1 to 4 are women, widows of certain members of the family of Khushaldas Mangatram, who are dead ; defendant 5 is the daughter of the deceased Pahlajrai, a member of the same family ; defendants 8 and 9 are brothers of defendant 5 ; defendants 6 and 7 are sons of one Thakurdas, also another member of the same family ; defendants 6 to 9 are minors and are represented by their guardians.

The plaintiffs' case is that the firm of Khushaldas Mangatram represented by Jeramdas as managing partner or manager of the joint family business borrowed Rs. 1,00,000 from plaintiff 1 on the equitable mortgage of the property in suit and other properties, that subsequently when the firm was adjudicated an insolvent, plaintiff 1 valued his security and gave notice to the official assignee as required by R. 12, Sch. 2, Presidency Towns Insolvency Act, to elect if he would redeem the mortgage, that as plaintiff 2 was not in a position to redeem the mortgage within the time allowed by law, he intimated to plaintiff 1 that the equity of redemption in the property which had by law vested in him on the passing of the order of adjudication had now revested in plaintiff 1, that plaintiff 1 had therefore become the owner of the equity of redemption of the property as well, that the property was in the occupation of the members of the family of Khushaldas Mangatram when that firm became insolvent, that all other members of the family had given up possession of different portions which were in their occupation, that the present defendants had refused to give up possession claiming that they are interested in the property as the owners, and that this suit was therefore filed to eject them.

The defendants have raised several defences to the action which are incorporated in the following issues :

(1) Is the suit for ejectment competent and maintainable as framed ? (2) Is the suit bad for want of certificate and statement ? (3) Is the suit bad for want of stamp ? (4) Is the plaint insufficiently stamped ? (5) Is the plaintiff the mortgagee or full owner of the property, the subject-matter of the suit ? (6) Is the mortgage null and void for want of stamp and registration ? (7) Is the mortgage binding on defendants or any of them ? (8) Did the property ever belong to the firm of Khushaldas Mangatram or was owned by the various members of the family as tenants-in-common ? (9) When was the property acquired and from what funds ? (10) Was there a partition between the members of the family ? If so, when ? (11) What were the shares of the respective parties in the properties ? (12) Is the official assignee's letter bad for want of stamp and registration ? (13) Were the mortgages as alleged made for the benefit of the joint family purpose and necessity ? (14) Was the business of the firm speculative or was it of the joint family firm ? (15) What is the defendants' position in equity and Hindu law ? (16) Are the defendants affected by the adjudication of members of the firm, and if so, how ? (17) Are the plaintiffs estopped ? (18) Are the defendants entitled to maintenance and residence ? (19) General.

The mehta of plaintiff 1 has been examined in part. Before taking further evidence in the case, it is desirable that I should give findings upon certain issues of law as they are likely to curtail the inquiry.

Issues 1 to 4 may be dealt with together. The plaintiffs are suing the defendants as trespassers. Their case is that the defendants were not tenants but permissive occupants of the portions which are in their possession. As this is not a suit between a landlord and his tenant, there is no question of a certificate by the rent controller being filed or a statement being made in the plaint that the premises are not governed by the Rent Act. Nor is there any question of any notice being given to the defendants as required by the Transfer of Property Act.

Mr. Fonseca has suggested that in any case before filing the suit notice should have been given to the defendants to give up possession. But failure to give such notice is only material for the purpose of dealing with the question of costs. Had the defendants appeared in Court and said that they were prepared to give up possession, very probably the plaintiffs would not have been entitled to their costs for want of notice. The failure to give such notice does not prevent the plaintiffs from proceeding with the suit.

With regard to the question of court-fee again, it would appear that the defen-

dants are not in possession of the whole of the property but are only in possession of some of the rooms on the upper floors. Therefore the value of possession which the plaintiffs are seeking cannot be said to be the value of the whole property. As pointed out by me in the case of *Mt. Moolibai* v. *Mt. Vassibai*, *A. I. R.* 1927 *Sind* 248, in such a case it would not be unreasonable for a plaintiff to value the relief at 12 times the monthly rent which the portion in the occupation of the defendants would yield.

In the insolvency proceedings the official assignee was asked to value the rental of this building. He submitted his valuation and after going into the matter the Court by its order dated 27th April 1928, fixed the rental of the whole building at Rs. 105 p. m. As said above, the defendants are in possession of only certain portions of the first, second and third floors. Assuming therefore that the rental of the whole of each of the floors is one-fourth of Rs. 105, i. e , Rs. 26-4-0, and assuming also that the whole of each of the upper floors is in the occupation of the defendants, the rent of the first, second and third floors would be Rs. 78-12-0. The maximum court-fee therefore which the plaintiffs have to pay is on a value equal to 12 times Rs. 78-12-0.

Mr. Dingomal states that he is prepared to pay the necessary court-fee and I permit him to do so in the course of two days. He gives his personal undertaking that the amount will be paid.

My findings therefore are that the suit is competent as framed, that it is not bad for want of a certificate of the rent controller of the statement referred to in para. 4 and that although the plaint is insufficiently stamped, that defect should be treated as cured in view of the undertaking given by Mr. Dingomal.

Issue 6.—The confirmatory letter given by the mortgagors in this case reads as follows :

" With reference to our conversation regarding loan of Rs. 1,00,000 (rupees one lac) only, to our firm : We confirm the said terms and in pursuance of which we have duly executed a demand pro-note for the above amount in your favour and have already deposited with you title-deeds of the following properties as per schedule hereinbelow by way of equitable mortgage as security for repayment of the amount due to you with interest on the said pro-note."

Then follows the schedule of the title-deeds of the properties deposited with the mortgagee, one of which is the subject-matter of the present litigation.

The doubts, if any, which existed with regard to the question of stamp and registration of such confirmatory letters have been amply removed by the decision of their Lordships of the Privy Council in the case of *Sundarachariar* v. *Narayana Aiyar* (1). The memorandum in that case which was in somewhat similar terms was given at the very time the mortgage was created and still it was held to be admissible. The present case is much stronger as the confirmatory letter was given on the day following the deposit of the deeds and the handing over of the cheque. I hold therefore on this issue in the negative.

Issue 12.—The letter given by the Official Assignee is only an intimation given by him in pursuance of the provisions of R. 12, Sch. 2. It does not purport to transfer any property to the mortgagee so as to bring it within the purview of the Stamp Act, or of the Transfer of Property Act. It is not a sale of property at all, and therefore it cannot be treated as a deed of conveyance so as to require stamp or registration.

It is not disputed that the Stamp Act and the Registration Act are to be strictly construed and therefore before Mr. Fonseca can ask me to hold that this document is inadmissible in evidence except on payment of the necessary stamp duty and penalty, or that it is inadmissible in evidence for want of registration, he has to show that it is a conveyance.

I am not at present concerned with the question whether the Official Assignee's letter should have been followed by a regular deed of conveyance being executed in favour of plaintiff 1, or whether in the absence of a deed of conveyance in his favour plaintiff 1 alone is not entitled to sue for ejectment. These points will be dealt with later under other issues to which they pertain. I hold on this issue against the defendants.

It might also be observed that if this letter is not received in evidence, it does not affect the case. The proviso to R. 12, Sch. 2, Presidency Towns Insolvency Act, which is relied upon by the plaintiffs reads as follows :

" Provided that the creditor may at any time, by notice in writing, require the Official Assignee

(1) A.I.R. 1931 P.C. 36=131 I.C. 328=58 I.A 68=54 Mad. 257 (P.C.).

to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the Official Assignee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it ; and the equity of redemptiou, or any other interest in the property comprised in the security which is vested in the Official Assignee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued."

The failure of the Official Assignee to signify his election to exercise the power to redeem the property within the time allowed puts an end to his equity of redemption which, without more, vests in the mortgagee.

The other issues will be dealt with after the evidence is recorded. (After recording the evidence,the following judg ment was delivered) : The case has been concluded by both parties, and I am now in a position to record my findings on the rest of the issues :

Issues 8 *to* 11.—The burden was on the defendants to prove that at one time or the other the members of the family of Khushaldas Mangatram had severed their joint family tie. Not only have they failed to prove this, but the admissions made by the defence witnesses, Exs. 10 to 12, prove the contrary. (Here the evi lence of some of the witnesses for the defendants was discussed and the judgment proceeded). I have no hesitation in holding on issue 8 that the property was purchased by Lalchand as belonglng to the firm; on issue 9 that it was acquire1 from the firm's money; on issue 10 that there was no partition amongst the members of the family although they messed separately; on issue 11 that defendants 1 to 5 had no share in the property and that defendants 6 to 9 possessed a joint undivided interest therein along with other members of the family.

Issues 7, 13 and 14.—The mortgage was created by all the adult members of the family for the purpose of their business and the money raise1 on it was, as a matter of fact, so utilized by them : vide entries from the books put in by the mehta of the Official Assignee. There is no evidence that the business of the firm was of a purely speculative nature, although, if it were so, it would not affect the case. The business being ancestral business and the firm having been in exis tence prior to the deaths of the coparceners through whom the defendants claim an interest, my finding on all these issues is against the defendants.

Issues 15, 16 and 18.—There is no allegation that a charge was created on the property in favour of any of the defendants. The mere fact that they resided in a portion of the property is therefore of no effect. On the passing of an order of adjudication against the adult co-parceners, the property has vested in the Official Assignee and he has every right to eject the defendants and to dispose it of for the benefit of the creditors. The defendants are not entitled to any rights of maintenance or residence over his property unless the claim of the mortgagee has been fully satisfied by the Official Assignee, and there is no question whatsoever that his claim can be fully satisfied either from this property or from the rest of the property of the insolvents.

Issue 17 does not therefore arise and is struck off.

Issue 5.—As the Official Assignee in whom the equity of redemption of the debtors in the property in suit has admittedly vested and the mortgagee have both joined in the suit, this issue hardly arises.

It would however appear that on the failure of the Official Assignee to elect to redeem the property within the time allowed by the proviso to R. 12, Sch. 2, Presidency Towns Insolvency Act, the equity of redemption of the debtor which was vested in the Official Assignee has by operation of law vested in the mortgagee. The proviso referred to above does not merely say that on the failure by the Official Assignee to elect, his right in the equity of redemption will be extiguished, but it goes much further and declares that such right "shall vest" in the mortgagee.

No vesting order is therefore necessary as required in the case of a mere disclaimer by the Official Assignee of onerous property : see Williams on Bankruptcy, Edn. 10, p. 416; Note to R. 12, Cl. C., Sch. 2, English Bankruptcy Act, 1883.

There is again no reason why the expression "shall vest" in this rule should not receive the same interpretation as in S. 17, Presidency Towns Insolvency Act, or in the corresponding section of the English Act. It has been held that an order of adjudication operates as a statutory transfer of the rights of the debtor in the property to the Official Assignee or Trustee in Bankruptcy, and that no con-

veyance or assignment is necessary to complete vesting of such rights in him in respect of property situate in British India or the United Kingdom, as the case may be. Of course, where immovable property is situate in a foreign country, the law of such country must also be complied with; Halsbury, Vol. 2, para 257 ; Sir Dinshaw Mulla's Law of Insolvency, para 257. The same principle applies, and no conveyance or assignment is therefore necessary to complete the vesting of the equity of redemption in the mortgagee under this rule in respect of property situate in British India.

Not only that, but it would appear that on the failure of the Official Assignee to elect, his rights in the equity of redemption are gone and that neither he nor the debtor is competent to execute a conveyance or an assignment in favour of the mortgagee : see the somewhat apposite observations of Sir Jessel, M. R. in Re *Mercer and Moore's Contract* (2), on the effect of a joint conveyance by the Trustee in Bankruptcy and the debtor of their interest, if any, in the property to the mortgagee after a disclaimer under the old Act of 1869.

The inconvenience which arose in consequence of the above decision has been amply removed by adequate provision being made in the subsequent Acts empowering the Court to pass a vesting order in the case of a disclaimer by the Official Assignee or Trustee in Bankruptcy of onerous property and by declaring that the equity of redemption shall vest in the mortgagee if the procedure laid down in R. 12 has been followed by him and the Official Assignee has failed to elect to redeem the property. Such failure has the effect of foreclosing him and of making the mortgagee an absolute owner : Halsbury Vol. 2, para. 376, and the title of the mortgagee to the property freed from the equity of redemption depends on proof (1) of the mortgage claim, (2) of the notice under R. 12 C and (3) of the failure of the trustee of the Official Assignee to signify his election within the time allowed : see Williams on Bankruptcy, Edn. 10, p. 463 ; Notes to R. 17, Sch. 2.

The mortgagee has given proof on all these points. I therefore hold that the mortgagee-plaintiff is now the owner of the property.

Issue 19.—There will therefore be a decree against the defendants for ejectment, for mesne profits from date of suit to possession at the rate to be determined in execution proceedings and costs.

P.N./R.K. *Suit decreed.*

(2) [1880] 49 L. J. Ch. 201=14 Ch, D. 287=42 L.T. 311=28 W.R. 485.

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* A. I. R. 1932 Sind 77

FERRERS, J. C. AND RUPCHAND, A. J. C.

Wadero Ali Gohar — Applicant.

v.

Khushaldas and *another* — Opponents.

Civil Revn. Appln. No. 103 of 1930, Decided on 15th December 1931.

*** Civil P. C. (1908), Sch. 2, Para. 3—"Matter in difference"—If Court is competent to pass a certain decree on application, reference by Court directing arbitrators to pass same decree is within jurisdiction.**

Where, if the case had proceeded in Court, the Court would ultimately have been competent to pass a decree against the mortgagor plaintiff for the payment of the mortgage-money, the Court has jurisdiction to make a reference to the arbitrators directing them to pass a mortgage-decree, even though such a decree could have been passed by the Court itself, only on a subsequent application of the mortgagor-plaintiff for the reason that the suit was filed under S. 15-B, Deccan Agriculturists Relief Act. The parties cannot have a piecemeal arbitration: *A. I. R.* 1922 *Sind* 1, *Ref.* [P 78 C 1]

Dipchand Chandumal—for Applicant.

Tolasing K. Advani—for Opponents.

Rupchand, A. J. C. — This revision application arises out of an order passed by ths learned First Class Sub-Judge, Larkana, disallowing the objections to an award made in the suit and passing a decree in terms thereof.

Mr. Dipchand has argued that the reference and award passed in this suit are in excess of the matters in dispute in the suit, on the ground that as the suit was filed under the provision of S. 15-B, Deccan Agriculturists' Relief Act, all that the Court could decide on the pleadings before it at the time of the reference was whether the transaction in suit was a mortgage or an out and out sale. It was only after the Court had held in favour of the plaintiff and the plaintiff had applied for a decree on the mortgage being passed against him that the Court could pass such a decree, and that therefore the Court had no jurisdiction to issue a mandate to the arbitrators to pass a mortgage-decree. We think there is no substance in this plea.

The points in issue between the parties were: (a) whether the transaction in suit was an out and out sale; (b) if not, was it a mortgage or a conditional sale and (c) should the plaintiff be restored to the property on payment of the amount for which it was mortgaged or conditionally sold. It is no doubt true that if the case had been proceeded with in Court, the question of redemption would have been dealt with by the Court on a subsequent application made in the suit. But the parties preferred to refer their disputes to arbitration. They could not ask for arbitration piecemeal. It was open to them to provide in the reference that in the event of arbitrators coming to the conclusion that the land be restored to the plaintiff on certain terms they could pass a final award to that effect. The parties accordingly provided in the reference inter alia as follows.

"The arbitrators will be at liberty to award money compensation to any party and make the property liable for it."

Acting under this authority the arbitrators have passed the usual mortgage-decree for about Rs. 21,000 against the plaintiffs. There is no doubt that if the case had proceeded in Court the Court would ultimately have been competent to pass a decree of this nature. That being so, it was within the competence of the Court to accept such a reference and the award passed thereon is not without jurisdiction and no revision lies: vide *Emnabai* v. *Fakir Mahomed* (1).

We accordingly dismiss the application with costs.

W.D./R.K. *Revision dismissed.*

(1) A. I. R. 1922 Sind 1=65 I. C. 50=15 S. L. R. 165.

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* A. I. R. 1932 Sind 78

MILNE, J. C. AND ASTON, A. J. C.

Firm of Khanumal—Appellants.

v.

Karim Mahomed and Co. and *others*—Respondents.

First Appeal No. 41 of 1927, Decided on 3rd December 1931.

(a) Partnership—Evidence of.

The question whether certain persons are partners in the legal sense depends upon the legal relations proved. [P 79 C 1]

*** (b) Civil P. C. (1908), O. 30, R. 1—Certain person, partner with firm in respect of particular transaction—Suit brought in respect of transactions without making him party, is not maintainable.**

The mere fact that a certain person was partner with a firm in respect of certain transactions does not make him a partner of that firm as such and a suit brought in the name of the firm in respect of the particular transactions without making that partner a party is not maintainable. [P 79 C 2]

(c) Practice—New plea—Pleadings.

It is not open to a party to a suit to rely on a contention, which was never raised by it in the pleadings. [P 80 C 1]

Balkishen H. Lula—for Appellant.

Tolasing K. Advani—for Respondents.

Judgment.—This is a suit for recovery of Rs. 3,600 being the insurance claim in respect of certain goods ordered by the plaintiffs. Defendants 1 were clearing agents of plaintiffs and defendants 2 the Insurance Company.

The plaintiffs alleged that defendants 1 had recovered Rs. 3,600 from the Insurance Company and had failed to account for the same and that in any case they would be liable even if they had not recovered the said amount from defendants 2 s they had withheld the relative documents entitling the plaintiffs to recover the said amounts from defendants 2.

Defendants 1 raised various objections to the suit, the first one being that Dipchand Assanmal was a partner with the plaintiff in the business of importing foreign goods; that it was he who managed the whole of the importing business; that he was a necessary party to the suits ; and that the suit as framed could not therefore lie.

The trial Court held that Dipchand was a partner with the plaintiffs in the transactions in suit, that he was a necessary party to the suit; and that the failure of the plaintiffs to join him was fatal to the suit.

On appeal the plaintiffs have contended that Dipchand was a cosharer and not a partner with them. They rely on the evidence of Ex. 11, Nanoomal, managing partner of the plaintiffs' firm, as showing that they did not deal with the goods jointly but with their own specific shares. The customs duty and clearing charges were paid half and half. This they alleged is .not partnership. There was no combination. The parties placed only certain orders in the name of one of them. No business was done together. No profit was shared. They rely in particular on the evidence of Karim Mahomed (Ex. 37) in respect of a consignment of 30 cases of playing cards as showing that the plaintiffs sold half of the consignment, 15 cases to Ismailjee

Alibhoy; and Dipchand sold his half consignment, 15 cases, to Moosa Jaffar.

The respondents contend that this is an entirely new contention which has been raised on appeal by the plaintiffs. There was not a word in the proceedings of the lower Court about Dipchand being a cosharer. The learned pleader for the appellants is not in a position to state whether any such contention was raised or not. According to the respondents he is merely taking advantage of a statement made by the witness Karim Mahomed. The plaintiffs as a matter of fact and Dipchand himself admitted in the lower Court that they were partners in the suit transactions. Nanoomal (Ex. 11) states that Dipchand was a partner in the goods in suit, though they had been sent for in the firm's name. Dipchand (Ex. 12) says that he and the plaintiffs had ordered out goods in partnership from America. Plaintiffs have produced no books showing that the profits of the business were not shared between them and Dipchand. They rely on the extract from the account (Ex. 26) as showing that in the transaction in which 15 cases were sold by Dipchand to Musa Jaffar the plaintiffs were interested and received their share of the profit.

It does appear that this is a contention which has been raised on appeal for the first time. The word "cosharer" is not to be found in the record. The plaintiffs and Dipchand admitted that they were partners in the suit transactions. They admitted so in examination-in-chief. The appellants contend that they merely stated that they were partners. The question whether they were partners in the legal sense depends on the legal relations proved. But if appellant's pleader objected to their client's description of themselves as partners and if their case in the lower Court was that the plaintiffs and Dipchand were not partners, when both Dipchand and the plaintiffs described themselves in examination-in-chief as partners, it would certainly have been the duty of the pleader to make their position clear. There seems to have been no serious dispute raised in the lower Court that Dipchand and the plaintiffs were not partners. The only stray piece of evidence on which the appellants can rely is the statement of Karim Mahomed (Ex. 37), and it appears that they have based their argument on this statement ; it forms the basis of their argument that Dipchand was not a partner but a cosharer. We therefore agree with the trial Court that the plaintiffs and Dipchand were partners in the suit transactions.

The appellants have further contended that even if it be held that the plaintiffs and Dipchand were partners yet the suit does not fail. The firm is on record and if Dipchand is a partner in the firm he is on record. But the firm which is suing is the firm of Khanoomal Jessamal. It is not contended by any party that Dipchand is or was a partner in that firm. He was a partner with that firm in the suit transactions. It therefore cannot be held that Dipchand is covered by the description of the plaintiffs given by them in their plaint.

The same reasoning applies to the further argument of the plaintiffs that even if they failed to disclose the name of Dipchand when they were asked to disclose the names of their partners, they can remedy that error. But they disclosed the names of the partners of the firm of Khanoomal Jessamal. It is clear that they were not at any stage suing on behalf of Dipchand but only on behalf of their own firm the partners of which with Dipchand constituted a separate partnership, which was interested in the suit transactions.

The further contention of the plaintiffs is that Dipchand being an insolvent they can sue on behalf of the firm without joining Dipchand. There might or might not have been force in their contention if they had been suing as the firm which was engaged in the suit transactions. But it is perfectly clear from the evidence and from their own description of themselves that they were suing on behalf of the firm of Khanumal Jessamal which was an entirely different partnership.

The last contention raised is in respect of the alleged agreement between plaintiffs and Dipchand that the claims in respect of 12 and 30 cases should be appropriated by the plaintiffs alone. The learned Additional Judicial Commissioner has dealt with this in his judgment :

"The plaintiffs have attempted to get over this difficulty by setting up an agreement between them and Dipchand that each of them was entitled to recover certain specific claims

The alleged agreement was not pleaded at all, all and it is not open to them to rely on it by putting certain stray questions to Nanumal and Dipchand without affording an opportunity to defendants 1 of meeting this new case. The alleged agreement is inherently improbable, and is supported by no reliable evidence. If Dipchand alone was conversant with the recovery of foreign claims there was no occasion for it, and if it was made there was no reason why Dipchand should have received the claim for locks which were assigned to the plaintiffs or why he should have entered the claims assigned to him in the "amanat" account. When pressed further he was forced to admit that the claims assigned to each party were not of equal value and each party had to receive and pay to the other the excess over his half-share. Nanumal does not speak of defendants 1 being a party to the agreement, and as soon as this defence was raised Dipchand tried to improve on the story by asserting that Karim Mahomed was present at the agreement. I have no doubt in my mind that this is a deliberate attempt on their part to set up an absolutely false agreement to get out of the technical defect and that their evidence on that point has no substratum of truth whatsoever."

Dipchand's evidence on this point (Ex. 12) is very halting. He says that the arrangement between him and the plaintiffs that they were to recover certain claims and he was to recover other claims was only tentative. The amount of the claims which the plaintiffs had to recover was not equal to the amount which he had to recover and it was agreed that they would adjust their accounts after the claims were recovered.

We agree with the learned Judge of the trial Court that it is not open to the appellants to rely on a contention which was never raised by them in the pleadings, for which further there is no reliable evidence.

We therefore confirm the judgment and decree of the lower Court and dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Sind 80

ASTON, A. J. C.

Hormusjee Cowasjee Byramji—Plaintiff.

v.

Secy. of State—Defendant.

Civil Suit No. 764 of 1927, Decided on 4th May 1931.

*** Tort—Negligence—Consignee while taking consignment obliged to cross railway lines—Heavy obligation lies on railway company to take reasonable precautions to ensure safety of consignee.**

Where a consignee coming to take the delivery of a consignment from the goods-shed is not a mere licensee but a person who is obliged by the requirements of the railway company and by the nature of their goods yard to cross railway lines several times, each time he takes delivery of goods, a heavy obligation lies on the railway company to take all reasonable precautions to ensure the safety of the consignee or his agents crossing the lines at the places which the railway sets apart for that purpose. [P 82 C 1]

Where it was necessary for a consignee, in order to take delivery of the consignment to cross the railway lines several times and while crossing the lines, some waggons standing stationary at once began to move and struck the car of the consignee although he tried to swerve and dashing it on the waggon on the next line reduced it to a total wreck and there was no signboard erected to warn the public nor was any man posted to warn the public and no whistle was blown or warning given:

Held: that the damage to the car was caused by the negligence of the servants of the railway company in failing to take reasonable precautions and the railway company was liable for the same: 26 *Bom.* 609, *Rel. on.*; *A. I. R.* 1925 *Mad.* 204, *Dist.* [P 83 C 1]

Isardas Oodharam—for Plaintiff.

Choithram Davanmal—for Defendant.

Judgment.—This is a suit filed by the plaintiff to recover the sum of Rs. 1,400 as damages caused to the plaintiff's Morris Oxford two-seater car through the negligence of the defendant's servant.

On 13th May 1927, Mr. Maneckji Barucha drove the car to the N. W. Ry. goods yard to clear a consignment. He was accompanied by Mr. Jehangir Rustomji and by one Cassam. After clearing the consignment they were returning to the entrance gate of the station yard, and in order to do so were crossing the lines at the nearest level crossing when suddenly some waggons which were standing stationary on the right side of the crossing began to move. Mr. Barucha, fearing they were about to be "smashed up," swerved to the left, but the end waggon struck the car and dashed it against a waggon on the next line. The plaintiff's car became a total wreck.

The plaintiff contends that the defendant's servants were guilty of negligence on three grounds, viz. (1) there was no signboard erected to warn the public; (2) no man was posted to warn the public, that shunting was going on and (3) there was a failure to blow any whistle or give a warning before the waggons were set in motion and sufficient precautions were not taken against danger to persons using the road.

The defendant's defence is that the goods yard is the private property of the defendant, that there was no need for the car to have crossed any railway line

that the driver crossed the line to suit his own convenience, and at his own risk. When he attempted to cross the level crossing the trains standing on the line nearest to him was doing shunting operations. It had blocked half of the level crossing. There were railway waggons also projecting into the level crossing on the next set of lines and the space between the two lots of waggons was small. It is further contended that the shunting jamadar warned the driver of the car that the train was shunting and warned him not to drive through the level crossing. (After stating the issues, the judgment considered evidence regarding trafic and proceeded.) It follows that a consignee coming to take delivery of a consignment from the goods shed to which the plaintiff's car was driven was not a mere licensee, he was a person who was obliged by the requirements of the railway company, and by nature of their goods yard, to cross railway lines several times each time he took delivery of goods. In the circumstances I think an obligation lay heavily on the railway company to take all reasonable precautions to insure the safety of consignees or their agents crossing the lines at the places which the railway set apart for that purpose: *Barrett* v. *Midland Ry. Co.* (1), *Cawasji Merwanji* v. *G. I. P. Ry. Co.* (2) and *James* v. *G. W. Ry. Co.* (3). It is not suggested that there was an obligation to erect a gate at the crossings. But in the absence of a gate or of a chain across the road the railway company should in my opinion at least have had a notice board placed in a conspicuous place in the road leading to the crossing, warning motorists and drivers of vehicles and pedestrians that the level crossing was closed on account of shunting or they should have posted one of their servants in the centre of the road leading to the crossing whose sole duty at that moment of danger was to warn motorists approaching the crossing of the danger. In the present case the evidence shows that the shunting jamadar was not in the road at all. There was no railway servant in the road. The evidence in my opinion indicates that the shunting jamadar was on platform No. 27. His attention was directed to a coupling and he had his back to the road leading to the level crossing and was facing in the direction of the engine. The engine driver had pushed a line of 15 waggons, so that the end waggon was at a short distance from the three stationary waggons. His next duty was to start again and push the line of waggons at a speed of four miles an hour towards the stationary waggons so that the shunting porter at the impact might couple them and crawl out from between the lines.

The engine driver being at a great distance from the stationary waggons would not be able to see exactly what was happening, but the shunting jamadar was in a position to control the movements of the engine by means of his flags. It seems to me obvious that the shunting jamadar with his back to the road leading to the level crossing would not be in a position to properly control or caution traffic proceeding along the road. He stated in evidence:

"when the coupling was done I signalled to the driver and behind my back the two Parsi gentlemen drove."

The result was that the driver of the plaintiff's car had no proper notice of the danger he ran in endeavouring to cross the level crossing. The engine had given no whistle when it started. There was no notice in a conspicuous place on the road that the level crossing was closed to traffic and there was no railway servant in a conspicuous place on the road to stop traffic from proceeding along it. No doubt the shunting jamadar and the shunting porter both alleged in evidence that the shunting jamadar was between platforms Nos. 22 and 27. It is hardly likely if this were true that both would have informed the police that the shunting jamadar was on platform No. 27. I disbelieve the statement that he was between Nos. 27 and 22. On turning the corner the driver of the car would notice three stationary waggons slightly projecting into the road, but the evidence shows that there was enough room for a car to pass to the left of them and to the right of the waggons slightly projecting into the road on the next line. The projection on the nearest line left 17½ feet roadway, that on the further line left 19½ feet. The line of 15 waggons being pushed into the three stationary waggons was being pushed at

(1) [1858] 115 R R. 925.
(2) [1902] 26 Bom. 609=4 Bom. L. R. 290.
(3) [1867] 36 L. J. C. P. 255.

such a slow speed that the motor driver might well fail to notice to approach or realize his danger. The present case is clearly distinguishable from those cases when the plaintiff with the exercise of reasonable care would have realized the position he was in, i. e., *Walker* v. *Midland Ry. Co.* (4), *Newman* v. *The London & South-Western Ry. Co.* (5), *Smith* v. *South-Eastern Ry. Co.* (6) and *M. S. M. Ry. Co.* v. *Jayammal* (7). On the impacts with the line of waggons the stationary waggons were jerked forward and the driver of the car suddenly found himself as he describes it in a position to be "smashed up." He endeavoured to swerve to the left, but it was of no avail. The waggons struck the car; it was pushed a distance of about 50 feet into waggons on the opposite line and the car became a total wreck.

I am of opinion that the damage to the car was caused by the negligence of the defendant's servants in failing to take reasonable precautions and that defendant is responsible for the same. The driver of the plaintiff's car was not in my opinion guilty of negligence or of a want of reasonable care.

On the question of damages, the evidence of Udharam Jethmal shows that the New India Assurance Co. paid the plaintiff a sum of Rs. 1,300, on account of damage to the car. Plaintiff stated in evidence that he received Rs. 1,100; but that was clearly a mistake. Plaintiff states that the car was sold by auction for Rs. 40. According to Udharam, a sum of Rs. 35 was received for the wreck of the car. Mr. Rolf, who was then Manager of Messrs John Fleming & Co., assessed the value of the car at the time of the accident as between Rs. 1,300 and Rs. 1,400 and the Insurance Company paid at the lowest rate. The plaintiff had purchased the car second hand for Rs. 2,000 in 1926. The car was a 1920 model and Mr. Daruwala had had it since 1923. After purchasing the car plaintiff insured it for Rs. 1,450 and during the nine months up to the time of the accident the car was driven about 2,000 or 3,000 miles. I see no reason for doubting the valuation of Mr. Rolf. The sum of Rs. 40 however which plaintiff admits was received must be deducted. I give judgment to plaintiff or Rs. 1,260, costs and interest at 6 per cent from date of suit till payment.

R.M./R.K. *Suit decreed.*

(4) 14 L. T. (n.s.) 796.
(5) 7 T. L. R. 138.
(6) [1896] 1 Q. B. 178=65 L. J. Q. B. 219=73 L. T. 614=60 J. P. 148=44 W. R. 291.
(7) A. I. R. 1925 Mad. 304=48 Mad. 417=85 I. C. 969.

A. I. R. 1932 Sind 82

MILNE, J. C. AND MEHTA, A. J. C.

Official Assignee—Appellant.

v.

Punjab National Bank, Ltd.—Respondents.

Misc. Appeal No. 62 of 1928, Decided on 31st July 1931.

Receiver — Equitable mortgagee procuring appointment of receiver to mortgaged property is entitled to income from property in receiver's hand in preference to Official Assignee — Provincial Insolvency Act (1920), S. 59.

A mortgagee who procures a receiver to be appointed in a mortgage suit is entitled to the income from the mortgaged property in the hands of the receiver in preference to the Official Assignee.

An equitable mortgagee who obtains the appointment of a receiver of the mortgaged property establishes a claim to have the recoveries made by the receiver ear-marked for his benefit, in case the mortgaged property is not sufficient to satisfy his claim, and an Official Assignee cannot claim the rents and profits of the property in the hands of the receiver for the benefit of the general body of creditors in preference to the mortgagee: *A. I. R.* 1931 *Mad.* 626 and 47 *Cal.* 418, *Rel. on.* [P 84 C 1, 2]

Asudamal Rewachand—for Appellant.

Dingomal Narainsing — for Respondents.

Judgment.—The facts underlying the order under appeal are that in Suit No. 236 of 1927 instituted by the Punjab National Bank for sale of property mortgaged to them by Moolji Morarji by equitable mortgage, a receiver of rents and profits of the mortgaged property was appointed. Subsequently, but before the decree was passed Moolji Morarji was adjudicated insolvent and the Official Assignee has claimed the rents and profits of the mortgaged property in the hands of the receiver for the benefit of the general body of creditors in preference to the bank. The learned Additional Judicial Commissioner held that the possession of the receiver was the possession of a stakeholder for and on behalf of the parties to the action in respect of their repective titles thereto, that the Official Assignee or the trustee takes the estate subject to the same equities as those to which it is subject in the hands of the bankrupt, that therefore the Official Re-

ceiver had no claim to the moneys in the hands of the receiver.

The appellant has contended that the receiver holds as an officer of the Court, that there was no direction to the receiver to pay over the rents and profits to the Punjab National Bank, that the receiver held for the benefit of both parties, and that therefore the Punjab National Bank cannot be considered to be secured creditors merely because a receiver was appointed pending the suit. The appellant relies on the following extract from Kerr on Receivers, Edn. 8, p. 177 :

"A receiver is an officer appointed to collect the rents and profits of real estate, or the income or capital of personal estate, upon the title of the parties to the action ; the rights of those parties are not affected by the order, but it operates as an injunction to prevent them from receiving the subject matter of the order, or from dealing with it to the prejudice of other parties to the action."

That is with reference to the rights of the receivers in general. The appellant contends that even an attaching creditor who gets an attachment before judgment gets no priority. He also relies on the case reported in *Re Pearce* (1). In that case a money decree was obtained and after judgment an order was made appointing a receiver of the debtor's interest in an hotel. The receiver was to make certain payments and was to retain the balance of profits to be applied in discharge of the debts and costs due to the plaintiffs as and when may be thereafter ordered. The Court of appeal held that the order appointing the receiver did not direct that the sums received by the receiver should be paid and applied in satisfaction of the judgment-creditor's debts. It did not create in favour of the creditors a mortgage charge or lien on the property of the debtor as a security for the debt, before the Court had passed any orders giving the execution creditors any right to any part of it, bankruptcy had supervened, and the fund in Court therefore belonged to the trustee in bankruptcy and not to the judgment creditors.

The case of the respondents is that the Punjab National Bank, on the strength of the equitable mortgage having obtained pending suit an order appointing a receiver, were in the position of secured creditors. They rely on the case of *Rameshwarsingh* v. *Chunilal Shaha* (2), for the proposition that the possession of a receiver in a mortgage suit is prima facie for the benefit of the party who has obtained the appointment. The learned Judges held that the contention that the receiver who was appointed at the instance of the first mortgagee held the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of all his dues, was clearly well founded. The dispute in that case was between the first mortgagee and the second mortgagee, who pending suit had purchased the equity of redemption and thus came in place of the original mortgagor.

In *Strong* v. *Carlyle Press* (3), it was held that a receiver should be appointed though winding up proceedings were pending. That was a case in which the receiver was appointed on behalf of the debenture holders of the company whose charge extended over all the property of the company and whose interest was in arrear. They commenced their action to enforce that security. A receiver was appointed on their application and subsequently a winding up order was made. It was held that the debenture holder had a right to the appointment of a receiver which right was not taken away by the winding up proceedings. But the debenture holders were clearly in the position of secured creditors in respect of the property for which the receiver was appointed.

Player v. *Crompton* and *Co. Limited* (4) was also a case of the appointment of a receiver at the instance of debenture holders.

The respondents rely on the statement p. 34 of Kerr on Receivers, Edn. 8, that the right to the appointment of a receiver is one of the rights which accrue to an equitable mortgagee whose security has become enforceable as one of the steps in realization. The Court as a matter of right appoints a receiver upon the application of an equitable mortgagee whose security has become enforceable either under its express terms or by operation of law. This passage certainly supports the contention of the respondents that the equitable mortgagee by obtaining the ap-

(1) [1919] 1 K. B. 78=88 L. J. K.B. 367=120 L.T. 334=(1919) B. & C. R. 131.
(2) [1920] 47 Cal. 418=56 I.C. 839.
(3) [1893] 1 Ch. 268=62 L J. Ch. 541=2 R. 283=68 L.T. 396=41 W. R. 404.
(4) [1914] 1 Ch. 954=83 L. J. Ch. 666=110 L. T. 759=58 S. J. 433.

pointment of a receiver has taken a step towards the realization of his security.

The case most in point is *Maharajah of Pithapuram* v. *Gokuldas Goverdhandass* (5), the head-note of which runs :

"Where a receiver is appointed by Court in respect of certain properties at the instance of a person in whose favour an equitable mortgage of those properties had been created by deposit of title-deeds, the equitable mortgagee, in the event of the security proving insufficient will have, in regard to any moneys realized by the receiver from the properties, a preferential right as against the ordinary creditors of the mortgagor, and will be entitled to the payment of such moneys or so much thereof as is sufficient to discharge the mortgage."

In that case the mortgagee was an equitable mortgagee. The contention that the possession of the receiver in a mortgage suit is prima facie for the benefit of the mortgagee who obtained the appointment was put forward by the petitioner in that case. The case *Rameshwar Singh* v. *Chunilal Shaha* (2) already referred to, was quoted with approval, and the Court asked in view of that ruling :

"If the object of appointing a receiver in a mortgage suit is to look after the interest of the mortgagee, though he is only a simple mortgagee, is he not entitled to claim that the profits of the mortgaged properties should be applied for his benefit when his security has become realizable, as one of the steps for such realization ?"

The Court held that if the receivers are to be considered as having been appointed for the benefit of the petitioner at whose instance they were appointed, then it must follow that the income in their hands from the mortgaged properties should be devoted to the satisfaction of his dues. The quotation from Kerr on Receivers is directly in point : a mortgagee who procures a receiver to be appointed in a mortgage suit is entitled to the income from the mortgaged properties in the hands of the receiver in preference to the assignee. The Court decided that since the receiver in that case was appointed at the instance of the petitioner and since the petitioner was not able to realize his decretal amount by the sale of the mortgaged properties, it must be held that he was clearly entitled to proceed against the income in the hands of the receiver as one of the steps for realization of his security. It may be noted that the claim was in respect of the income of the properties realized subsequent to the date of the decree.

The point is not free from difficulty, but in view of the Madras ruling quoted which supports the view taken by the learned Additional Judicial Commissioner, and in view of the general trend of the authorities above quoted that the equitable mortgagee by obtaining the appointment of a receiver of the mortgaged property does establish a claim to have the recoveries made by the receiver earmarked for his benefit in case the mortgaged property is not sufficient to satisfy his claim, we agree with the finding of the learned Additional Judicial Commissioner, and dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

(5) A. I. R. 1931 Mad. 626=133 I. C. 504=54 Mad. 565.

A. I. R. 1932 Sind 84

RUPCHAND, A. J. C.

Danish Dairies Milk Export A/S — Plaintiffs.

v.

Murlidhar & Co.—Defendants.

Suit No. 138 of 1931, Decided on 18th August 1931.

(a) Civil P. C. (1908), O. 39, R. 2 — Injunction restraining import of certain goods — When may be issued stated—Tort, Trademark.

No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. That is the only question of law which can arise in these cases. All the rest are questions of fact: *The Birmingham Vinegar Brewery Co. Ltd.* v. *Powell*, (1897) *A. C.* 710, *Ref.* [P 85 C 2]

A fraudulent misrepresentation by the defendant is no longer an essential ingredient for the issue of an injunction: *Millington* v. *Fox*, (1838) 45 *R. R.* 271; *Singer Manufacturing Co.* v. *Wilson*, (1877) 3 *A. C.* 376 and *Cellular Clothing Co.* v. *Maxton*, (1899) *A. C.* 326, *Ref.* [P 86 C 2]

(b) Civil P. C. (1908), O. 39, R. 2 (2)— Party not carrying business in British India should be put to terms in granting injunction.

Where the plaintiffs are a foreign firm and do not carry on business in British India, they should be put to terms in granting temporary injunction against the defendant. [P 87 C 1]

Suganlal Hassanand—for Plaintiffs.

Srikishendas H. Lula—for Defendants.

Rupchand, A. J. C.—This is a suit for an injunction restraining the defendants from importing into India and selling condensed milk in tins bearing labels which are said to be a colourable imitation of those on the tins of milk imported for sale by the plaintiffs. The main feature of the two labels is the device of a cow. The plaintiffs' labels contain the picture of a cow with the word "Dancow"

imprinted over the picture. The defendants' labels likewise contain the picture of a cow almost of similar size and occupying more or less the same position on the labels as that of the plaintiffs on their labels, but it has the word "Cow" printed over the picture in identically the same position as the word "Dancow" and has at the same time the words "white" and "brand" printed on the left and right of the picture so as to read "white cow brand." The minor points of difference between the two devices are that on different kinds of milk imported by the plaintiffs they have different labels; each label has the same device of a cow, but the picture of the cow is coloured black, light red, deep red and green, representing different qualities of milk, while the labels of the defendants have each of them a cow coloured white, but with different backgrounds to represent different qualities of milk. The horns of the cow on plaintiffs' labels are turned forwards while those of the cow on the defendants' label are turned slightly backwards. The two devices are pasted below: *

Plaintiffs'.
EVAPORATED
(1) DANISH MILK
DANCOW
DANISH DAIRIES
MILK EXPORT A/S

Defendants'
EVAPORATED
(2) Sterlized Full Cream Unsweetened
MILK
WHITE COW BRAND
Anglo Dutch Condensed Milk Co.
AMSTERDAM.

* (1) By consent of Mr. Lulla, the label from one of the tins (empty) produced by Mr. Lulla is removed and pasted in here.
(2) Slip supplied by Mr. Lulla.

The plaintiffs say that they have imported into India their milk with the aforesaid devices for very many years and their Milk is known in the market as "Gaoo Chhap" (or Cow Brand). They have produced a certificate from the Calcutta Registry Office to show that this brand was registered in that office about eight years ago.

The plaintiffs say that the defendants have imported their milk into India only since March 1931, and that they have fraudulently imitated the device on the plaintiffs' tins so as to enable them to pass off their goods as those of the plaintiffs, and they urge that this has been done at the instance of one Shivaldas who was still recently the manager of the chief importer of the plaintiffs' milk and is now the partner or, at any rate, the manager of the defendants' firm.

My brother Aston has granted an ex parte ad interim injunction, and the only point at present before me is whether this injuction should continue pending the trial or not.

The proposition of law involved in such cases is of a simple character and is well settled although its application to the facts of particular case often involves considerable difficulties.

This proposition was stated by Lord Halsbury in *The Birmingham Vinegar Brewerr Co. Ltd.* v. *Powell* (1) at p. 711 as follows:

"The proposition of law is one which has been accepted by the highest judicial authority and acted upon for a great number of years."

It is that of Turner, L. J., who says in *Burgess* v. *Burgess* (2):

"No man can have any right to present his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another."

That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down by Turner, L. J., is if he were to say in terms:

"These are the goods manufactured by a rival tradesman; and it seems to be assumed that unless he says something equivalent to that no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle or the form of the label, or the nature of the thing sold in the package, he is making the statement not in express words but in one of those different forms in which the statement can be made by something that he knows

(1) [1897] A. C. 710=66 L. J. Ch. 763=76 L. T. 792,
(2) [1853] 3 D. M. & G. 204.

will be so understood by the public. In each case it comes to be a question whether or not there is the statement made, and if the statement is made, there can be no doubt of the legal conclusion that he must be restrained from representing that the goods that he makes are the goods of the rival tradesman."

A good deal would therefore depend upon the evidence which will be given at the trial. For the purposes of this rule, I have carefully examined the two devices, and in the absence of the evidence which will be given at the trial, I am not prepared to say that the plaintiffs have no prime facie case to go to trial.

Whether the plaintiffs' goods are identified with the device of a cow or are known as "Gaoo Chapp" (cow brand) or not, are questions of evidence. If their goods are so known, the plaintiffs' case would fall within the decision in *Reddaway* v. *Banhan* (3) and the decision in the *Birmingham Vinegar Brewery Co. Ltd.* v. *Powell* (1) referred to above. In the former case the plaintiffs having proved that the expression "camel hair belting" was identified with the goods of their manufacture and of no other persons, the defendants were restrained from selling their products under the same name even though the words were merely an accurate description of the articles sold. In the latter case the defendants were likewise restrained from using the words "Yorkshire Relish" as descriptive of or in connexion with their sauce, without clearly distinguishing it from the plaintiffs.

The effect of the argument of the learned pleader for the defendants that the words "Gaoo" and "Cow" are common words in the Hindustani and English language respectively and that these words only indicate that the milk contained in the tins is cow's milk or Danish cow's milk is, to my mind, nothing more than to require the plaintiffs to make out a very strong case for satisfying the Court that their goods are identified with this device and that their goods alone are known as "Gaoo Chhap" (or cow brand): *Cellular Clothing Co.* v. *Maxton* (4).

The argument that the defendants' device of a cow is always coloured white and that as their goods will be sold in the market as white cow brand milk, their device is not calculated to deceive unwary purchasers has also very little or no substance in it.

In *In re The Trademark of La Societe Anonyme Des Verreries De L'etolle* (5), where the plaintiffs had registered a trade-mark of a star which they had used in connexion with their glass since 1875, succeeded in obtaining an order expunging a trade-mark registered by the defendants which consisted of the words "Red Star Brand" without any device whatsoever.

In that case Lindley, L. J., said at p. 28 :

"Two marks may be calculated to deceive either by appealing to the eye or to the ear, or by one appealing to the eye, and one to the ear. Finding that the applicants' glass is sold as "Star" glass or "Star Brand" glass, and bearing in mind that star may be in any colour, I cannot say that "Red Star Brand" is not calculated to deceive."

These observations would equally apply to the present case. The mere fact that the plaintiffs' cow is coloured differently on different kinds of milk would not matter. In this connexion, it might be noted that, as a matter of fact, under the English Patents Designs and Trade-marks Act, the registration of a device in any one colour enables the person registering the device to adopt any other colour on the same device.

Mr. Lulla has exhibited tins of 13 other importers of cow's milk which have different devices of cows, and has argued that the fact that other firms import milk with labels having the device of a cow or cows negatives any fraudulent intention on the part of the defendants in adopting the device in question and has further argued that the labels with devices of a cow or cows are common to the trade.

Now, in the first place, a fraudulent misrepresentation by the defendant is no longer an essential ingredient for the issue of an injunction : *Millington* v. *Fox* (6), *Singer Manufacturing Co.* v. *Wilson* (7) and *Collular Clothing Co.* v. *Manton* (4). In the next place, whether the emblem of a cow and the expression "Gaoo Chhap" are at the present time used as descriptive of the contents of the tins and not as a trade-mark and that such trade-mark or trade description has become publici juris are again question of

(3) [1896] A. C. 199=65 L. J. Q. B. 381=74 L. T. 289=44 W. R. 638.
(4) [1899] A. C. 326=68 L. J. P. C. 72=80 L. T. 809=16 Rep. Pat. Cas. 397.
(5) [1894] 2 Ch. 26.
(6) [1838] 45 R.R. 271.
(7) [1877] 3 A. C. 376=47 L. J. Ch. 481=38 L. T. 303=26 W. R. 664.

evidence. see *Powell* v. *Birmingham Vinegar Brewery Co.* (8) and *Birmingham Vinegar Brewery Co.* v. *Powell* (1).

Lastly, Mr. Lulla has contended and not without considerable force that as the plaintiffs are a foreign firm and do not carry on business in British India, they should be put to terms. I therefore think that this rule should be made absolute, subject however to the condition that the plaintiffs should give security to the satisfaction of the Nazir of this Court in the sum of Rs. 4,000 (four thousand only) which approximately represents £ 300 (three hundred) to secure the defendants against any loss which they might have sustained or might sustain in consequence of this injunction, and costs of this suit, if any, awarded to them. I order accordingly. Security should be furnished within three weeks ; failing compliance this rule will stand discharged.

K.N./R.K. *Order accordingly.*

(8) [1894] A. C. 8=63 L. J. Ch. 152=6 R. 52=70 L. T. 1=58 J. P. 296.

A. I. R. 1932 Sind 87

MILNE, J. C. AND MEHTA, A. J. C.

Haroon—Applicant.

v.

Emperor—Opponent.

Criminal Revn. Appln. No. 129 of 1931, Decided on 15th October 1931, against order of Special First Class Magistrate, Karachi.

Criminal P. C. (1898), S. 106—Person convicted of offences not in themselves coming under S. 106—Magistrate must record finding with respect to facts which make section applicable.

When a person is convicted of offences which do not in themselves and apart from any other incidents come within the terms of S. 106, it is incumbent upon the Magistrate to record a clear finding with respect to the facts which in his opinion make the section applicable to his case. Consequently where the Magistrate convicts the accused under S. 426, Penal Code, and also binds him under S. 106 without recording a finding that a breach of the peace has taken place or is likely to take place in the future, the order under S. 106 cannot be sustained: 30 *Cal.* 93 and 26 *Cal.* 576, *Foll.*; *A. I. R.* 1924 *Nag.* 118, *Ref.*

[P 88 C 1]

A. P. Fonseca—for Applicant.

J. B. Kadri—for Opponent.

C. M. Lobo—for the Crown.

Milne, J. C.—In this case the complainant alleged that there had been a dispute between her and the accused about the ownership of a Municipal plot. The plot had been awarded to the complainant by the Municipal authorities The accused being dissatisfied with this decision filed a suit in the Small Cause Court for ejectment which was dismissed. The accused then made a doorway into the portion occupied by Sumri, the complainant, and when the latter remonstrated with him he threatened her.

The learned Magistrate held that there had been a dispute between the parties; the accused had tried to make a door into the portion occupied by the complainant, that there was an altercation between the parties in which each one abused the other, and he was of the opinion that the accused was the aggressor. He therefore convicted him under S. 426 and fined him Rs. 20; in default to suffer rigorous imprisonment for one month. He also bound him down under S. 106, Criminal P. C., to keep the peace for six months in the sum of Rs. 50.

The applicant contends, in the first place, that the learned Magistrate has not found that the necessary ingredients of the offence were proved. But it is clear that the learned Magistrate found that the accused did make a doorway in the complainant's wall and in doing so he must have caused some damage to her property; on that account he did diminish the value of the property belonging to her. The question of the accused's intention or his knowledge that he was likely to cause loss to the complainant is to be inferred from his acts. The applicant knew that the Municipality had awarded the possession of the plot to the complainant and that his application to civil Court had failed.

We are therefore of opinion that there is no ground for interference in revision with the conviction and sentence passed by the learned Magistrate under S. 426.

The learned Public Prosecutor however admits that he is unable to support the order under S. 106, Criminal P. C. There has been some conflict between the various High Courts whether "other offences involving breach of the peace" refer to offences in which a breach of the peace is an essential or necessary ingredient, and not to offences which merely provoke or are likely to lead to a breach of the peace. The Bombay and Allahabad High Courts have held that the words "involving a breach of the peace" include offences in which a breach of the

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peace is likely to occur. But there is however one further matter to be considered and that is that the learned Magistrate has not come to any finding that a breach of the peace has taken place or is likely to take place in the future. It has been held that when a person is convicted of offences which do not in themselves and apart from any other incidents, come within the terms of S. 106, it is incumbent upon the Magistrate to record a clear finding with respect to the facts which in his opinion make the section applicable to his case: vide *Baidya Nath* v. *Nibaran Chunder* (1). That view was also taken in *Nanha* v. *Kanhayalal* (2), in which it was held that there must be an express finding to the effect that the act involves a breach of the peace or an evident intention of committing the same, or the evidence must be so clear as to satisfy the Court (without an express finding) that such was the case: cf. also *Jib Lal* v. *Jogmohun* (3). Even then if the words "involving a breach of the peace" are to be given a wide interpretation, the learned Magistrate has not shown that the wider interpretation can be given in this case. We therefore agree that the order of the learned Magistrate under S. 106, Criminal P. C., cannot stand and set it aside accordingly.

P.N./R.K. *Order set aside.*

(1) [1902] 30 Cal. 93=6 C. W. N. 471.
(2) A. I. R. 1924 Nag. 118=75 I. C. 983=25 Cr. L. J. 71.
(3) [1899] 26 Cal. 576.

* A. I. R. 1932 Sind 88

RUPCHAND AND MEHTA, A. J. Cs.

Emperor

v.

Nim and *another*—Opponents.

Criminal Revn. Applns. Nos. 209 and 229 of 1931, Decided on 27th January 1932.

(a) Criminal P. C. (1898), Ss. 112 and 123—Case submitted to Sessions Judge by Subdivisional Magistrate under S. 123—Sessions Judge cannot order Subdivisional Magistrate to try case de novo.

Where a case is submitted to the Secssions Judge under S. 123 by a Subdivisional Magistrate then acting under the powers vested in him under Cl. 3 of that section, the Sessions Judge has no jurisdiction to direct the Magistrate to pass a fresh order under S. 112 and after complying with the provisions of S. 112 to try the cases de novo. It is not within the competence of the Sesslons Judge to order a retrial. [P 88 C 2]

*** (b) Criminal P. C. (1898), S. 123—Case submitted to Sessions Judge by Subdivisional Magistrate under S. 123—Sessions Court is Court of first instance and not Court of appeal.**

Where a case is submitted to the Sessions Judge by a Subdivisional Magistrate under S. 123 and where a suspect is liable to imprisonment for a period exceeding one year, the whole case should be dealt with by that Court as a Court of first instance and not as a Court of appeal. That Court is also vested with all such subsidiary powers as may be necessary to enable it to finally dispose of the case. As no appeal is provided in a case of this nature, the Sessions Judge has no jurisdiction to deal with it as an appeal or to exercise the powers vested in him as a Court of appeal, and to order a retrial. In certain fit cases it is permissible to the Sessions Judge under S. 123 to refer the case to the High Court under S. 438 with a recommendation that the proceedings be quashed and a retrial ordered. But he cannot himself order a retrial. [P 89 C 1, 2]

(c) Criminal Trial—Appeal—Right of, must be given affirmatively and not presumed.

A right of appeal is a creature of statutory enactment and such right must be affirmatively given and not presumed. [P 89 C 1]

C. M. Lobo for the Crown.

Gobindram Jaichandrai — for Opponents.

Rupchand, A. J. C.—There are two connected applications for revision of orders passed by the Sessions Judge, Hyderabad, in two cases submitted to him by the Subdivisional Magistrate, Tando, under S. 123, Cl. (2), Criminal P. C. The main point in issue in both these applications is whether acting under the powers vested in him under Cl. 3 of that section, the learned Judge has jurisdiction to direct the Magistrate to pass a fresh order under S. 112 and after complying with the provisions of that section to try the cases de novo.

Section 123, Cl. (3) reads:

"Such Court after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary may pass such order on the case as it thinks fit. Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years."

The powers conferred upon the Court by this clause are much more circumscribed than those conferred on a Court of appeal under S. 423, Cl. (b). Prima facie therefore it was not within the competence of the learned Judge to order a retrial.

It was argued that S. 406 as amended by Act 18 of 1923 gives a right of appeal to a suspect against an order passed under S. 118 of the Code, and that although this right is by virtue of the proviso to that section limited to cases where suspects are required to furnish security for

a period not exceeding one year, it could never have been the intention of the legislature to deprive the Sessions Judge of the exercise by him of his appellate powers when dealing with a case submitted to him under Cl. (2), S. 123. It is urged that therefore a more liberal interpretation should be put upon the provisions of Cl. (3).

There is however no substance in this argument.

Where a suspect is liable to imprisonment for a period exceeding one year, the legislature has thought fit to provide that the whole case should be laid before a superior Court and that it should be dealt with by that Court as a Court of first instance and not as a Court of appeal. Not only that, but the legislature has thought fit to vest expressly the superior Court with all such subsidiary powers as may be necessary to enable it to finally dispose of the case.

Where a case is so submitted, there is no appellant and no respondent before the superior Court, nor is there any obligation on the suspect to file an appeal within any fixed period of time on pain of his losing the right of challenging the order passed against him under S. 118 or of losing the right of attacking the legality of the proceedings in such other manner as may be permissible under the law.

This is not the only section of the Code where proceedings are required to be laid before a superior Court for the purpose of awarding adequate punishment on a person who has been condemned by a Subordinate Court. S. 349 is another somewhat analogous instance, and provides specifically for powers which such superior Court may exercise when dealing with a case submitted to it by a Second Class or Third Class Magistrate. These powers are to a certain extent wider than those specified in Cl. (3), S. 123, and yet it has been held that they do not include the power to order a retrial.

A right of appeal is a creature of statutory enactment, and in the language of Lord Chancellor Halsbury *Lame* v. *Estaile* (1), such right must "be affirmatively given and not presumed." As no appeal is provided in a case of this nature the Sessions Judge had no jurisdiction to deal with it as an appeal or to exercise the powers vested in him as a Court of appeal, and to order a retrial. Perhaps in certain fit cases it might be permissible to a Judge to whom a case has been submitted under Cl. (2), S. 123, to refer the case to the High Court under S. 438 with a recommendation that the proceedings be quashed and a retrial ordered. But he cannot himself order a retrial.

On the merits also we do not think that the learned Judge had sufficient materials before him to justify the order complained against. It is no doubt true that there are certain irregularities in the proceedings. The orders passed under S. 112 were subsequently amended in both cases and the amendments although initialled have not been dated. The entries in the diaries as to the time when the orders under S. 112 were first passed and when they were subsequently amended have not been regularly made. In Criminal Revision Application No. 209 of 1931, the first order under S. 112 bears date 22nd June. The application by the Crown Prosecutor for enhancing the period of security was not made till 4th July, and curiously enough neither the order passed on that application nor the amendment made in the order under S. 112 have been dated. So far as this case is concerned, the order under S. 112 having been amended on a subsequent date, it was incumbent on the learned Magistrate to have shown when and at what stage of the proceedings the amendment was actually made and also to have noted whether the order so amended had been read and explained to the opponents. But these facts were not in themselves sufficient to warrant the learned Judge in coming to the conclusion that neither the original orders nor the amended orders had, as a matter of fact, been read out to the opponents, or to come to the conclusion that perhaps some of the evidence had actually been recorded before the amended orders were made. .

We think that the learned Judge would have been well advised if before arriving at his conclusions, he had called for an explanation from the Magistrate with regard to these irregularities especially when such conclusions were to a certain extent a reflection upon the conduct of the Magistrate.

We have considered the explanation subsequently submitted by the Magistrate, and we think that although the

(1) [1891] A. C. 211.

proceedings disclose a certain amount of carelessness on the part of the clerk of the Magistrate in not making proper entries in the diary, and on the part of the Magistrate in not dating the amendments made by him, especially the amendment in the order passed by him in Criminal Revision Application No. 209 of 1931, there are no grounds to suppose that the amended orders were not read to the opponents before their trial actually commenced.

In Criminal Revision Application No. 229 of 1931, the learned Sessions Judge has also given effect to another ground which was urged before him. It appears that the Magistrate had not obtained the signature of the opponents on their statements recorded under S. 342. These statements therefore failed to comply with one of the provisions of S. 364 and there is nothing on the record to show why the signatures of the opponents in this case were not obtained. It may be that this was due to a refusal on their part to put their signatures as appears to have been done by the opponents in the connected case. But again this irregularity was curable in the manner provided by S. 533 by requiring the Magistrate to obtain the signatures of the opponents on their statements.

For these reasons we are afraid we cannot uphold the orders complained against.

As the learned Judge had not dealt with all the objections urged before him, we set aside the orders passed by him, and direct him to dispose of both these cases, according to law in the light of the above observations.

B.V./R.K. *Order accordingly.*

A. I. R. 1932 Sind 90

MILNE, J. C. AND MEHTA, A. J. C.

Hayat Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 108 of 1931, Decided on 14th October 1931.

(a) Penal Code (1860), S. 471—Production of certified copy of forged document with necessary knowledge and intention is offence under S. 471.

The production of a certified copy of a forged document with the necessary knowledge and intention is a user of forged document punishable under S. 471. It is an offence in respect of the document produced; the production of the certifind copy is a user of the forged original: *A. I. R.* 1925 *Oudh* 413, *Rel. on.*; *A. I. R.* 1926 *Oudh* 255, *Ref.*; 8 *O. C.* 313, *Dist.* [P 91 C 1]

(b) Criminal P. C. (1898), S. 195 (1) (c)—Document alleged to be forged used in Court by party before complaint — Sanction for prosecution is necessary—Penal Code (1860), S. 471.

Where before complaint made a document has been produced in a Court by a party to a proceeding before it, the sanction of such Court is necessary for his prosecution in respect of an antecedent forgery and antecedent user before a Sub-Registrar: 44 *Cal.* 1002; *A. I. R.* 1926 *All.* 30 and 39 *Mad.* 677, *Foll.* [P 91 C 2]

Dipchand Chandumal—for Applicant.

Bhojsing G. Pahlajani — for Opposite Party.

C. M. Lobo—for the Crown.

Milne, J. C.— The facts leading to this revision application are as follows:

On 15th August 1929 one K. B. Sayed Khan Rind died. It was alleged that on 6th June 1929 he had executed a will. On 13th January 1931 accused 1 filed a suit on the will in the First Class Sub-Judge's Court, Shikarpur. He filed a certified copy of the will alleging that the original was missing and applied for an interim injunction on the strength of the will which interim injunction was granted in January 1931. The present complaint was filed on 1st April 1931 the allegation being that the will was a forgery. The complaint was under S. 467 in respect of all the accused and under S. 471 in respect of accused 1, 4 and 5, as they had produced the document before the Sub-Registrar of Jacobabad for registration and also against accused 1 under S. 474 for possession of a document known by him to be forged.

An objection was taken by the accused that the First Class Magistrate, Jacobabad before whom the criminal complaint was filed had no jurisdiction to entertain the complaint in view of the provisions of S. 195 (1) (c), Criminal P. C. But the learned Magistrate held that the document that had been produced in the civil Court proceedings was a copy and not the original will, relying on two cases, *King Emperor* v. *Raja Mustafa Ali Khan* (1) and *Girdharilal* v. *Emperor* (2).

Accused 1 has applied for revision to this Court and contends that the sanction of the civil Court is required. The first case relied on by the lower Court,

(1) [1901] 8 O. C. 313=2 Cr. L. J. 653.
(2) A. I. R. 1925 Oudh 413=86 I. C. 993=26 Cr. L. J. 929.

King Emperor v. *Raja Mustafa Ali Khan* (1) is not available. In the second case *Girdharilal* v. *Emperor* (2) the first-mentioned case was relied on for the propositions that if the section is literally construed the words refer only to the production of the original and that there were good grounds for holding that the language used was deliberate. There is a later passage in the learned Judge's judgment which tends to support the applicant's case:

"The use of certified copies of forged originals by a person who knows that the original are forged clearly amounts to making use of forged documents within the meaning of S. 471."

In *Mathura Prasad* v. *Emperor* (3) it was held by the learned Chief Judge of the Oudh Chief Court:

"When forgeries, if any, were committed by one person inside the record room and copies reproducing the false entries were put up in the suits contesting the notice of ejectment the use of certified copies is a use of forged documents when they are put in a case in this way. Of course the mere circumstance that the documents had been forged would not be sufficient to justify a conviction. It is necessary to prove in order to obtain such a conviction that the use had been fraudulent or dishonest and in addition that the person putting in the copies knew or had reason to believe that the originals were forged.

The opponent relies on *Girdharilal* v. *Emperor* (2) quoted. He contends that the production of the copy is not a production of the original. But it seems to be the tenor of the rulings relied upon by the applicant that the production of a certified copy of a forged document is a use of the forged document. That opinion would be in accordance with the substance of what was actually done and we would therefore hold that the production of a certified copy of a forged document with the necessary knowledge and intention is a user of forged document punishable under S. 471. It is an offence in respect of the document produced—the production of the certified copy is a user of the forged original.

The opponent further contends that the provisions of S. 195 (1) (c) do not apply to a prior use, thatis to say, to a use prior to the production in Court of the document in respect of which the offence has been committed. He does not raise this contention in respect of the offence alleged under S. 467 but in respect only of the offence under S. 47. For this proposition he relies on *Noor Mahomed* v. *Kaikhosru* (4) and *In the matter of Abdul Gani* v. *Emperor* (5). In *Noor Mahomed* v. *Kaikhosru* (4) the Court held that the use complained of being prior in date to the use of the document in question in evidence in a civil Court the sanction of such Court under S. 195 (1) (c), Criminal P. C. was not necessary. The majority however of the High Courts in India have taken a contrary view. In *Nalini Kanta* v. *Anukul Chandra* (6) it was held that where before complaint made a document has been produced in a Court by a party to a proceeding before it, the sanction of such Court is necessary for his prosecution in respect of an antecedent forgery and antecedent user before a Sub-Registrar. That case is exactly on all fours with the present case. The same view was taken in *Kanhaiyalal* v. *Bhagwan Das* (7) and *In re K. Parameswaran Nambudri* (8). The consensus of authority is supported by the plain wording of S. 195 (1) (c) which is not limited to offences committed in the course of the proceedings in Court; it may refer to an offence committed in any previous proceeding. We cannot therefore accept the contention of the opponent that on this ground sanction is not required.

We are of opinion therefore that as regards the present application the offences under Ss. 467 and 471 cannot be taken cognizance of by the learned Magistrate without the previous sanction of the Court in which the certified copy of the alleged forged will was produced. We see no reason to draw any distinction in respect of the offence under S. 474 as that is really part of the alleged offence under S. 471.

As we are of opinion that the sanction of the Court is required we quash the proceedings in respect of the present applicant. We need not consider the further contention of the applicant that the offence alleged falls also under S. 195 (1) (a) as the facts alleged constitute an offence under S. 182.

(3) A. I. R. 1926 Oudh 255=93 I. C. 66=27 Cr. L. J. 402.

(4) [1902] 4 Bom. L. R. 268.
(5) [1915] 16 Cr. L. J. 617=30 I. C. 441.
(6) [1917] 44 Cal. 1002=18 Cr. L. J. 522=39 I. C. 490.
(7) A. I. R. 1926 All. 30=89 I. C. 1053=26 Cr. L. J. 1485=48 All. 60.
(8) [1916] 39 Mad. 677=16 Cr. L. J. 721=31 I. C. 161.

He has further requested that if this Court does not agree with him on the question of sanction, that the proceedings should be stayed; but it is not necessary to consider that question now. The other accused however are not before us and we cannot consider the question of stay in respect of these accused; though as the complaint fails in respect of the principal accused on the ground of lack of sanction the question of stay is one which might well be considered in respect of these other accused.

V.B./R.K. *Order accordingly.*

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* A. I. R. 1932 Sind 92

MILNE, J. C. AND MEHTA, A. J. C.

Gomibai—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Applns. Nos. 104 and 105 of 1931, Decided on 2nd November 1931.

*** (a) Criminal P. C. (1898), S. 494—Public Prosecutor is responsible person for making application for withdrawal.**

The Public Prosecutor is the person responsible under S. 494 for making the application for withdrawal. It is for him to satisfy himself that there are grounds for making the application.

[P 93 C 1]

(b) Criminal P. C. (1898), Ss. 494 and 439—Consent under S. 494—Adequate grounds—High Court should not interfere in revision.

If under S. 494 the Magistrate has given his consent for withdrawal of applications and has adequate grounds before him for giving that consent, the High Court should not as a Court of revision interfere in the matter: *A. I. R.* 1926 *Mad.* 296; *A. I. R.* 1925 *Sind* 190 and *A. I. R.* 1924 *Pat.* 283, *Ref.* [P 93 C 1]

*** (c) Criminal P. C. (1898), S. 494 — No formal inquiry is necessary under S. 494.**

There is no provision in the Criminal Procedure Code that there should be any formal inquiry under S. 494. As the purpose of S. 494 is that in proper cases a criminal complaint should not be proceeded with, it would be rather absurd to hold that the matter should be the subject of formal inquiry before a case is withdrawn. That there should be a formal inquiry in the presence of the parties to decide the matter which in the opinion of the proper authorities should not be dragged into Court would defeat the purpose of the section: *A. I. R.* 1921 *Cal.* 259, *Ref.*

[P 93 C 1, 2]

(d) Criminal P. C. (1898), S. 494—Magistrate need not necessarily record his reasons for allowing withdrawal of case.

There is nothing in S. 494, Criminal P. C., to require the Magistrate to record his reasons at the time of allowing the withdrawal of a case, although it is desirable that where a case is permitted to be withdrawn there should be some material on the record of the case to satisfy the High Court that prima facie there was some ground for the withdrawal of the case: *A. I. R.* 1930 *Sind* 156, *Foll.*; 57 *I. C.* 657, *Ref.*

[P 93 C 2]

Hatim B. Tyebji—for Applicant.

C. M. Lobo, Public Prosecutor—for the Crown.

Partabrai D. Punwani—for Opponent.

Milne, J. C.—In these cases the applicants had filed complaints against one Mr. Kishenchand a practicing pleader of Hyderabad..

Applicant in Criminal Revision Application No. 104 of 1931 is Gomibai the mother of Mr. Kishenchand. The other application filed by Shrimati Putlibai is in respect of a separate complaint against Mr. Kishenchand relating to the same incident. There had been a family dispute which gave rise to these complaints; the complaints were made under S. 323 and Ss. 504 and 506. The Public Prosecutor for Sind applied that the case should be withdrawn under S. 494, Criminal P. C. and this was allowed by the Magistrate. It is against the withdrawal of the complaints that the applicants have filed these revision applications.

The Public Prosecutor in his application dated 10th June 1931 put on record the reasons for which the complaints should be withdrawn. The first was that the family of the accused and Gomibai was a highly respectable family; that the immediate cause of the present litigation was admittedly the betrothal of one of the daughters of the complainant, a sister of the accused, a betrothal which the complainant appears to have opposed, that on a careful consideration of the facts placed before the District Magistrate and information in his possession he was desirous that the present legal proceedings in this Court should be withdrawn as it was in the interests of public policy and decency that the previous history and conduct of complainant should not be made the subject-matter of inquiry in a criminal Court; the Public Prosecutor in view of the nature of the complaints, the delay in filing the same, the absence of any injuries, the nonciting of witnesses who were shown to be eyewitnesses and the points stressed in the previous paragraphs considered that these were fit cases for withdrawal under S. 494, Criminal P. C.

The Public Prosecutor has quoted the opinion of the District Magistrate. But

the Public Prosecutor is the person responsible under S. 494 for making the application for withdrawal. It is for him to satisfy himself that there are grounds for making the application. The learned Additional City Magistrate also singles out the view of the District Magistrate as the particular ground which appealed to him in consenting to the application. The applicant contends therefore that the learned Magistrate passed his order purely on the opinion of the District Magistrate; the District Magistrate's grounds are stated in para. 3 of the Public Prosecutor's application and they are not proper grounds on which the withdrawal of the complaint should have been allowed. These grounds, he says, are extraneous to the case. But the District Magistrate was impressed by the fact that it was highly desirable that the defence which the accused would have to put up if the cases were proceeded with, should not be a matter of a Court inquiry. The defence that would be put in the cases is hardly matter extraneous to the cases. The application is the application of the Public Prosecutor; the reference to the views of the District Magistrate is not to be taken by itself. If the responsible authorities considered the cases and arrived at the conclusion that, in view of the very great weakness of the cases and the desirability of avoiding an investigation into the mental condition of the complainant and her previous conduct, this was a proper case for withdrawal, it can hardly be said that the considerations which weighed with them were improper considerations or extraneous to the case. The learned Additional City Magistrate may have singled out the opinion of the District Magistrate on one particular point, but if he has given his consent and had adequate grcunds before him for giving that consent, we do not think that we should as a Court of revision interfere in the matter.

The applicant complains that the grounds on which the Public Prosecutor and the District Magistrate arrived at their various conclusions are not before the Court. There is no provision in the Criminal Procedure Code that there should be any formal inquiry under S. 494 and as the purpose of S. 494 is that in proper cases a criminal complaint should not be proceeded with, it would be rather absurd to hold that the matter should be the subject of formal inquiry before a case is withdrawn. That there should be a formal inquiry in the presence of the parties to decide the matter which in the opinion of the proper authorities should not be dragged into Court would defeat the purpose of the section.

The applicant relies on *Rajani Kanta* v. *Idris Thakur* (1). This lays down nothing more than that the reasons for the order should be stated in the order to enable the High Court in revision to determine the propriety of the exercise of its discretion by the lower Court. The lower Court in this case insisted on a full statement from the Public Prosecutor of the grounds on which the withdrawal application was made. In the Calcutta case there had been a commitment to the Sessions and the Public Prosecutor sought the withdrawal of the case on the ground of "absence of evidence" and the High Court held that the evidence on the record was sufficient to establish a case for the jury and the consent to the withdrawal was improperly accorded. The Public Prosecutor has in para. 4 of his statement given what in his opinion are the inherent weaknesses of the cases; no attempt has been made to challenge the correctness of that statement. There is nothing on record of the previous history or the mental condition of the complainant Gomibai. But the question of withdrawal has been left to the discretion of the Public Prosecutor and as it appears from his statement that he did direct his attention to considerations which should weigh with him, we are not of opinion that it was incumbent on the Magistrate to require proof of the facts stated so far as they were not apparent from the existing record if he were satisfied from the statement of the Public Prosecutor that there were sufficient grounds for permitting the withdrawal. It was laid down in a Bench ruling of this Court the *Emperor* v. *Dipchand* (2) that :

"There is nothing in S. 494, Criminal P. C., to require the Magistrate to record his reasons at the time of allowing the withdrawal of a case, although it is desirable that where a case is permitted to be withdrawn there should be some material on the record of the case to satisfy the High Court that prima facie there was some ground for the withdrawal of the case."

(1) A. I. R. 1921 Cal. 259=64 I. C. 280=22 Cr. L. J. 760=48 Cal. 1105.

(2) A. I. R. 1930 Sind 156=1930 Cr.C. 620=31 Cr.L.J. 684=124 I. C. 378=24 S.L.R. 377.

In the present case the reasons for withdrawal are on record. We cannot hold that the reasons are improper reasons or extraneous to the case. Nor can we hold that the learned Additional City Magistrate was wrong if he relied on the responsible officer entitled to act under S. 494 duly satisfying himself of the facts stated in his application.

We see no reason to distinguish between the applications as both arise out of the same incident.

We therefore dismiss the applications.

Mehta, A. J. C. — In *Gopibari* v. *Emperor* (3), decided by the Patna High Court it was held that where a case has been started upon a police report and the Court Sub-Inspector wants to withdraw the case, the Court acts without jurisdiction, in rejecting the prayer for withdrawal simply because the complainant wants to proceed with the case. That was clearly a police case. Mr. Tyabji for the applicants is however not prepared to challenge the right of the Public Prosecutor to enter a nolle prosequi even in a case like the one we are dealing with in which the Magistrate has in the first instance already issued process on the complaint of a private individual.

What remains to be considered then is the contention of the applicants that the consent given by the learned Magistrate for withdrawal of their complaints, on being moved thereto by the Public Prosecutor was not based on proper judicial grounds. I quite concur in the view expressed in *Emperor* v. *Dipchand* (2) that though a Court granting its consent under S. 394, Criminal P. C. is not bound to state the grounds which influenced the Court, it is desirable that it should do so in order to enable a higher Court to determine whether the consent, which is a judicial order, has or has not been properly granted. In the two cognate cases before us the grounds such as appealed to him have been given by the Magistrate. There are also the grounds stated in the application of the Public Prosecutor. It has been held in *In re Kaliappa Goundan* (4) that when a Court in passing an order under S. 494, Criminal P. C. exercises a judicial discretion in a proper way the High Court will not ordinarily interfere with that order in revision. It has been also laid down by a Bench of our own Court in *Khanu* v. *Emperor* (5) following the ruling in *Gulli Bhagat* v. *Narainsingh* (6), that where discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court is that as a revisional Court it will neither inquire into the reasons nor interfere with the exercise of such discretion.

Since it is not contended that the Public Prosecutor has no right in a private complaint to apply for withdrawal of the case, and since we are not satisfied that the discretion exercised by the lower Court in according its sanction to the withdrawal is on the face of it arbitrary or capricious, I must concur in the order proposed by the learned Judicial Commissioner that these applications be dismissed.

B.V./R.K. *Applications dismissed.*

(3) [1920] 57 I. C. 657.
(4) A. I. R. 1926 Mad. 296=92 I. C. 750=27 Cr. L. J. 334.
(5) A. I. R. 1925 Sind 190=82 I. C. 760=25 Cr. L. J. 1368=19 S. L. R. 353.
(6) A. I. R. 1924 Pat. 283=77 I. C. 734=25 Cr. L. J. 446=2 Pat. 708.

* A. I. R. 1932 Sind 94

MEHTA, A. J. C.

Sirumal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 112 of 1931, Decided on 15th February 1932.

***(a) Penal Code (1860), Ss. 476 and 482 —Trade-mark—Word used as—Test of invented word laid down—Question is one of fact — Trade-mark includes whole label—Trade-mark.**

A mere ordinary addition to, or mis-spelling or variation of, a word in use in the English language does not make the word so formed an invented word but the question in each case is one of fact. The test of an invented word is that it must have been substantially new at the date of registration; or have been substantially new when first used by the applicant, and have been only used to denote his goods down to the date of registration. It is not necessary that its production should have involved any great ingenuity or anything like invention in the sense in which the term is used in patent law. The word "Aguerine" not being an ordinary English word nor a combination of two ordinary English words must be regarded as a fit subject of a trade-mark. The fact that the word coined by the complainant to denote the name of his fever mixture and registered as a trade-mark has been copied by another does not absolve the accused from the consequences of copying it. A person who employs a label which in general resembles the label used by another manufacturer is guilty of counterfeiting the trade-mark, even though

the registered trade-mark of the one be different from that of the other. The expression "trade-mark" as defined in S. 478 includes the whole design on the box and the label pasted on it.

Where therefore there is no dispute in the fact that there is a striking similarity in the design of the complainant's bottle and that of the accused, it is perfectly clear that the accused has used a false trade-mark within the meaning of S. 482: 24 *I.C.* 834 & 30 *I.C.* 1007, *Ref.* [P 97 C 1]

(b) **Penal Code (1860), S. 480 — "Using false trade-mark"—Meaning of, explained.**

Not only whosoever marks any goods or package or receptacle containing goods, but also whosoever uses any such package or receptacle with any such mark thereon is said to use a false trade-mark, if the whole thing is done in a manner reasonably calculated to cause it to be believed that the goods are of a certain manufacture whereas they are not of that manufacture : 38 *Cal.* 110, *Ref.* [P 98 C 1]

* **(c) Merchandise Marks Act (1889), S. 15 —"Offence" does not mean only first offence but also repetition of it.**

The word "offence" in S. 15 does not mean the very first such offence. If such an interpretation of the section be good law a person infringing another's trade-mark may merely do so once, clandestinely, sit quiet for three years and then make a public use of it without any fear of a criminal prosecution. [P 100 C 1]

Tarachand Khimandas—for Appellant.

D. N. O. Sullivan—for the Crown.

Jessaram Banasing—for Complainant.

Judgment.—The appellant Sirumal, son of Shewaram, a Hakim of Tand Ghulamali, Hyderabad Sind, has been convicted by the Special First Class Magistrate, Cantonment and Sudder Bazzaar, Karachi, of an offence punishable under S. 482, I. P. C., in that he the accused in September and October 1930 in Karachi used a false trade-mark by selling a fever mixture of his own with the trade-mark and the get up of the complainant's mixture known as "Aguerine," with intent to defraud the public.

The complainant Ramchand Sardarsing is the proprietor of the Victoria Chemical Works, Karachi. His case is that since 1907 he has been manufacturing articles of provisions and medicines. In 1917 he registered in Bombay the trade-mark "Aguerine," a word coined by him for a fever mixture prepared from his own formula. His Aguerine which is a 4 oz bottle with a particular label is packed in an orange colour carton together with a tin spoon. All these articles, namely, the bottle, the label, the spoon and the carton are solely his property used exclusively by him from the commencement of his business. The name "Aguerine" and the carton and the spoon have also been registered by him in Calcutta in 1930. The complainant further maintains that "Aguerine" is a very well known cure for fever sold extensively throughout the length and breadth of this country as a result of advertisement on a large scale, and known as the product of the Victoria Chemical Works, Karachi. In September 1930 the complainant came to know that the accused had been advertising and selling in Karachi "Aguerine Mixture" with a label and a spoon packed in a pink carton resembling the complainant's "Aguerine" through a chemist's shop in Karachi named Dipchand and Sons. He therefore filed a complaint against the accused for infringement of his trade-mark.

A bottle of the complainant's "Aguerine" was produced in Court to compare with a bottle of the accused's "Aguerine Mixture." The learned Magistrate has found that the whole get-up of the accused's bottle is exactly similar to that of the complainant's. Both the bottles are of the same size. The printed matter on the labels is also the same, word for word, except that the price of the complainant's "Aguerine" is Re. 1-4-0 whilst that of the accused is Re. 1 per bottle. The spoon of the accused is exactly like that of the complainant. Lastly, the carton in which the bottles and the spoons are packed are also strikingly similar, with the slight difference that on the complainant's carton there is the picture of Queen Victoria whilst on that of the accused there is a picture of his own self. The difference in colour is not such as can easily be marked.

Through one Kishinchand (Ex. 35) an advertisting agent, the complainant sought to prove that the accused came to the witness in September 1930 and got inserted in two local papers Al Wahid and Sind Herald an advertisement for the copied "Aguerine Mixture." Dipchand, the chemist, Ex. 41, deposed to the fact that he had purchased from the accused some bottles of "Aguerine Mixture" and sold it in September and October 1930. D'Costa (Ex. 36) was examined as a witness on behalf of the complainant to prove that he had purchased a bottle of "Aguerine Mixture" from Dipchand's shop ; but finding that it was not as efficacious as he expected "Aguerine" to be and noticing from the label that the medicine was not a preparation of the Victoria Chemical Works, Karachi

went and informed the complainant about it. All this is believed by the trial Court.

As against the prosecution evidence the accused by his written statement (Ex. 44) maintained that the fever mixture which he is selling is prepared from a recipe of Bawa Miskeendas and adopted by the accused on assuming the Bawa's Gadi in 1926. The accused further maintained that as he has been selling this mixture since 1927, the present complaint is not within limitation; and that as he has never sold his stuff in Karachi, the Karachi Court has no jurisdiction. In support of this defence the accused produced some witnesses according to whom the accused's "Aguerine Mixture" had been on the market from 7 to 12 years on the Hyderabad side.

The learned Magistrate who has written a very carefully considered judgment has relied on the prosecution evidence in preference to that of the defence giving his reasons therefor, and convicted and sentenced the accused to pay a fine of Rupees 500 or in default to suffer rigorous imprisonment for six months, under S. 482, I. P. C. Hence this appeal.

Mr. Tarachand on behalf of the appellant contends in the first place that there cannot be any trade-mark in the word "Aguerine" inasmuch as it is merely composed of two ordinary English words ague and rine. Reliance is placed on certain English rulings in support of the proposition that a mere combination of words in ordinary use cannot be registered as a trade-mark. In re *Uneeda Trade-mark* (1) it was held that the word "uneeda" is a mere mis-spelling of ordinary English words, and not a new word invented within the meaning of S. 10, Patent, Designs and Trade-marks Act (1888), and was therefore not a registrable trade-mark. "Uneeda" was considered to be merely descriptive of the character or quality of the goods : and on that ground too it was rejected. That decision was upheld in appeal. *In re. Uneeda Trade-mark* (2). Another word: "orlwoola" was also considered to be a mis-spelling of the ordinary English words "all wool" and therefore not registrable. That was decided in *Re Joseph Crosfield & Sons, Ltd.* (3). An application for the registration of the word "pirle" was rejected on the ground that where a particular word cannot be registered as a trade-mark another word sounding exactly like it, but spelt differently cannot be registered: this was the ruling given in *Re Ripley & Son's Trade-mark* (4). On the strength of these and other authorities discussed in para. 1256 of Halsbury's Laws of England, Vol. 27, it is urged on behalf of the appellant that the word "Aguerine" being merely a combination of two English words cannot be allowed to constitute a trade right. Such an argument however ignores the fact that the word "rine" meaning a bark is an obsolete word.

It seems to have been used by the poet Spencer centuries ago. It cannot be regarded as an ordinary English word in modern use. On the other hand the word "motorine," invented as a name for a lubricant was considered fit for registration because it had no direct reference to the character or the quality of the goods sold: *Re Price's Patent Candle Co. Trade-mark* (5). Similarly "cocoatina" was held to be a fit subject of trade-mark in *Schweitzer* v. *Atkins* (6). A certain degree of laxity in subsequent judgments is well illustrated in the case in which an application to register the word "fireprofine" was granted on the applicant's disclaimer of the word "fire proof." The test of an invented word is that it must have been substantially new at the date of registration ; or have been substantially new when first used by the applicant, and have been only used to denote his goods down to the date of registration. It is not necessary that its production should have involved any great ingenuity or anything like "invention" in the sense in which the term is used in patent law : *Re Eastman Photographic Materials Co. Ltd's.* (7). This case entirely revolutionized the law as to registration of in-

(1) [1901] 1 Ch. 550.
(2) [1902] 1 Ch. 783=86 L.T. 439=71 L.J. Ch. 353=50 W.R. 467=19 Rep. Pat. Cas 281=18 T.L.R. 453.
(3) [1910] 1 Ch. 130=79 L. J. Ch. 211=101 L. T. 537=54 S. J. 100=26 Rep. Pat. Cas. 837=26 T. L. R. 100.
(4) [1898] 78 L. T. 367=15 Rep. Pat. Cas. 151 =14 T. L. R. 299.
(5) [1907] 2 Ch. 435=76 L. J. Ch. 646=97 L. T. 235=23 T. L. R. 672=24 Rep. Pat. Cas. 585.
(6) [1868] 37 L. J. Ch. 847=19 L. T. 6=16 W. R. 1080.
(7) [1898] A. C. 571=67 L. J. Ch. 628=79 L. T. 195=47 W. R. 152=14 T. L. R. 527.

vented words, it having previously been held that an invented word must not refer to the character or quality of the goods. After discussing the various cases on this subject, Kerly on Trade Marks., Edn. 4, at p. 167 says :

"The result is that a mere ordinary addition to, or mis-spelling or variation of, a word in use in the English language does not make the word so formed an invented word but the question in each case is one of fact."

The word "Aguerine" not being an ordinary English word nor a combination of two ordinary English words must be regarded as a fit subject of a trade-mark. The authorship of the word "Aguerine" has been attributed by the accused to his predecessors Bawa Miskeendas ; but I do not believe that a fakir residing in a small village in Hyderabad District practising medicine, a mere village Hakim, could have thought of this combination of English words and coined a new word like "Aguerine." It is more likely that an up to date concern like that of the complainant conceived the idea of forming such a word. There has been no registration on the part of the accused ; whilst the complainant relies on the registration in Bombay in 1917 and in Calcutta in 1930. I am therefore satisfied on the evidence that the word "Aguerine" has been originally invented by the complainant and must have been subsequently copied by the accused.

Yet another argument of Mr. Tarachand is that the word "Aguerine" is not solely used by the complainant and cannot therefore be his exclusive trade-mark. A reference is made to "Aguirin" in Squire's Pharmacopaea ; but apart from the difference in the spelling of the word it is a white crystalline powder of German manufacture supposed to act as a powerful diuretic. That word therefore is not an infringement of the name of the complainant's mixture. Even if it is it cannot absolve the accused from the consequences of copying it.

The complainant's grievance however is not merely with regard to the plagiarism of the name of the accused, but also with regard to the get-up of the goods. There is no doubt whatsoever that the imitation is so close that an unwary customer is likely to be deceived. Mr. Tarachand who has argued the appeal so ably on behalf of the appellant has wisely refrained from contending that there is no imitation in the size of the bottle as well as in the way it is rigged up for sale. A person who employs a label which in general resembles the label used by another manufacturer is guilty of counterfeiting the trade-mark, even though the registered trade-mark of the one be different from that of the other: *Emperor* v. *Ganpat Sitaram* (8). The expression "trade-mark" as defined in S. 478, I.P.C. includes the whole design on the box and the label pasted on it : *Nilmoney Nag* v. *Durga Pad Banerji* (9). There is no disputing the fact that there is a striking similarity in the design of the complainant's bottle and that of the accused. Under the circumstances it is perfectly clear that the accused has used a false trade-mark within the meaning of S. 482, I. P. C.

The next point urged on behalf of the accused is, that there should have been no conviction under S. 482, I. P. C., inasmuch as it is not clearly established that the accused adopted the trade-mark with intent to defraud. It is put to me that Dipchand & Co. who purchased the bottles from the accused knew very well that there was the verisimilitude and yet thought fit to put the bottles up for sale. But the fraud which the accused practised by selling his mixture through Dipchand & Co. was not on the chemist but on the public at large, the prospective customers.

As no other ingredient constituting the offence of using a false trade-mark is wanting, it must be held proved that the accused has committed the offence punishable under the section mentioned above. Two points however are urged in support of the contention that though the offence may have been committed the conviction cannot be maintained, one is of jurisdiction and the other of limitation.

With regard to jurisdiction, it is argued by Mr. Tarachand that the use of the false trade-mark complained of in this case was not in the act of selling some bottles of the accused's manufacture to Dipchand and Co., in Karachi but in the act of manufacturing the medicine and creating the get-up of the bottles viz., the label, the carton and the spoon and that these acts are not shown to have been committed in Karachi. Now, reading the definition of using a false trade mark as given in S. 480, I. P. C., it is

(8) A. I. R. 1914 Bom. 128=15 Cr. L. J. 522.
(9) [1915] 16 Cr. L. J. 719=30 I. C. 1007.

apparent that not only whosoever marks any goods or package or receptacle containing goods but also whosoever uses any such package or receptacle with any such mark thereon is said to use a false trade-mark if the whole thing is done in a manner reasonably calculated to cause it to be believed that the goods are of a certain manufacture whereas they are not of that manufacture. In the *British American Tobacco Co. Ltd.* v. *Mahboob Buksh* (10) it is observed that in India there is no system of registration nor is there any provision for statutory title to a trade-mark ; so that the rights of a party setting up rival claims to the ownership of a trade-mark must be determined in accordance with the principles of the English Common law. Kerly at pp. 438 and 440 discusses what constitutes infringement. The mere act of advertising bearing a false trade-mark might also amount to infringement. In the present case Kishinchand the advertising agent (Ex. 35), swears to it that the accused actually came to Karachi in September 1930 to push his wares in this part of the country and actually got the advertisements inserted in the two newspapers Al Wahid and Sind Herald. Then again Dipchand (Ex. 41) who has been believed by the Magistrate swears that he was given for sale and he actually sold some bottles of the accused's " Aguerine Mixture " in Karachi. The complainant has also got attached certain bottles of the accused's " Aguerine Mix. ture " from the shop of J. Tirath & Co. in Karachi. The complainant's assertion that the accused is selling his bottles through that firm is uncontroverted. I am therefore satisfied that the accused did use the false trade-mark in Karachi and that therefore the Karachi Court has jurisdiction.

The other plea is that the complaint in the present case is not within time. The appellant relies on S. 15, Merchandise Marks Act (4 of 1889), which reads as follows :

" No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence or one year, after the first discovery thereof by the prosecutor whichever expiration first happens."

It is pleaded that if at all the accused can be said to have committed the offence of using the trade-mark of the complainant he has been doing so for more than three years before the present prosecution and that therefore S. 15 would be a bar to his conviction by a criminal Court. Witnesses have been examined on behalf of the defence to prove the long user. They are Ex. 51, Khajumal, and Ex. 52, Motumal, two zamindars, Ex. 54, Hemandas a medical practitioner, and Ex. 58, Manikram, a schoolmaster. The witnesses did not inspire the trial Court with confidence, and I see no reason to estimate their credibility any higher. It seems the accused Bawa has a large following. People may come forward to help him out of a fix. The evidence of Ex. 51 read between the lines carries its own condemnation. He says that he has been seeing the same kind of carton used for the accused's mixture since the last 20 years. There is however the bust of the accused with beard and moustaches, and it is ridiculous to be asked to believe that the accused who is now 26 years of age looked anything like that 20 years ago. But from the entry (Ex. 45) in the bandi produced by the accused it appears that what he sold was " Aguerine " which is complainant's mixture ; the accused's medicine is known as " Aguerine Mixture." Ex. 54 was a private medical practitioner at Tando Mahomed Khan close to Tando Ghulamali the village of the accused. He states that he used to buy the accused's mixture at one rupee per bottle and used to sell it to his customers for the same price.

It is unlikely he would not think of making any profit unlees he was an intimate friend or devotee of the accused. He does not produce any account books. I refuse to place any reliance on the testimony of such a man. Ex. 58, Manikrai, was a teacher in Tando Ghulamali school in 1911. He says that he had then seen the "Aguerine Mixture" sold by fakir Miskeendas. He however says that the cardboard box of the mixture was like Ex. 12 which is the present carton used by the accused. The photo of the accused on this carton belies this witness. If as the accused and his witnesses make it out that Miskeendas' mixture was so widely sold in the bazar, it is strange that the accused cannot produce any documentary evidence of the manufacture or the sale. Surely if he gave an order to any firm of lithographers for the labels or the cartons or to any tinman for the spoons he

(10) [1911] 38 Cal. 110=7 I. C. 279.

could easily produce the vouchers. Then again, if he sold his mixture on such a large scale he could produce his accounts with chemists and druggists. The only documentary evidence which the accused can muster up and that too at the eleventh hour, is Ex. 45 consisting of a couple of entries from his bandi for 1919. The entries are however in respect of "Aguerine" which is the name of the complainant's medicine and not "Aguerine Mixture" which is the name of the accused's medicine. It may be that the accused and his predecessors were in the habit of purchasing complainant's "Aguerino" from Karachi and selling it in Tando Gulamali to their patients. It is also proved by the complainant that in 1926 the accused had indented on the complainant's factory for some bottles of "Aguerine." Ex. 26 is the invoice. If the accused had his own "Aguerine Mixture" why he should buy "Aguerine" from the complainant passes one's comprehension. I am therefore inclined to agree with the learned Magistrate that it was only in September or October 1930 that the accused conceived the idea of putting on the market some mixture of his under the trade-mark of the complainant.

Even if the accused had succeeded in establishing the fact that the use by him of the trade-mark in respect of which the present complaint has been filed extended over a number of years prior to this prosecution, I do not see how that circumstance could have availed him in successfully pleading limitation. The offence complained of in the present case is the offence of using a false trade-mark in Karachi in September or October 1930. Within three years of that offence and certainly within one year of the first discovery of it by the complainant the present criminal case has been filed. It would therefore be obviously within time. In *Jaggannath* v. *Emperor* (11) there is a decision of our own Court. Pratt, J. C., says:

"But although the trade-mark is false and fraudulent the accused is not to be dealt with criminally unless the prosecution has been filed within the time limited by S. 15, Merchandise Marks Act 4 of 1889. The Magistrate has dealt with the question of limitation within one year of first discovery, but has not considered whether the prosecution has been filed within three years of the first offence. The expression 'first offence' must be construed as the first offence of the series. As pointed out by the Madras High Court in *Ruppeli* v. *Ponnusami Tevan* (12) the recourse to the criminal Courts is only provided as a speedy remedy to traders who are diligent. If the words 'first offence' were applied to the most recent instance of use of a false trade-mark it would be open to the party aggrieved to stand by for years and then take action and this construction would render the provision of law as to limitation entirely nugatory."

I have reproduced these three paragraphs verbatim in order to show with due deference that there was some confusion in the mind of the learned Judge with regard to the expression "first offence" as if it was part of the section itself, and that it may perhaps account for the repercussion in the head-note of the report of the case which reads as follows:

"The expression 'first offence' in S. 15, Merchandise Marks Act, must be construed as the first offence of the series of similar offences regarding the same trade-mark."

Now there is no such expression "first offence" in S. 15, Merchandise Marks Act. Had the legislature intended that the period of three years should determine the limitation for a prosecution as from the very first use of a false trade-mark, we should have expected to find the word "offence" qualified by the word "first" just as in the case of the discovery of the offence by the prosecutor. The Madras case *Ruppeli* v. *Ponnusami Tevan* (12) relied on by the learned Judge in *Jagannath* v. *Emperor* (11) supports the contention that the period of three years is not to run from the very first moment use of a false trade-mark has been made. The facts of the case were that the complainant having in 1893 discovered that goods were being sold marked with what was alleged to be a counterfeit trade-mark called upon the accused to discontinue the use of the counterfeit trade-mark and to render an account of all the sales reserving to himself the right to proceed further; but no action was taken until 1898. It was held that inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade-mark had been discontinued after his first discovery and complaint in 1893, the prosecution in 1898 was time barred under S. 15, Merchandise Marks Act, 1889. From this reasoning it is fair to deduce that had the complainant proved that the use of the alleged counterfeit trade-mark had

(11) [1915] 10 S. L. R. 45=17 Cr. L. J. 367=35 I. C. 671.

(12) [1899] 22 Mad. 488=1 Weir 821.

been discontinued after the first discovery by him in 1893, and that subsequently it had been adopted again within one year of the complaint in 1898 there would have been no bar of limitation. With great respect for the learned Judge of our Court who decided *Jagannath* v. *Emperor* (11), I am unable to agree with him in the view that the word "offence" in S. 15 of the Act means the very first such offence. If such an interpretation of the section be good law a person infringing another's trade-mark may merely do so once clandestinely, sit quiet for three years and then make a public use of it without any fear of a criminal prosecution. In that case the provision in the section about the first discovery of the use by the prosecutor should be meaningless. The purloiner is more afraid of a criminal Court than of a civil Court. In the present case I am convinced that the use in respect of which the complaint has been filed was the very first offence committed by the accused. He has failed to prove user by him prior to that complained of. So that, even if the view of Pratt, J. C., be correct, it does not help the appellant at all. The conviction of the appellant is therefore correct and must be maintained. With regard to the sentence I do not think that the fine imposed is excessive, or out of proportion to the boldness with which the accused started deceiving the Karachi public by palming off a mixture of his own under the well-known trade word "Aguerine." The sentence of six months imprisonment in default of the fine is however illegal. The maximum sentence prescribed by S. 482, I. P. C., is one year. Under S. 65 therefore the term of imprisonment in default cannot exceed three months. Consequently, in the order of the lower Court about imprisonment in default of fine I will substitute three months instead of six months.

With regard to the order of confiscation and destruction of the offending goods, passed by the learned Magistrate under S. 9, Merchandise Marks Act, I would vary it so that the actual stuff, that is, the medicine together with the bottles containing the stuff and the spoons may be returned to the persons from whose possession they were produced in Court provided that the labels and cartons are destroyed first.

K.N./R.K. *Order accordingly.*

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* A. I. R. 1932 Sind 100

FERRERS, J. C. AND RUPCHAND A. J. C.

Khairatiram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 156 and 166 of 1931, Decided on 22nd December 1931.

(a) Criminal P. C. (1898), Ss. 110 and 439 — In case under S. 110 Court of Judicial Commissioner in Sind does not sit as Court of Appeal —It may see record of lower Court when it deems fit in revision.

In cases under S. 110, the Court of the Judicial Commissioner, Sind, does not sit as a Court of Appeal. The responsibility of administering the provisions of that section does not rest upon that Court. Nevertheless when there appears anything unsatisfactory or unusual in the proceedings of the lower Court that Court looks into the record to satisfy itself that an order under S. 110 has been properly passed. [P 101 C 2]

*** (b) Evidence Act (1872), S. 133 — Evidence of accomplice—How corroborated explained—Corroborative evidence must be independent and must connect accused with crime — It is direct or circumstantial — Evidence of accomplice against two prisoners — Corroboration as to one prisoner's crime is no corroboration as regards other.**

The nature of corroborative evidence required to support the evidence of an accomplice is as follows:

Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which forms in some material particular not only the evidence that the crime has been committed but also that he personally committed it. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime. Where there is one witness of bad character (an accomplice) giving evidence against two prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If therefore there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it would be unjust to give it a general effect: *King* v. *Baskerville*, (1916) 2 *K. B.* 658, *Foll.* [P 103 C 2]

Motiram Idanmal and *Santdas Idanmal*—for Applicants.

C. M. Lobo, Public Prosecutor—for the Crown.

Ferrers, J. C.—The facts underlying this application are as follows:

On 15th September 1930 at the City Police Station, Karachi, something exploded. What this thing may have been is uncertain. The defence call it a cracker. The prosecution prefer to describe it as a bomb. To justify the more formidable appellation no evidence has been

led. It is agreed however that in fact there was no harm done; not even a pane of glass broken. The incident became the subject of a police investigation, and on 23rd September 1930, the Inspector came in touch with a man called Ishwarchand who from that time forward was working as a police spy. On 16th October 1930, the Deputy Superintendent of Police searched the shop of Bhojraj Nevandram on the Marriot Road. He took possession of a cyclostyle machine and a bundle of copies of a paper headed Balvo Bulletin. Bhojraj is the father of Jethanand accused 3, but neither Bhojraj nor Jethanand was present at the search. Neither of them lives in the place in which these things were found. On 2nd November 1930, the Inspector Gholam Kader searched the house of accused 2. In it there was found a pocket diary containing certain entries which will be referred to later. The house of accused 3 was again searched the same day but nothing was found. On 2nd November the poster, which is Ex. 17 was found stuck up in several places. This poster is written in misshapen letters by an unpractised hand. It is in the following words :

"As Karachi C. I. D., is roaming hither and thither like blind ones, so in order to give them some right trace we hereby declare that on every Sunday night at 12-30 a. m., we manufacture bombs on the Ocean Bank near Clifton. If police want to arrest the party they should come there preparing themselves to face the red flashes and hot wounds of Bomb and Bullets.

Note.—Public is also informed that the bombs are sold in Gandhi Garden at 4 a. m. on Saturday night at the rate of eight annas each.

By order of Commander of Revolutionary party in Sind."

The poster is signed by a sketch of a sickle and a hammer.

On 7th November, there was a second explosion at the same place as the first and with no more result. On 9th November, Ishwarchand who had been acting since 23rd September as a police spy made a statement in writing. He declared that eight persons whom he named were all members of a revolutionary party in Karachi. All these eight were arrested on 10th November. It was apparently at first intended to prosecute the prisoners under the appropriate sections for some specific offence or offences. A remand was applied for and granted. At the expiration of that remand on 24th November the Inspector of Police prayed the Court to take action against the accused under Ss. 110 and 117, Criminal P. C. His allegations were that they were all working in concert and were so desperate and dangerous that their remaining at large was hazardous to the public. The accused were at that time in custody. On 26th November the Magistrate made an order directing each of the accused to execute a bond for Rs. 20,000, with two respectable sureties owning landed property worth Rs. 20,000 each for maintaining good behaviour, until the conclusion of this case. In Magistrate's Court the case came to a conclusion on 7th March 1931. On that day accused 1, 4 and 7 were discharged under S. 119, Criminal P. C., and an order was made that accused 2, 3, 5, 6 and 8 should enter into a bond for Rs. 10,000 each with two respectable sureties owning landed property in the same amount for their good behaviour for 12 months.

Against this order the persons affected appealed to the Sessions Court. In that Court their appeal was duly heard and on 12th August 1931 the Judge set aside the order of the Magistrate so far as it affected Nos. 5, 6 and 8. The order in respect of Nos. 2 and 3 was upheld.

No. 3, who is Jethanand, has furnished the security which was required of him, No. 2 Khairatiram is in custody. No further appeal was competent but Khairatiram and Jethanand have come to this Court in revision.

In cases under S. 110 this Court does not sit as a Court of Appeal. The responsibility of administering the provisions of that section does not rest upon us. Nevertheless when there appears anything unsatisfactory or unusual in the proceedings of the lower Court a High Court will look into the record to satisfy itself that an order under S. 110 has been properly passed.

Now in the present case it is distinctly stated by the learned Magistrate that the principal evidence against the applicants is that of the approver Ishwarchand. The learned Magistrate might have gone further. It would not be too much to say that the whole case rests entirely upon the testimony of this man Ishwarchand. (After considering what manner of man Ishwarchand was, the learned Judicial Commissioner proceeded as follows) : We

think therefore that even if we accept all the findings of fact which appear to have been accepted by the learned Judge there is still nothing which can be said to form a sufficient corroboration of the allegation made by Ishwarchand. We are perfectly satisfied that without corroboration this man Ishwarchand is altogether unworthy of credit.

For these reasons we discharge the order made by the learned Magistrate. Khairatiram who is in jail will be set at liberty and the security bond given by Jethanand will be discharged.

Rupchand, A. J. C.— Police Inspector, Sind C. I. D., lodged information before the Additional City Magistrate, Karachi, against the appellants Jethanand and Khairatiram and six others under S. 110, Cl. (f), Criminal P. C., alleging that they were members of a revolutionary party formed for the purpose of destroying Government buildings, injuring Government officers and committing robberies, and that this party was responsible for (a) throwing of bombs over the City Police Station on 15th September and 17th November 1930 ; (b) the issue of the Balvo Bulletin containing revolutionary articles and (c) the sticking of posters advertising the sale of bombs. He prayed that pending the inquiry the suspects should be ordered to furnish security under the provisions of S. 117, Cl. (3), Criminal P. C.

On that information the learned Additional City Magistrate passed orders under Ss. 112 and 117 (c), fixing the amount of security at Rs. 20,000, in the case of each suspect and called on them to show cause why they should not be bound down to be of good behaviour for a period of 12 months.

It will be convenient to refer here in their chronological order to certain events connected with this case.

It is said that on 15th September 1930, a bomb was thrown at the City Police Station which however caused no damage to any person or property. About that time a poster is said to have been discovered by the police headed "Sale of bombs in Karachi."

Towards the end of that month, one Ishwarchand, a Punjabi who is said to be one of the revolutionaries, was employed by the police as a spy, and on information supplied by him, the police kept a watch on the movements of these eight suspects and actually shadowed both by day and night the applicant Khairatiram and two others who are not now before us.

On 16th October, the police searched certain premises belonging to the father of Jethanand and secured from there a cyclostyle machine, a number of copies of certain pages of a magazine headed, Balvo Bulletin (i. e., Mutiny of Revolutionary Bulletin). They also secured from the pocket of a coat lying there pieces of paper which contained extracts from Mill's History on British India Vol. 7, p. 358 and their translations.

On 2nd November 1930, the police secured a poster said to be revolutionary in its nature. On the same day they searched the house of Khairatiram and secured from him a diary to which reference will be made later.

On 4th November 1930, another poster, also said to be revolutionary in its nature, was secured by the police from a garden.

On 7th November a second bomb is said to have been thrown near the police station which likewise did no damage.

On 9th November Ishwarchand made a statement, Ex. 2-A, in the case before the police implicating these eight persons as members of a revolutionary party, which he said, had been organized by a Bengali Senji.

It is not necessary to refer to what he said with regard to the suspects who are not now before us.

With regard to Jethanand he said: (a) that he was the person entrusted with enrolling of new members, (b) that he supplied the purse, (c) that he published the Congress Bulletin, (d) that on one occasion he had asked the witness to translate for him a piece of English from Mill's History of British India, Vol. 7. p. 358, but that he had refused to do so, (e) that he had published a revolutionary article (Ex. 5) written by Khairatiram, and (f) that he was responsible for putting up one of the alleged revolutionary posters.

With regard to Khairatiram, he said (a) that his duty was to prepare bombs and teach the method of making bombs to others, (b) that about a month before that date Khairatiram had noted a prescription for making bombs in his diary, (c) that he was responsible for putting up one of the posters and (d) that he had thrown one of the bombs.

On the same day, namely, 9th November all the eight suspects were arrested and charged with criminal conspiracy and throwing bombs in pursuance thereof. After obtaining two remands the police dropped that case, and lodged information which is the subject-matter of the present inquiry.

At the trial the Crown mainly relied on the evidence of the approver. The learned Additional City Magistrate held that in regard to several particulars the evidence of the approver was hardly believable and that such of his evidence as was not found to be false could not be safely relied upon unless it received material corroboration from other evidence. He accordingly discharged the rule against three out of the eight suspects but passed orders against the remaining five including the two applicants. He however reduced the amount of their security from Rs. 20,000 to Rs, 10,000.

On appeal to this Court on its Sessions Court side, the learned Judicial Commissioner (Mr. Milne) also experienced some difficulty in accepting the evidence of the approver with regard to three out of the five suspects who had been ordered to furnish security as the evidence of the approver was, in his opinion, not corroborated by other evidence. He accordingly discharged the rule as against them. With regard to the applicants he remanded the case to the lower Court to enable the Crown to prove and exhibit certain documents which had been secured from the house of Jethanand at the search held on 16th October and after that evidence was certified, he dismissed their appeal. They have now come to us in revision.

Now in this case there is no question whatsoever of accepting the uncorroborated testimonies of Ishwarchand under the provisions of S. 133 of the Act. Apart from the fact that he is an approver and was employed as a spy for over two months his antecedents are far from satisfactory and on the top of it he has been held by the learned Magistrate to be false in some particulars.

The leading English case on the nature of corroborative evidence required to support the evidence of an accomplice is that of the *King* v. *Baskerville* (1). In that case Lord Reading, C. J., has said at p. 667:

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which forms in some material particular not only the evidence that the crime has been committed but also that he personally committed it . . . . The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

And while dealing with the further question whether the evidence of an accomplice against the prisoners corroborated as to one prisoner's participation in the crime but not as to the other, his Lordship has said at p. 669:

> "We think the law is correctly stated by Alderson, B. in *Reg.* v. *Jenkins* (2). The learned Baron said where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If, therefore you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me it would be unjust to give it a general effect."

These principles of law are equally applicable in India. The Crown had therefore to give corroborative evidence on two points:

(1) That there was a revolutionary party in Karachi, and (2) that each of the applicants was a member of such party.

In dealing with the case of Jethanand, the learned Judicial Commissioner (Mr. Milne) has said that the evidence of the approver receives corroboration by the finding of the cyclostyle machine and copies of certain pages of a cyclostyled bulletin headed the Balvo Bulletin, the get-up of these pages being similar to that of Ex. 5 produced by the approver; and has further said at p. 18, line 120 of the paper-book:

> "There is sufficient proof then of the existence of a revolutionary party in Karachi, the throwing of bombs, the publication of revolutionary posters, the issue of revolutionary bulletins. The evidence of the approver shows this. There is also sufficient evidence of accused's connexion with it."

It is worthy of note that notwithstanding the great array of criminal acts which were attributed by the approver to Jethanand, the only piece of corroborative evidence relied upon by the learned Judicial Commissioner is of what was found at the search and nothing more.

Now the copies of the bulletin found at the search held on 16th October 1930,

(1) [1916] 2 K. B. 658=86 L. J. K. B. 28=80 J. P. 446=115 L. T. 453=60 S. J. 696.

(2) [1857] 1 Cox. C. C. 177.

and exhibited after the order of remand, have for reasons best known to the Crown not been officially translated. The learned Judicial Commissioner (Mr. Milne) has not relied upon anything contained in them. All that he appears to have relied upon is the fact that these bulletins are headed "Balvo" which he has translated as "revolution."

We asked the Public Prosecutor to draw our attention to anything contained in the body of the pages exhibited which is said to be of a revolutionary character, but he has discreetly declined to do so. It would therefore not be rash for us to assume that these sheets contain no revolutionary articles. With regard to the name by which the bulletin was styled, it would without further evidence be difficult to presume from its name that the paper was a revolutionary paper and more so, to presume that it was a paper owned and published by a revolutionary party whose object was the throwing of bombs, the publication of revolutionary posters and the committing of dacoities. (The judgment after pointing out the lack of corroborative evidence as against Jethanand proceeded). The case against the accused Khairatiram is still weaker. The only corroboration relied upon is, that the diary found at the search of his house contained the following note on one of its pages:

"Potash chloras,"

"Potash nitras."

These words by themselves denote nothing. All that is alleged is that no doubt these ingredients are used for several purposes but along with several other ingredients they are also used for the purpose of making bombs. In dealing with this point the learned Judicial Commissioner (Mr. Milne) has said that although the entry may have been perfectly harmless, it was an unusual entry and that the failure of the accused to explain it was sufficient corroboration of the approver's story. With all respect, I cannot accede to that view. There is nothing on the record to show that the attention of Khairatiram was invited to this alleged piece of corroborative evidence, or that although he was afforded an opportunity of explaining it, he had failed to do so. There is nothing in his examination under S. 342, Criminal P.C. to suggest that his attention was drawn to it nor is there anything in the information lodged by the Inspector which has been referred to above or in the order passed under S. 112, Criminal P. C., to invite his attention to it. The order under S. 112, Criminal P. C., is as vague as it could possibly be. It reads as follows:

"Whereas it appears to this Court that you the abovesaid accused are working in concert, and are so desperate and dangerous that your remaining at large without security is hazardous to the public: You the abovesaid accused are hereby required to show cause and."

This piece of circumstantial evidence was compatible with the innocence of Khairatiram and was on the very face of it capable of an easy explanation. Had his attention been drawn to it, an explanation would have been forthcoming. The effect of this alleged corroborative piece of evidence is, in my opinion, therefore nil.

Apart from that, it would appear that, as in the case of Jethanand, the diary of Khairatiram was secured prior to the date on which Ex. 2-A was recorded and that it is therefore more likely than not that the statement made by the approver was based upon what had been found by the police.

Under the circumstances, it is with all respect, difficult for me to hold that the evidence of the circumstances relied upon by the learned Judicial Commissioner (Mr. Milne) was corroborated proof of the accused being members of a revolutionary party.

For these reasons, I concur in the order passed by the learned Judicial Commissioner.

B.V./R.K. *Order accordingly.*

A. I. R. 1932 Sind 104

MEHTA, A. J. C.

Daily Gazette Press Ltd.—Plaintiffs.

v.

Karachi Municipality—Defendants.

Civil Suit No. 157 of 1930, Decided on 25th September 1931.

Bombay District Municipal Act (1901), S. 167—Suit for injunction against Municipality—One month's notice is essential.

The giving of a month's notice under S. 167 of the Act is essential before instituting a suit against a Municipality for an injunction restraining it from doing a certain thing. The suit must be dismissed in the absence of such notice: *A. I. R.* 1927 *P. C.* 176, *Rel. on.* [P 105 C 2]

Choithram Dewanmal—for Plaintiffs.

Kundanmal Dayaram — for Defendants.

Judgment.—The facts relevant for the purposes of the present order are very short and simple. Four resolutions having been sent in by certain councillors of the defendant Municipality, the Chief Officer issued a notice convening a special general meeting of the Municipality to take place on Monday, 26th May 1930, at 6 p. m., for the consideration of those resolutions. Thereupon the plaintiff, who is a ratepayer of the Municipality, instituted the present suit in which two reliefs are claimed, namely, (a) a declaration that the proposed resolutions are political in their nature and any dealing with or discussion on or passing them constituted a breach of trust and would be outside the scope of the powers conferred on the defendant by the District Municipal Act 3 of 1901; and (b) for a perpetual injunction restraining the defendant from bringing up for discussion and / or discussing or in any way dealing with and considering the said resolutions. An interim injunction was prayed for which was negatived by Haveliwala, A. J. C. In appeal the order refusing interim relief was upheld by Wild, J. C., and Rupchand, A. J. C.

Today the arguments of the learned pleaders have been heard on the preliminary issue whether the present suit is not maintainable for want of a notice under S. 167, Bombay District Municipal Act 3 of 1901.

In the course of his judgment in the appeal mentioned above, Rupchand, A. J. C., has dealt exhaustively with the question as to whether a suit for injunction, like the one filed by the plaintiff, can be entertained without a notice. Although he has come to the conclusion that want of notice is a fatal defect, and although Haveliwala, A. J. C., has also expressed an opinion in his order rejecting the application for interim injunction that the present suit is not competent to proceed in the absence of one month's notice as required by S. 167 of the Act, it appears that there has been no final pronouncement on this issue and hence I have heard the arguments once again.

At one time there was a conflict of decisions on the question whether prior to the institution of a suit for injunction, that is, for the prevention of an act or omission, a notice, if required by law, is absolutely necessary. The decision of the Privy Council in *Bhagchand Dagadusa* v. *Secy. of State* (1) has however set the controversy at rest. In that case it was held by their Lordships that a suit the notice whereof to the defendant is a statutory obligation to be fulfilled before institution cannot be proceeded with if no such notice has preceded it, and that even a suit for injunction is not an exception to the rule requiring the formality of notice being gone through, whatever the hardship to the plaintiff a strict insistence of this rule may entail, Judges have to interpret the law as it is and not as it ought to be.

Mr. Choithram endeavours to establish a distinction between the Privy Council case and the present one on the ground that in that suit the question considered was whether a notice under S. 80, Civil P. C., was or was not necessary, whereas in the present case we are concerned with S. 167, District Municipal Act, which makes it obligatory for a plaintiff to commence a suit against a Municipality only if the suit is in respect of "anything done or purporting to have been done by the Municipality." It is argued from the difference between the wording of S. 80, Civil P. C., and of S. 167, Municipal Act, that a prior notice is not an absolute sine qua non of a suit against a Municipality in respect of any act which the Municipality is likely to do in the future.

Now, in the present case the cause of action according to para. 4 of the plaint is the notice issued by the Chief Officer in the ordinary course of his duties convening a special general meeting for the consideration of the resolutions objected to by the plaintiff. Consequently, this is a suit in respect of an act done or purporting to have been done under the Municipal Act, albeit there is a prayer for a declaration that the resolution sent in cannot be discussed or dealt with by the Municipality without committing a breach of trust. Thus then, even if it be assumed for a moment that for a suit filed against a Municipality in respect of any act to be done in the future no notice is necessary, still, in the present case, a notice was necessary. The suit is clearly one for a declaration in respect of the resolutions which had already

(1) A. I. R. 1927 P. C. 176=104 I. C. 257=54 I. A. 338=51 Bom. 725 (P. C.).

been submitted for discussion in a special meeting.

Mr. Choithram further contends that if the prayer for the declaration cannot be granted, the Court might at least grant the second prayer which is for injunction and which relates to an act which the Municipality was threatening to do after the suit. It is however admitted that the meeting that was convened specially for the purpose of transacting the business objected to by the plaintiffs has already taken place and the resolutions have already been discussed and dealt with by the defendant Municipality. Under the circumstances, the prayer for injunction is meaningless.

I must therefore dismiss this suit with costs, and I order accordingly.

B.V./R.K. *Suit dismissed.*

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* A. I. R. 1932 Sind 106

MILNE, J. C.

Karachi Bank Ltd.—Applicants.

v.

J. R. Castellino—Opposite Party.

Misc. Appln. No. 93 of 1930, Decided on 6th October 1931.

*** Companies Act (1913), Ss. 231 and 185 —Application for refund of money paid to creditor by way of fraudulent preference does not lie.**

There is no provision in the Act for a summary method of recovering money paid to a creditor by way of a fraudulent preference. Consequently an application for refund of such money does not lie under the Companies Act : 46 *P. R.* 1915 ; *In re United English & Scottish Co., Ex parte Hawkins*, (1868) 3 *Ch. A.* 787 ; *Jackson & Barsford Ltd. In re*, (1906) 2 *Ch.* 467; *Russell Hunting Record Co. Ltd. In re*, (1910) 2 *Ch.* 78 ; *Washington Diamond Mining Co. In re*, (1893) 3 *Ch.* 95 and *W. Blackburn & Co. In re*, (1899) 2 *Ch.* 725, *Ref.* [P 107 C 1]

Fatehchand Asudomal—for Applicants.

K. N. Kotwal—for Opposite Party.

Judgment.—This is an application on behalf of the Karachi Bank Ltd. (in liquidation) by its Official Liquidators Mr. Dharamdas Thawardas, Official Assignee and Mr. Fatehchand Assudomal, Pleader, against one Castellino of Messrs. Cutler Palmer, Bombay. It is alleged by the applicants that on a petition dated 14th March 1929 this Court ordered the winding up of the Karachi Bank Ltd.; that on 5th March 1929 the directors of the bank resolved to suspend payment and to wind up the company by voluntary liquidation; that on 5th March a telegram was sent to the Bombay branch of the Karachi Bank to suspend payment and a second telegram was sent to the same effect on the morning of 6th March 1929. Both these telegrams were received by the Bombay branch before the opening hour on 6th March 1929. The opponent was a creditor of the bank for a sum of Rs. 290 odd in a Savings Bank account at Bombay. On 6th March 1929 the opponent in collusion with the Bombay staff received a sum of Rs. 285 from the bank. The applicants allege that this payment was within three months of the commencement of the winding up of the bank and was made when the company was unable to pay its debts as they became due from its own money and was made with a view to giving a preference to the opponent over the other creditors. The Official Liquidators therefore prayed that the said payment be set aside and the opponent be ordered to pay back the said amount of Rs. 285 with interest at 6 per cent from 6th March 1929 to date of payment.

The application was made under S. 234, Companies Act read with S. 56, Presidency Towns Insolvency Act. An initial objection has been taken that the application does not lie. The section under which the application should really have been brought was S. 231, that is what the applicants intended. The opponent urges that S. 231 defines what is a fraudulent preference ; it does not provide any summary method of recovering money paid by way of fraudulent preference. Applicants rely on *Tarachand* v. *Official Liquidators of the Peoples Bank of India Ltd., Lahore* (1) in which it was held that the Official Liquidator is not entitled by summary order to a refund of money realized by a creditor of the bank before the order of winding up was passed but after the bank had passed a resolution stopping payment of debts. The liquidator should file a regular suit to recover the amounts realized by such creditor. That was a ruling under the Act of 1882. It was held that Ss. 149 and 152 of the Act (corresponding to Ss. 100 and 103 of the English Act of 1862) referred only to the persons therein specifically mentioned. S. 149 corresponds to S. 185, Companies Act, 1913, on which the applicants rely. Reliance is also placed on *In re United English and Scottish Co., Ex parte Haw-*

(1) [1915] 46 P. R. 1915=29 I. C. 265.

kins (2) which is quoted in *Tarachand* v. *Official Liquidators of the Peoples Bank of India Ltd., Lahore* (1). In that case a creditor of a joint stock company obtained a garnishee order attaching the money of the company in the hands of their bankers; subsequently a petition for the winding up of the company was presented, and after the presentation of the petition but before the winding up order the creditor obtained an order under the Common Law Procedure Act for payment of the money from the bankers. The Official Liquidator having taken out a summons under S. 100 of the English Act of 1862, the Court ordered the creditor to refund the money. It was held on appeal that the creditor was not a trustee within the meaning of S. 100, and the Court had no jurisdiction to make the order ; that S. 100 of the Act of 1862 referred to the contributories and officers of the company and could not be extended to other persons.

The applicants rely on certain English rulings, viz., *Jackson & Barsford Ltd., In re* (3), *Russell Hunting Record Co. Ltd., In re* (4), *Washington Diamond Mining Co., In re* (5) and *W. Blackburn & Co., In re* (6), as showing that the procedure under the English Act is by summons. But it is clear that there is no provision in the Companies Act for a summary method of recovering money paid by way of a fraudulent preference. S. 231 merely defines what is a fraudulent preference : S. 185 has no application ; it refers to contributories, trustees, receivers, bankers, agents or officers of the company and provides a summary remedy in respect of such persons, but no summary remedy is provided in respect of a creditor to whom payment has been made by way of fraudulent preference. I would therefore hold that the present application does not lie. Application dismissed. No order as to costs.

P.N./R.K. *Application dismissed.*

(2) [1868] 3 Ch. A. 787=19 L. T. 232=16 W. R. 1136.
(3) [1906] 2 Ch. 467.
(4) [1910] 2 Ch. 78.
(5) [1893] 3 Ch. 95.
(6) [1899] 2 Ch. 725.

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* A. I. R. 1932 Sind 107

FERRERS, J. C.

Jethmal Parsram—Applicant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 29 of 1932, Decided on 3rd May 1932.

(a) Emergency Powers Ordinance (2 of 1932), S. 4—Powers given by S. 4 are very wide.

The powers given by S. 4 are very wide. They authorize an order containing directions that the person addressed shall conduct himself in such manner, abstain from such acts, or take such order with any property in his possession or under his control, as may be specified, in the order. [P 109 C 1]

(b) Criminal Trial — Sentence — Offence punishable under two statutes — Sentence cannot be more severe than what Court can give for any of such offences.

An act may be an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined and punished. In such an event the law is that the offender shall not be punished with a more severe punishment than the Court which tries him could award for any of such offences. [P 109 C 1]

***(c) Interpretation of Statutes—Ordinances —Work of interpreting ordinances belongs to Courts of law and not to executive Government of a province.**

To interpret the words of an ordinance is a function reserved for the Courts which are established for that purpose; any exposition which may be proposed by the Executive Government of a Province has the weight which must always belong to the considered opinion of enlightened experience, but it cannot be quoted or received as an authority by a Court of law. [P 110 C 2]

(d) Emergency Powers Ordinance (2 of 1932), S. 63—Newspaper article describing ordinances passed by Government as "hellish" "ghoulish", etc. — Such words stir up hatred against Government and fall within scope of S. 63.

The words "ghoulish", "tortures" and "hellish" when applied in a newspaper article to ordinances passed by the Government fall within the mischief which S. 63 is intended to repress. They stir up hatred against the Government established by law. [P 110 C 1,2]

(e) Criminal Trial—Sentence.

In the present case the previous conviction of 13 years ago was not taken into account while considering the quantum of punishment for a subsequent offence. [P 111 C 1]

Santdas Mangharam—for Applicant.

C. M. Lobo —for the Crown.

Judgment.—On 4th January 1932 the Governor-General was pleased to make and promulgate the Emergency Powers Ordinance 2 of 1932.

Section 63 of that Ordinance applies the provisions of the Indian Press (Emergency Powers) Act 1931, to the printing and publication of objectionable matter

of any of the kinds described in that section.

At that time Jethmal Parsram, the appellant, was the printer and publisher of a daily newspaper called the "Sind Herald." In that paper, on the 19th January, he published an article headed "George Lansbury's Hopes." In this article he said among other things:

"* * *We belong to that school of politics whose fundamental belief has been that the union between India and Britain is essential for a world commonwealth."

He said however in the same article that:

"* * *the British Government has violated the very basis of political morality,"

and he made other remarks of such a character that the article appears to have been brought to the notice of the District Magistrate. That officer did not think that the article furnished grounds for action. He did however think it necessary to issue to the Editor a warning which is in these words:

"The general tone of the articles published on the 15th January, 16th January and 19th January is most objectionable. They undoubtedly offend against the Indian Press (Emergency Powers) Act as amended by S. 63, Emergency Powers Ordinance 2 of 1932."

The attention of the Editor/Printer/Publisher of the Sind Herald was invited to the Government of Bombay Circular No. 60, Political Department, dated 11th January 1932, and he was warned that if further objectionable matter was published in his newspaper, the District Magistrate would take action without further warning. The date of this communication was 23rd January 1932. In answer to it the appellant published in his newspaper an open letter addressed to the District Magistrate, in which he said:

"I feel sure that nothing in my articles is in violation of the instructions contained in the Government Circular. * * * My only crime seems to be that I have believed the concluding portion of that circular which permits legitimate criticizm."

He says:

"You are well aware that I have belonged to a school of politics which has not advocated general disobedience of laws, and for holding such views I have undergone a suffering before which imprisonment in your jail is a trifle. But when I find that Government are goading people to break laws by issuing impossible orders, leaving no option to any honest man but to disobey, I must hold Government responsible for undermining the authority of law. I want to know if you can quote the opinion of one honest man in the country however Liberal or Moderate he may be, who would advise . . . . any self-respecting Indian to comply with the order to salam the police daily? * * * You know that I am one of those fast diminishing number of men with whom the union of British and India for the world is almost a religious conviction. * * * I have counted the cost of my frankness and it does not frighten me. I cannot agree to remain quiet when I witness around me the growing reign of injustice."

The article containing these words was published on 27th January 1932. On the 1st February the District Magistrate issued an order under S. 4 (1), Indian Press (Emergency Powers) Act, as extended by S. 63, Emergency Powers Ordinance 2 of 1932, which was in these words:

"Whereas I am satisfied that there are reasonable grounds for believing that Jethmal Parsram, Editor of the "Sind Herald" has acted, is acting, and, or is about to act, in furtherance of a movement prejudicial to the public safety or peace, now therefore I, J. R. Hood, District Magistrate of Karachi, in virtue of the powers delegated to me under S. 4, Emergency Powers Ordinance 2 of 1932, do hereby direct the said Jethmal Parsram, Editor of the Sind Herald, to abstain from publishing any matter in furtherance of the Civil Disobedience movement or of any other movement prejudicial to the public safety or peace or any matter falling within the mischief of S. 4 (1), Indian Press Emergency Powers Act as extended by S. 63, Emergency Powers Ordinance 2 of 1932 and to refrain from all other unlawful activities."

This order was answered by the appellant in the Sind Herald of 7th February 1932 in a second open letter to the District Magistrate of Karachi. He said among other things:

"I challenge you as District Magistrate of Karachi to contradict me when I say I have not before or after your warning written one single word inciting people towards any overt act, prejudicial to public safety or peace. I am and have been a man of peace, wishing well to my country and the entire humanity besides. And for this, if I am to be punished, I can only say that I will await the execution of your future orders with due submission."

After this the Editor continued to conduct his periodical in conformity with his declared policy until 24th February. On that day he published two articles headed respectively "Doomsday Budgets" and "Gujarat Mail". These articles were made the subject of an information lodged by an Inspector of Police with the City Magistrate of Karachi. This information says:

"In the Sind Herald of 24th February 1932 the accused edited and printed and published two articles, namely:"

"Doomsday Budgets" and "Gujarat Mail": thereby violating the order of the District Magistrate, Karachi, as these articles fall within S. 4 (1), Press (Emergency Powers) Act read

with S. 63 (D), Emergency Powers Ordinance 2, f 1932."

A Magistrate of the First Class, sitting as a summary Court under S. 43, Emergency Powers Ordinance 2 of 1932, disposed of this information on 14th March 1932. He found the accused guilty and under S. 21 of the Ordinance he sentenced him to rigorous imprisonment for 18 months and a fine of Rs. 1,000 or in default to further rigorous imprisonment for six months. Against this conviction and these sentences this appeal has been made. The appellant began by taking two points of law. They can be briefly disposed of, for both of them are futile. The first is that:

"the order of the District Magistrate was beyond the scope of the ordinance itself."

This can scarcely be. The powers given by S. 4 of the ordinance are very wide. They authorize an order containing directions that the person addressed shall conduct himself in such manner, abstain from such acts, or take such order with any property in his possession or under his control, as may be specified, in the order. It cannot be successfully contended that the order made by the District Magistrate, which has already been quoted, exceeds the very wide limits laid down by this section. The second point of law is that:

"Section 63 of the ordinance merely amplifies S. 4, Act 23 of 1931, and any breach of any clause of S. 63 is not at all punishable under Ordinance No. 2 of 1932 under Act 23 of 1931."

The learned pleader argued that if an act is an offence punishable under the Press (Emergency Powers) Act, then it cannot also be punishable as a breach of the order made by the District Magistrate. This argument is unsustainable. An act may be an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined and punished. In such an event the law is that the offender shall not be punished with a more severe punishment than the Court which tries him could award for any of such offences. In the present case one of such offences is the breach of the order made by the District Magistrate under S. 4 of the ordinance. The sentence which the learned Magistrate has imposed is not more severe than S. 21 authorizes him to impose for disobedience of any such order. I think therefore that both the points of law must be disallowed. I come next to the point of fact. The information laid against the appellant refers to two articles only. Both of them are short and I shall therefore set them both out at full length. The first is headed "Doomsday Budgets". It is in these words:

"The Provincial Budgets indicate a state of affairs, which belies completely the optimism of Sir Hoare, that soon the Indian situation will be eased. The tremendous deficits of the Provincial Budgets disclose the ugly fact as nothing else could, that the ruin has already come. There are three crores and seventy lakhs of deficit which the Bengal Government alone has had to face; out of these about a crore is due to incurring the excessive police and jail expenses. Repression and riding rough over the rights of people, bring about agitation, revolt and rebellion, to face which enormous sums of money are required, which can only be had, by excessive taxation that again leads to more and more disaffection; thus the vicious circle moves on.

Even in free countries it is not possible for any Government to feel secure, in these days of financial chaos; how much more is that true of a foreign Government? Where is Sir Samuel's rule by ordinances leading to? It is said the British Masters of India thought that a three months experiment would suffice to crush out the aggressive national movements; the third month is now fast approaching its end, and any superficial observer can see that Government has achieved nothing, except the locking up oi the Congress leaders and workers, an action that has resulted only in weaning away from them the entire sympathies of the people. Sir Samuel Hoare must cry "halt," otherwise after financially ruining the provinces and then India he will find that the "law of boomerang" will have undone the Empire which is the pride of the die-hards."

In this article the Editor enunciates a series of general propositions. Of these the greater part I take to be true, but it is of no consequence whether they be true or whether they be false. They are at least opinions which every free man is entitled to entertain, profess and defend. A place in which a man may be imprisoned for the use of the words which I have quoted would no longer deserve to be called a free country; and a law, which would justify such imprisonment, is a law which, I for one, would not administer. I have however no doubt that the ordinance has not, and was not, ever intended to have any such effect; and if there was nothing more before me than the words I have quoted then I should reverse the conviction without hesitation and without delay. There is however something more.

The next article is in these terms:

"Gujarat Mail."

(Free Lance).

"What are poor journalists to do? Indeed they are literally between the devil and the deep sea. As if the ghoulish ordinances were not sufficiently harassing for them, that it was necessary for the "Gujarat Mail" to suck whatever little of their blood was left."

"The starters of that Gujarat Mail propose to shoot the Editors who do not dip their pen in more and more poison in order that the existence of the enemies of the Gujarat Mail be embittered, if not ruined; that shows conclusively that these goblins of the underworld are not satisfied with that miserable specimen of humanity called the Editor."

"In spite of this the poor dears, have to suffer all the tortures of the hellish ordinances whose axe hangs on their heads. Truly between the devil and the deep sea."

"Is it any use asking who is the devil and who is the sea; which is better and which is worse?"

In this article the words which I think cannot be defended are "ghoulish," 'tortures' and 'hellish.' A ghoul is a fabulous monster which lurks in graveyards to dig up and devour the bodies of the dead. Used of these ordinances, the word "ghoulish" is mere nonsense. It has no application either literally or by metaphor. The word in this context is meaningless; but it is malignant. It is susceptible of one interpretation and one only. It was set down to stir up hatred. The same thing may be said of the words "tortures" and "hellish."

The case for the appellant was argued with gravity and in good sense. The learned pleader made no attempt to justify the use of these words. He wisely elected to put his case on another and firmer ground. He stated that in Gujarat posters had been published announcing that certain anonymous assassins intended to shoot those editors who do not dip their pens in more and more poison. This threat it was which impelled the appellant to say, that between the goblins of the underworld on the one hand and all the tortures of the hellish ordinances on the other that miserable specimen of humanity called the "Editor" is between the devil and the deep sea. The learned pleader said in effect:

The objectionable words are the angry ejaculations of a man driven to distraction; he was goaded by both sides; he has kicked against the pricks; and he has hurt his own heels. The circular says that Government:

"have no desire to interfere with honest journalism and have no wish to penalise occasional and unintentional inclusion of undesirable matter in a paper which is ordinarily well conducted."

It is on these words that the learned pleader proposed to rely.

The answer to this is that the appellant has relied on words which have no authority. To interpret the words of an ordinance is a function reserved for the Courts which are established for that purpose; any exposition which may be proposed by the Executive Government of a Province has the weight which must always belong to the considered opinion of enlightened experience but it cannot be quoted or received as an authority by a Court of law. As a general proposition I take this to be true; but in the particular instance I have no doubt that the circular correctly sets forth the intentions of the lawgiver who promulgated this ordinance. I suppose that it is undoubtedly safe to say that the lawgiver did not desire to interfere with honest journalism or to penalize occasional and unintentional lapses into undesirable language. Accordingly I think that an angry word unadvisedly used in the heat of controversy might be overlooked. But in this case the word "unadvisedly" has no place. The Editor had very recently received a solemn and serious warning. He was aware that he was (in his own language) "sitting on a volcano which may burst any moment without any intimation."

He has more than once congratulated the officers of Government upon the coolness of their heads. It is much to be regretted that when he passed for press the article headed "the Gujrat Mail" he was not himself more sedulous to emulate that virtue for which he commends the District Magistrate. Written in these circumstances, and after these warnings, the words to which I have referred "ghoulish," "tortures" and "hellish" appear to me to fall within the mischief which S. 63 was intended to repress. The mischief is defined in these words:

"to bring into hatred or contempt . . . . . the Government established by law . . . . . or to excite disaffection towards . . . . . the said Government."

My conclusions therefore are that the order passed by the District Magistrate was within the powers conferred upon him by S. 4 (1) of the ordinane. I find

also that the order was infringed by the appellant.

I must therefore uphold the conviction; but the question of sentence raises other considerations.

The order directed the appellant

"(1) to abstain from publishing any matter in furtherance of the civil disobedience movement; or (2) of any other movement prejudicial to public safety or (3) any matter falling within the mischief of S. 4 (1), Indian Press (Emergency Powers) Act . . . . . and to refrain from all other unlawful activities."

Now the appellant openly challenged the District Magistrate to contradict him when he said that he had never written one single word inciting people towards any overt act prejudicial to public safety or peace. He denies also that he had ever published any matter whatever in furtherence of the civil disobedience movement. This challenge has not been taken up. The information on which the conviction and sentence followed, did not allege that the appellant had committed any other unlawful act except the publication of the two articles hereinbefore discussed. Before passing the sentence the learned Magistrate observed:

"In June 1919, this man was convicted under Ss. 124-A and 153, I. P. C. and sentenced to undergo rigorous imprisonment for two years."

This observation has been severely criticized and those criticizms have not been satisfactorily answered. It does not appear that the accused was ever asked whether he admits these convictions or whether he had anything to say about them. I am now told that though he admits the fact of the conviction, he is also in a position to show that he subsequently received a free pardon. It appears to me that the previous conviction of 13 years ago ought not to be taken into consideration in assessing the quantum of punishment for the present offence. I think also that if the present offence had not been aggravated by the previous conviction the sentence would not have been by any means so severe as it is.

For the reasons that I have given I feel myself bound to uphold and confirm the conviction; but I remit the fine and reduce the imprisonment to the period already undergone. The result will be that the prisoner will be forthwith set at liberty.

B.V./R.K. *Sentence reduced.*

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* A. I. R. 1932 Sind 111

FERRERS, J. C. AND RUPCHAND, A. J. C.

William Jacks & Co.—Applicants.

v.

Harrowing Steamship Co. Ltd. and *others*—Opponents.

Revn. Applns. Nos. 106, 107 and 109 of 1928, Decided on 31st March 1932.

*** (a) Arbitration Act (1899), S. 19—Bill of lading containing clause for arbitration—Arbitrators and umpire required to be residents of London and arbitration required to take place in London—Either party permitted to make submission rule of High Court of Justice in England—S. 19 applied to the submission clause and stay of suit could be ordered—Submission clause was not illegal under S. 28, Contract Act—There was nothing unfair to plaintiff if stay was ordered—Contract Act (1872), S. 28.**

Submission clause contained in a bill of lading required that all arbitrators and umpires should be resident in London and that the arbitration should take place there. It further provided that the submission may be made a rule of the High Court of Justice in England by either party:

Held: that S. 19 was applicable to this submission clause so as to order stay of suit. The submission clause was not rendered illegal by S. 28, Contract Act, and there was nothing so unfair to the plaintiff if the stay was ordered that the Court should use its discretion not to grant stay: *Scott* v. *Avary*, (1856) 5 *H. L.* 811; *Law* v. *Garret*, (1878) 8 *Ch. D.* 26; *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society Ltd.*, (1903) 1 *K. B.* 249; *Kirchner & Co.* v. *Gruban*, (1909) 1 *Ch.* 413 and *A. I. R.* 1924 *Bom.* 381, *Foll.*; *A. I. R.* 1921 *Sind* 202, *Dist.* [P 112 C 2]

*** (b) Arbitration Act (1899), S. 19—Where all defendants are bound by submission, all need not apply for stay of suit.**

Where all the defendants are bound by the submission clause, it is not at all necessary for all of them to apply for stay; or to show their willingness to submit disputes to arbitration. It is sufficient if one of them does so, and wishes to take advantage of the submission clause: *Willeford* v. *Watson*, (1878) 8 *Ch.* 473, *Foll.* [P 114 C 1]

Dipchand Chandumal and *D. N. O'Sullivan*—for Applicant.

Tolasing K. Advani and *Choitram Devanmal*—for Opponents.

Rupchand, A. J. C.—These are applications in revision against orders passed under S. 19, Indian Arbitration Act, staying the suits filed in this Court and the Court of Small Causes, Karachi. These suits are for recovery of the value of sugar shipped at Danzig and short delivered here. The sugar was carried under bills of lading issued by the Master of the S. S, "Ethelwolf" which is owned by defendants 2. These bills have imprinted on them the words "Messrs. Louis Dreyfus

& Co., Sugar Bill of Lading" and Messrs. Louis Dreyfus & Co., are defendants 1. The plaintiffs are the holders of the bills of lading. They have based their claim as against defendants 1 on two grounds: first, that they are the charterers of the steamer, and secondly, that they have signed an indemnity bond in favour of the customs authorities at Karachi as required by S. 64, Sea Customs Act, agreeing to

"be personally answerable for the discharge of all claims established by the owners of the goods comprised in the import cargo in respect of such goods."

The bills of lading inter alia contain the following clause:

"6. Any dispute arising out of this contract to be settled by arbitration, each party appointing an arbitrator, and should they be unable to agree, the decision of an umpire selected by them to be final. The arbitrators and umpire are all to be commercial men and resident in London, and the arbitration to take place there. This submission may be made a rule of the High Court of Justice in England by either party."

On the strength of this clause defendants 2 applied to the Court for stay of the suits, and their applications have been allowed.

The main ground on which the order complained against has been attacked is that the Court had no jurisdiction to pass the order under S. 19 of the Act. It is suggested that a submission which contemplates: (a) the appointment of arbitrators residing in London; (b) the holding of arbitration there, and (c) the submission to arbitration being made rule of the High Court in England, was not a submission to which S. 19 applied and stress has been laid on the expression "a submission to which the Act applied" appearing in that section. But there is no substance in this argument. S. 2 of the Act defines the cases to which the Act applies. It reads:

"2. Subject to the provisions of S. 23, this Act shall apply only in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit could whether with leave or otherwise, be instituted in a Presidency Town; provided that the Local Government may, by notification in the Local Official Gazette, declare this Act applicable in any other local area as if it were a Presidency Town."

The right of the plaintiffs to bring these suits here is not disputed. Were it otherwise the suits of the plaintiffs would be liable to be dismissed in limine and there will be no occasion for applying for their stay. Although Karachi is not a Presidency Town, the Act has been duly extended to it. Again a "submission" is defined in S. 4, Cl. (2) of the Act to mean

"a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."

The bills of lading are written agreements and contain a clause which provides for submission of disputes arising thereunder to arbitration.

There is nothing in Ss. 2, 4 and 19 or in any other part of the Act to suggest that a written agreement which provides for submission of disputes to arbitration is not "a submission to which the Act applies" unless the submission contemplates the appointment of arbitratore residing within the jurisdiction of the Court in which the suit is filed or unless it contemplates that the submission should be made rule of such Court and of no other Court.

It was finally suggested that S. 28, Contract Act rendered an agreement of this kind invalid in law. But again that section is of no help to the plaintiff. The proviso to the section expressly excludes an agreement to submit disputes to arbitration from the category of an agreement by which

"a party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedlngs in the ordinary tribunals.".

Again a provision in the contract which enables either party to make the submission a rule of the High Court in England cannot by any stretch of imagination be interpreted to restrict absolutely the right of the plaintiffs to enforce the contract by the usual legal proceedings in the ordinary tribunals. In the first place it does not prevent either party from filing a suit in a Court of ordinary jurisdiction, and in the next place it is only an enabling provision and does not even restrict the right of either party to make the submission a rule of any other Court of competent jurisdiction where a suit based on the same cause of action is entertainable. Whether such Court will stay its hands when approached under S. 19, Indian Arbitration Act, or under any other provision of law in force is quite another matter. In the leading case of *Scott* v. *Avary* (1), it was held that an agreement which makes the obtaining of an award as a condition prece-

(1) [1856] 5 H. L. C. 811=25 L J. Ex. 303=2 Jur. (n.s.) 815=4 W. R. 746.

dent to the entertainment or a suit did not oust the jurisdicton of the Court and was therefore not illegal; and much less can the submission clause in the present case be illegal.

The provisions of the Indian Arbitration Act are based upon those contained in the English Arbitration Act, 1889; and the Courts in England have stayed suits under the provisions of that Act not only in cases where the contract sued upon provides for a submission to private arbitration of persons residing in foreign countries but also in cases where the contract sued upon contemplates the settlement of disputes by a foreign tribunal: Halsbury Vol. 1, para. 42: *Law* v. *Garret* (2); *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society Ltd.* (3); *Kirchner & Co.* v. *Gruban* (4) and *the Cap Blanco* (5).

In *Kureshi & Sons* v. *Soomar Haji* (6), a case decided by Crouch, A. J. C., on the original side of this Court, the bill of lading provided that:

" claim for short delivery of or damage done to goods and all other disputes shall be settled by the British Consul at the Port of destination."

The country craft carrying the cargo from Karachi to Bushire did not proceed to Bushire but returned from Mid Ocean. The Court held that the provision referred to above amounted to a submission to arbitration, but refused the stay of the suit on the merits. In that case however no application for stay of the suit under S. 19, Indian Arbitration Act, had been made, and the question came up for decision on a plea having been raised in the written statement that in view of this provision in the bill of lading the Court had no jurisdiction to entertain the suit and it was only that plea which was negatived. But the principle of the English cases referred to above was applied in the case of *Haji Abdulla* v. *G. R. Stamp* (7), where an application was made under S. 19, Indian Arbitration Act. In that case the policy of insurrance provided for reference of all disputes to England and further provided that no legal proceedings shall be taken to enforce any claim except in England, where the underwriters were domiciled and carried on business; and stay of the suit was granted treating the provision referred to above as a submission clause.

In this connexion it was further argued that the plaintiffs were not parties to the bills of lading they being holders thereof. But the claim "under" the persons in whose favour the bills of lading were issued, within the meaning of S. 19; and it is hardly open to them to blow hot and cold by basing their claim on the contract contained in the bills of lading and at the same time denying their liability to be bound by its terms.

The next ground urged by the learned pleader was that there were fit cases in which the Court should have exercised its discretion in favour of the plaintiffs by refusing to stay the suits. It was argued that it was unfair to the plaintiffs to be compelled to refer disputes to arbitration in England when all their evidence to prove shortage of sugar and its value was available here.

But again there is nothing unfair about it. It may reasonably, be assumed that it was in the contemplation of the parties, that there might be a likelihood of shortage in sugar at the ports of destination and that in that event claims for shortage would ordinarily be preferred at such ports. The owners of the ship were not willing that they should be made to litigate claims made against them at the various ports of discharge to which their ships may go; and for that purpose they made it as one of the essential terms of their contract of carriage that all claims made against them should be settled by commercial men residing in London. The shippers agreed to this term with full knowledge of the inconvenience which they might be put to in consequence of this term and it is not open to them to urge that as a ground. If at all, it will be unfair to the owners of the ship to deny them the benefit of this provision which they had secured for themselves under their contract. If the claim in suit had arisen on account of any unforeseen circumstance which was not in the contemplation of the parties, it would have been another matter. In so far as the claims in suit were within the contemplation of the

(2) [1878] 8 Ch. D. 26=38 L. T. 3=26 W. R. 426.
(3) [1903] 1 K. B. 249=72 L. J. K. B. 211=88 L. T. 6=51 W. R. 402=19 T. L R. 155.
(4) [1909] 1 Ch. 413=78 L. J. Ch. 117=99 L. T. 932.
(5) [1913] P. 130=83 L. J. P. 23=109 L. T. 672=29 T. L. R. 557=12 Asp. M. C. 399.
(6) A. I. R. 1921 Sind 202=15 S. L. R. 88.
(7) A. I. R. 1924 Bom. 381=80 I. C. 523.

parties this term cannot,to use the words of Lord Hatherly in *Kitchner* v. *Turnbull* (8), be "lightly overturned;" and it would be a wrong and improper exercise of discretion to refuse to stay the suits on the alleged ground of inconvenience.

In this connexion, it would not be out of place to mention that clauses similar to the one in dispute have been in use for very many years, and have not only been given effect to in disputes between subjects owing allegiance to the same sovereign but also in disputes between subjects of different sovereign powers who are consenting parties to the Arbitration Protocol Act 1924, as amended by the Arbitration Foreign Award Act 1930. S. 8 of that Act provides that where the Act applies the Court is bound to stay a suit based on a contract containing a submission clause unless the party who applies for stay has taken any step in the proceedings other than that of putting in an appearance, or unless the Court is satisfied that the agreement, or the arbitration clause had become inoperative or cannot proceed.

It was suggested that the application for stay by one of the defendants was not competent, and that there was no proof before the Court that either or both of the defendants were ready and willing to do all things necessary to the proper conduct of the arbitration. But again, provided all the defendants are bound by the submission clause, it is not at all necessary for all of them to apply for stay, or to show their willingness to submit disputes to arbitration. It is sufficient if one of them does so, and wishes to take advantage of the submission clause. It was so held in the leading case of *Willeford* v. *Watson* (9). With regard to proof, the learned Additional Judicial Commissioner had before him the petition filed by defendant 2 which was duly verified as true to their knowledge by a competent officer of the defendants and which contained the necessary averments.

Strictly speaking, this petition was not enough and the learned Additional Judicial Commissioner would have been well advised if he had asked for proof by affidavits or otherwise in that behalf. But his failure to do so is not by itself sufficient to induce us to exercise our extraordinary jurisdiction. No prejudice has been caused to the plaintiffs in consequence of this defect. The plaintiffs have themselves offered no proof to the contrary, and all that they complain of is want of a formal affidavit which would no doubt have been filed if ordered. Lastly, it was suggested that as defendants 1 were sued de hors the bills of lading there should have been no stay of the suits as against them. But this argument is likewise misconceived.

Defendants 1 have been sued in a dual capacity, first, as charterers of the ship, that is to say, as principals. If that be so, the bills of lading were signed by the Master as their agent. The bills of lading bore their name on the top of it and the terms contained therein had therefore their approval. The other capacity in which they have been sued is, that they gave an undertaking to the customs authorities. But that undertaking was given by them as agents of the ship in order to enable the ship to obtain port clearance, and their liability is expressly limited by S. 64, Sea Customs Act, to the discharge of claims established by the owners of the cargo against the ship: *Firm of Haji Shakoor Gany* v. *Firm of Volkart Brothers* (10). That being so it is incumbent on the plaintiffs to establish their claim against the ship, before they can get relief against the agents. In either case there was no obstacle in the way of the stay of the suit.

We understand that defendants 2 are to be responsible for the nomination of one of the two arbitrators and for the conduct of the arbitration proceedings. In order to avoid any plea being subsequently raised that an award passed between the plaintiffs and defendants 2 is not binding upon defendants 1, we think that it will sufficiently protect the interests of the plaintiffs, if defendants 1 give an undertaking that they will be bound by the award so far as the plaintiffs are concerned, this undertaking to be given without prejudice to the disputes between them and the defendants 2 inter se. We accordingly uphold the order passed by the trial Court subject to this undertaking being given. The undertaking to be given within seven days, and

(8) [1871] 20 W. R. 253.
(9) [1878] 8 Ch. 473.

(10) A. I. R. 1931 Sind 124 = 133 I. C. 77 = 25 S. L. R. 222.

on its being given, these applications will stand dismissed.

S.N./R.K. *Stay confirmed.*

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* A. I. R. 1932 Sind 115

ASTON, A. J. C.

Mt. Hurmat Bibi and *another*—Plaintiffs.

v.

Mt. Kaz Banu and *others*—Defendants.

Suit No. 294 of 1931, Decided on 17th March 1932.

*** Provident Fund Act (1925), S. 5—Unless nomination is altered nominee is entitled to receive amount—Mere grant of probate or letters of administration to third person does not affect nominee's rights.**

The provisions of the Act relating to the right of nominees to receive the provident fund are not to be read, as though they were controlled by, or subject to any other law for the time being in force, or subject to any disposition whether testamentary or otherwise, by the subscriber or depositor. Unless the nomination is cancelled by the subscriber or varied by a nomination in favour of another person, the nominee, on the death of the subscriber must be regarded as having had conferred on him or her an absolute right to receive the Provident Fund. The fact that letters of administration or probate is granted to a different person does not prevent the nominee from claiming under the Act the full amount of the sum due on death of a subscriber to the fund; 64 *I. C.* 62; *A. I. R.* 1924 *Sind* 57 and *A. I. R.* 1923 *Lah.* 773, *Dist.*

[P 116 C 1]

Kundanmal Dayaram—for Plaintiffs.

B. P. Samtani—for Defendants.

Judgment.—This is an application made by the plaintiff under O. 39, R. 1, Civil P. C., for an injunction restraining defendant 1 from recovering from the North-Western Railway more than one-fourth of the amount standing to the credit of one Mahomed Kassim deceased in the State Railway Provident Fund pending the disposal of this suit and also for an injunction restraining her from recovering more than one-fourth of the gratuity allowance payable by the North Western Railway.

An interim order was granted prohibiting the Chief Accounts Officer, North-Western Railway from paying and defendant 1 from recovering more than one-fourth of the Provident Fund and gratuity allowance to defendant 1.

The Divisional Superintendent, North-Western Railway, Karachi, has replied that the gratuity has been paid to the widow and that the prohibitory order relating to the Provident Fund had been forwarded to the Chief Accounts Officer, Provident Fund, Lahore, who arranges the payment of Provident Fund dues.

On behalf of the plaintiff reliance is placed on *V. Vaz* v. *Maddox* (1), *Aimai* v. *Awabai Dhanjishaw Jamsetji* (2) and *Hardial Devi Ditta* v. *Janki Das* (3).

The Chief Accounts Officer, North-Western Railway, has drawn attention to Ss. 4 (a) and 3 (2) Provident Fund Act 19 of 1925 and to the fact that a declaration has been made in favour of defendant 1. The Chief Accounts Officer contends that by virtue of the provisions of the Provident Fund Act the whole amount of the provident fund money (viz., Rs. 1765-10) held at the credit of the late Mr. Mahomed Kasim vests in Mt. Kaz Banu, his widow, defendant 1 and he applies that the prohibitory order be raised.

I am of opinion that the view of the Accounts Officer is correct. *Vaz* v. *Maddox* (1) and *Aimai* v. *Awabai Dhanjishaw Jamesetji* (2), as Mr. Samtani for defendant 1 points out, were under the old law. When they were decided the Provident Fund Act 9 of 1897, as amended by the Provident Fund Amending Acts 13 of 1898, 4 of 1903, 10 of 1914 and 14 of 1919, was in force. The Provident Fund Act has since been the subject of a further and more important amendment in 1925. This amendment it seems to me has left no doubt as to the real intentions of the legislature. In *Aimai* v. *Awabai Dhanjishaw Jamsetji* (2), Kennedy, J. C., observed:

"But it is urged that the effect of the statute is to defeat the provisions of the ordinary law and to set up a new law of inheritance in respect of these Provident Funds. It is said that any fund due to the subscriber and standing at his credit at the time of his death passes absolutely to the nominee. I am not concerned with the intentions of the Provident Fund, unless they are clearly expressed. In that case it would be necessary to see whether such an intention could under the statute be given effect to. Perhaps the framers of these rules did intend that the nominee should take that absolute estate. But there is no direct enactment to that effect."

This criticizm is no longer applicable to the Provident Fund Act as now amended for as if in answer to the objections of Kennedy. J. C.. in *Aimai* v. *Awabai Dhanjishaw Jamsetji* (2), it is

(1) [1920] 64 I. C. 62.
(2) A. I. R. 1924 Sind 57=76 I. C. 739=18 S. L. R. 311.
(3) A. I. R. 1928 Lah. 773=108 I. C. 894.

now enacted by S. 5, Provident Fund Act, 1925, that

"(1) subject to the provisions of this Act, but otherwise notwithstanding anything contained in any law for the time being in force or any disposition, whether testamentary or otherwise by a subscriber to, or depositor in a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, any nomination duly made in accordance with the rules of the fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor shall be deemed to confer such right absolutely, until such nomination is varied by another nomination made in like manner or is expressly cancelled by the subscriber or depositor by notice given in such manner and to such authority as is prescribed by those rules

(2) Notwithstanding anything contained in the Succession Certificate Act 1889, or the Bombay Regn. 8 of 1827, any such person shall on the death of the subscriber or depositor be entitled to the grant of a certificate under that Act, or that regulation as the case may be entitling him to receive payment of such sum or part and such certificate shall not be deemed to be invalidated or superseded by any grant to any other person of probate or letters of administration to the estate of the deceased."

In order therefore to ascertain the person or persons who are entitled to receive Government or Railway Provident Funds, it is necessary to look at the provisions of the Provident Fund Act, 1925, itself. The provisions of that Act relating to the right of nominees to receive the Provident Fund are not to be read as though they were controlled by, or subject to any other law for the time being in force, or subject to any disposition whether testamentary or otherwise by the subscriber or depositor. Unless the nomination is cancelled by the subscriber or varied by a nomination in favour of another person, the nominee, on the death of the subscriber must be regarded as having had conferred on him or her an absolute right to receive the Provident Fund. He is now entitled on the death of the subscriber, notwithstanding anything in the Bombay Succession Certificate Act 1889, or the Regn. 8 of 1827, to the grant of a certificate entitling him or her to receive payment under that Act or under that regulation and such certificate is not to be deemed to be invalidated or superseded by the grant of probate or letters of administration to any other person. The case *Hardial Devi Ditta* v. *Jankidas* (3) which followed *Aimai* v. *Awabai Dhanjishaw Jamsedji* (2) was no doubt decided after the Provident Fund Act 1925, came into force but the amendment of the Act since *Aimai* v. *Awabai* (2) was decided does not appear to have been brought to the notice of the Court. There is no reference to the amendment in the judgment and no discussion regarding the intention with which the Act was amended or the extent to which the old law has been modified.

Defendant 1 is admittedly the nominee. The deceased Mahomed Kassim admittedly made a declaration in her favour. It is not suggested that the declaration was cancelled or varied. For the reasons which I have mentioned Mt, Kaz Banu is entitled in my opinion to have the prohibitory order raised. The application for a temporary injunction and prohibitory order is dismissed with costs.

The Accounts Officer to be informed.

K.N./R.K. *Application dismissed.*

A. I. R. 1932 Sind 116

MILNE, J. C. AND MEHTA, A. J. C.

Khemchand Santdas—Appellant.

v.

Fakhrudin Ibrahimji—Respondent.

Second Appeal No. 9 of 1928, Decided on 11th September 1931, against order of Assistant Judge, Sukkur.

(a) Presidency Small Cause Courts Act (1882), S. 31—Decree passed by Presidency Small Cause Court transferred for execution to Court of Sub-Judge—S. 48, Civil P. C. is not applicable—Civil P. C. (1908), S. 48.

Section 31, Presidency Small Cause Courts Act, provides merely for the procedure to be followed by the executing Court to which a decree of a Presidency Small Cause Court has been transferred. The period of limitation prescribed by S. 48, Civil P. C., is a part of the substantive law of limitation and the section is not a mere matter of procedure. Where such a decree passed by the Presidency Small Cause Court is transferred to the Court of a Sub-Judge for execution the law of limitation applicable for its execution is that of the Court which passed it and S. 48, Civil P. C., does not apply : 17 *Cal.* 491 ; 24 *Cal.* 473 ; 31 *Mad.* 24 and 36 *Mad.* 108, *Rel. on.* [P 118 C 1]

(b) Civil P. C. (1908), S. 11—Applicability —S. 11 and explanations thereto apply to execution proceedings—Question of limitation not raised on application for execution —Order for execution issued—Judgment-debtor cannot contend in any subsequent

application that former application was time barred.

Per *Milne, J. C.*—Principles of S. 11 and the explanation thereto apply to execution proceedings in the absence of any special reasons. A question of limitation which goes to the root of the proceedings which if successfully raised would result in the application for execution being dismissed is clearly one which should be raised when it is first open to the judgment-debtor to raise that contention and if not raised, the judgment-debtor is for ever barred from raising it. Therefore if the question of limitation is not raised on an application for execution and an order for execution is issued on the application it is not open to the judgment-debtor to contend on any subsequent application that the former application was time barred : *A. I. R.* 1921 *P. C.* 23; 8 *Cal.* 51 (*P. C.*); *A. I. R.* 1920 *Bom.* 264; *A.I R.* 1924 *Bom.* 495 ; *A. I. R.* 1921 *Bom.* 256; *A. I. R.* 1926 *Oudh* 291 ; *A. I. R.* 1930 *Rang.* 213 and *A. I. R.* 1926 *All.* 71, *Rel. on.* ; *A. I. R.* 1922 *Pat.* 289, *not Foll.* ; 50 *I. C.* 972 ; 40 *Mad.* 1016 and *A. I. R.* 1915 *All.* 344, *Ref.* ; 40 *Mad.* 780, *Appr.* [P 119 C 2]

Kodumal Lekhraj—for Appellant.

Pahlajsingh B. Advani — Amicus Curiae.

Milne, J. C. —This is an appeal against the order of the learned Assistant Judge, Sukkur, dismissing the appeal against the order of the learned Sub-Judge, Shikarpur, ordering execution of a decree against the appellant. The respondent has not appeared but Mr. Pahlajsing has very ably argued his case as amicus curiae. The decree was one passed by the Small Cause Court, Bombay on 13th February 1905. It was transferred to Sukkur District on 18th September 1926 and again to the Sub-Judge of Shikarpur on 8th March 1926.

The first ground of objection taken before the learned Sub-Judge was that the decree being more than 12 years old could not be executed in view of the provisions of S. 48, Civil P. C. The learned Sub-Judge held that S. 48 did not apply relying upon *Shree Krishna Doss* v. *Alumbu Ammal* (1) and the lower appellate Court agreed with the trial Court. The appellate Court further held that the contention that the execution of the decree was barred because an earlier execution application of 17th January 1911 was barred was not sound on the ground that subsequent execution applications had been entertained and orders for execution issued after notice served on the judgment-debtor ; and it was not therefore open to the judgment-debtor to contend that the present application was barred because the previous application of 17th January 1911 was barred.

As regards the first contention the judgment-debtor relies on the provisions of S. 31, Presidency Small Cause Courts Act, which provides that the procedure prescribed by the Civil Procedure Code for the execution of decrees by Courts other than those which made them should apply to the execution of a decree of a Presidency Small Cause Court transferred to any other Court for execution. He relies on *Ponnappa Reddi* v. *Thiru Vengada Pillai & Co.* (2) for the proposition that the Civil Procedure Code being made applicable the whole Code is applicable and on *Martand* v. *Vinayak* (3) for the proposition that the executing Court should be guided by the rules in force in its own district.

The contention of the judgment-creditor is that S. 48 provides a rule of limitation and not of procedure ; it is not made applicable by S. 31, Presidency Small Cause Courts Act. It was held in *Tincowry Dawn* v. *Debendro Nath* (4) that the period of limitation applicable to the execution of a decree, transmitted by one Court to another for execution depends on the character of the Court which passed the decree, and not on the character of the Court executing it, reliance being placed on the provisions of Ss. 227 and 228, Civil P. C., 1882. In the Code of 1882 it was provided in S. 228 that the Court executing a decree shall have the same powers in executing that decree as if it had been passed by itself. This it was held referred simply to the manner of execution and left the matter of limitation to be governed by the Limitation Act. It was held that the law depends not on the character of the Court which executes the decree, but of the Court which passed it though the manner of execution is that of the Court which executes the decree. This principle was followed in *Jogemayi Dassi* v. *Thackomani Dassi* (5). It was held that the law of limitation is not altered by the transfer of proceedings in execution. Reliance was placed on the provisions of S. 227, Civil P. C,, 1882 directing the Court to execute the decree sent to it, in the same manner as if it had been made

(1) [1913] 36 Mad. 108=11 I. C. 635.

(2) A. I. R. 1925 Mad. 1179=90 I. C. 509.
(3) [1907] 31 Bom. 5=8 Bom. L. R. 832.
(4) [1890] 17 Cal. 491.
(5) [1896] 24 Cal. 473.

by itself. The " manner " of execution refers to the procedure under which the execution is to be had, and had no reference to the limitation. The same principle was followed in *Sambasiva Mudaliar* v. *Panchanda Pillai* (6). That decision was with reference to the Revenue Recovery Act, 1864, S. 40 of which empowers a Court of competent jurisdiction to cause the proper process to be issued for the purpose of putting the purchaser in possession in the same manner as if the purchased lands had been decreed to the purchaser by a decision of the Court. It does not by implication, make the law of limitation with reference to the execution of the decrees or orders of civil Courts applicable to proceedings under S. 40 of the Act. The case of *Shree Krishna Doss* v. *Alimbi Ammal* (1), is directly in point. That was a decree of the Presidency Small Cause Court, Madras, transferred for execution to the City Civil Court ; it was held that although a decree may be transferred by the Court which passed it to another Court for execution, the law of limitation applicable for its execution is that applicable to the decrees of the former Court, i. e., of the Court which passed it. Reliance was placed on *Tincowrie Dawn* v. *Debendro Nath Mookerjee* (4) and *Jogemaya Dassi* v. *Thackomoni Dassi* (5) already quoted.

Section 48, Civil P. C., clearly provides a limitation period of 12 years. That is no mere matter of procedure. I must agree with the findings of the two lower Courts that a decree of a Presidency Small Cause Court when transmitted to another Court for execution is not barred by S. 48, Civil P. C., though more than 12 years have elapsed from the date of the decree.

The second point taken was that in the execution application the first application shown is dated 17th January 1911 and that on the face of it that application for execution was time barred. The judgment-creditor contends that in subsequent applications in 1914, 1917, 1923 and 1925 execution was ordered after notice was issued and the judgment-debtor not having raised the plea of limitation in 1911 or having raised the plea and having had it decided against him, it is not open to him now to raise the plea of limitation ; he is barred on principles of law analogous to those stated in Expl. 4, S. 11, Civil P. C. A considerable number of authorities have been quoted on both sides: many of the same High Courts. The general trend of these decisions would appear to be that, while principles of law analogous to Expl. 4 to S. 11, Civil P. C., are applicable to the execution of decrees, it depends upon the facts of the particular case whether they are or are not so applicable. There are certain provisions of law applicable to suits, the necessity of raising certain pleas at certain times and the placing of the whole of the claim and of the whole of the defence before the Court which are not specifically applicable to execution proceedings. It was held in *Kalyan Singh* v. *Jagan Prasad* (7) that if a judgment-debtor does not take exception to the amount erroneously set forth in an application for the execution of a decree as being the sum due, he is not prevented by the principle of res judicata from doing so on a subsequent application for the execution of the same decree.

It was pointed out that the judgment-debtor had very little reason for taking exception to the earlier applications for execution as a large sum was due under the decree. When the decree was practically satisfied the question as to how much (if any) remained due for the first time became really important. In *Somasundaram* v. *Chokkalingam* (8) a judgment-debtor who has applied for and obtained restitution of a sum of money recovered from him in execution of a decree which was subsequently reversed on appeal filed a subsequent application for recovery of interest on the amount for the period during which the decree-holder had the use of money; it was held that the subsequent application was not barred by the rule of constructive res judicata under S. 11, Expl. 4, or by O. 2, R. 2, Civil P. C., and it was further said that unless the decision of the question subsequently raised was either expressly given or must be deemed to have been necessarily implied in the previous decision, the principle of res judicata should not be applied to execution proceedings. That is a proposition with which I would, with respect, agree as a substantial statement of the principles governing the application of the doctrine

(6) [1907] 31 Mad. 24=17 M. L. J. 441.

(7) A. I. R. 1915 All. 344=30 I. C. 523=37 All. 589.

(8) [1917] 40 Mad. 780=38 I. C. 806.

of res judicata to execution proceedings. That principle was followed in *Subramania Ayyar* v. *Raja Rajeswara Sethupathi* (9). Notice was issued to the respondents to show cause why they should not be brought on record as the legal representatives of the deceased judgment-debtor for purposes of execution; they did not appear, and an order was made ex parte; it was held that they were not estopped by this order from moving to set aside the attachment on the ground that the properties did not belong to the judgment-debtor. There was no particular reason why they should raise that objection on the first application. They apparently did not contend that they were not the legal representatives of the deceased for the purpose of execution.

In *Mahadeo* v. *Trimbakbhat* (10) an application to execute the decree made in 1914 was dismissed as the application was not shown to be in time. It was held that the judgment creditor was not barred from showing that the subsequent application was in time. This perhaps goes further than the previous rulings quoted. It may be noted that in this case the second application was in time on grounds which were not urged on the first application. It is perhaps doubtful whether a judgment-creditor who had failed to urge on his first application all the grounds known to him for saving limitation should be allowed on a subsequent application to raise a contention which should have been raised by him on the first application. This ruling was followed in *Ramchandra* v. *Shriniwas* (11). In *Prithi Mahton* v. *Jamshed Khan* (12) it was held that the special rules laid down in the Explanations to S. 11 which go beyond the ordinary doctrine of res judicata ought not to be applied generally in execution proceedings. In that case the auction-purchaser at a Court sale had his sale set aside on an application under O. 21, R. 90. A suit was brought and it was contended therein that the question of nontransferability which, if established, would put an end to the defendant's claim, could not be raised in the suit because in the proceedings under O. 21, R. 90, no such point had been taken. I should with respect be inclined to state the doctrine conversely, that the principles of S. 11 and the Explanations thereto should apply in the absence of any special reasons. They are principles of general application and should apply to execution proceedings except in so far as the application of these sections depends upon the special procedure and special provisions relating to the conduct of suits. I should further hold that where a claimant should necessarily in execution proceedings have raised all the defences open to him, he should be barred from raising these contentions in subsequent proceedings. The decision in *Sanwaldas* v. *The Collector of Etah* (13) is on all fours with that of *Subramania Ayyar* v. *Raja Rajeswara Dorai* (9).

A question of limitation which goes to the root of the proceedings, which, if successfully raised would result in the application for execution being dismissed, is clearly one which should be raised when it is first open to the judgment-debtor to raise that contention; and if not raised, the judgment-debtor is for ever barred from raising it. There is clear authority for that proposition. It was held in *Mungul Pershad Dichit* v. *Girija Kant Lahiri* (14), that although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court, having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. In *Raja of Ramnad* v. *Velusami Tevar* (15) it was held that the order allowing appellant to execute the decree involved legally the rejection of the plea that execution was barred by limitation and that such plea could not be raised in subsequent proceedings. Their Lordships apparently were of the view that the result would have been the same even if the plea of limitation had not been expressly raised. This decision of the Privy Council is directly in point on the question now at issue. The same principle was followed in *Desaippa* v. *Dun-*

(9) [1917] 40 Mad. 1016=38 I. C. 627.
(10) [1919] 50 I C. 972.
(11) A. I. R. 1922 Bom. 238=66 I. C. 940=46 Bom 467.
(12) A. I. R. 1922 Pat. 289=67 I. C. 656=1 Pat. 593.
(13) A. I. R. 1924 All. 700=83 I. C. 848=46 All. 560.
(14) [1881] 8 Cal. 51=8 I. A. 123=4 Sar. 248 (P.C.).
(15) A. I. R. 1921 P. C. 23=59 I. C. 880=48 I. A. 45 (P.C.).

dappa (16). A darkhast of September 1910 which it was contended was time barred because a darkhast of March 1910 was time barred was held to be in time, and that decision not having been reversed on appeal a subsequent darkhast could not be held time barred on the same ground : vide also *Gadigappa* v. *Shiddapa* (17), *Prabhu Lingappa* v. *Gurunath* (18), *Raghubar Singh* v. *Gokaran* (19), *Daw Ohn Bwin* v. *U Ba* (20) and *Dip Prakash* v. *Bohra Dwarka Prasad* (21). I must hold therefore that if the question of limitation is not raised on an application for execution and an order for execution is issued on the application it is not open to the judgment-debtor to contend on any subsequent application that the former application was time barred.

As regards the facts of the present case it is clear that notice was issued on the application for execution made on 17th January 1911 and that an order was made on 30th February 1911 for execution to issue. There were subsequent applications in 1914, 1917, 1923 and 1925 on which an order for execution was passed after issue of notice to the judgment-debtor. The judgment-debtor cannot therefore now contend that the execution proceedings of 17th January 1911 were time barred. I therefore uphold the order of the lower appellate Court and dismiss the appeal with costs.

Mehta, A. J. C.—The decree sought to be executed in this case was passed by the Court of Small Causes, Bombay, on 13th February 1905. It was transferred to the District Court, Sukkur in September 1925 and thence to the Court of the Subordinate Judge of Shikarpur on 8th March 1926. The learned Sub-Judge decided that S. 48, Civil P.C., did not operate as a bar to execution and consequently allowed execution to proceed. On appeal the learned Assistant Judge concurred in the view taken by the Subordinate Court and also rejected an additional plea taken by the judgment-debtor which was to the effect that as the first application for execution, namely, one of 17th January 1911 in the Small Cause Court at Bombay, was not within three years of the decree and was consequently barred under Art. 182, Limitation Act, the subsequent applications were likewise barred. The decree was allowed to be executed; hence this second appeal.

I have had the advantage of reading the judgment of the learned Judicial Commissioner. From the authorities reviewed therein the proposition may be said to be well established, namely, that S. 31, Presidency Towns Small Cause Courts Act, provides merely for the procedure to be followed by the executing Court to which a decree of a Presidency Small Cause Court has been transferred. Mr. Kodumal for the judgment-debtor does not seriously dispute this proposition but he contends that S. 48 provides merely a rule of procedure and nothing more. This contention cannot be upheld because the period of limitation prescribed by S. 48 is a part of the substantive law of limitation, as will appear from the wording of Arts. 181 and 182, Limitation Act. It has nothing to do with the manner of executing the decree. Indeed when the section lays down in effect that a decree is so to say extinct after 12 years and is no longer executable, it cannot be maintained that such a provision indicates the mode or the manner in which a decree is to be executed. I am in perfect agreement with the view taken in *Shree Krishna Doss* v. *Alumbi Ammal* (1) that when a decree passed by one Court is transferred to another Court for execution, the law of limitation applicable is that of the Court which passed it. In regard to the manner of executing a decree as, for instance, when the provisions of the Deccan Agriculturists' Relief Act apply to the executing Court, the executing Court has to proceed as if the decree had been passed by itself and follow the relevant provisions of the Deccan Agriculturists' Relief Act. The plea of the judgment-debtor in the present case that S. 48, Civil P. C., is a bar to the present application for execution in the Shikarpur Court must therefore be rejected.

(16) A. I. R. 1920 Bom. 264=54 I. C. 693=44 Bom. 217.
(17) A.I R. 1924 Bom. 495=83 I. C. 155=48 Bom. 638.
(18) A. I. R. 1921 Bom. 256=59 I. C. 747=45 Bom. 453.
(19) A. I. R. 1926 Oudh 291=93 I. C. 833=1 Luck. 171.
(20) A. I. R. 1930 Rang. 213=127 I. C. 375=8 Rang. 302.
(21) A. I. R. 1926 All. 71=90 I. C. 83=48 All. 201.

The other point taken by the judgment-debtor before the first appellate Court has to my mind no substance in it at all. The decree was no doubt passed in February 1905 and the first application for execution no doubt appears to have been made in January 1911; still it cannot be urged that it was prima facie barred by Art. 182, Limitation Act. On behalf of the judgment-debtor Mr. Kodumal is not prepared to say that a certified copy of this decree has not been registered. In case of registration the period of limitation allowed by the article is six years. There is therefore no material upon which the judgment-debtor can succeed in getting a decision from the Shikarpur Court that the first application was barred by limitation. In this view of the case it is unnecessary for me to say that the Privy Council ruling in *Pommappa Reddi* v. *Thiru Vengade Pillai & Co.* (2) actually goes the length of saying that even if a plea of limitation had not been expressly raised, the mere fact that an execution application was allowed to be proceeded with amounts to rejection of such plea. I have my doubts whether their Lordships have really expressed any such view as appears to have been laid down in the semble to the head-note of the case. For the foregoing reasons I agree with the learned Judicial Commissioner that the order of the lower appellate Court should be upheld and this appeal dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Sind 121

ASTON, A. J. C.

Ahmed Haji Esmail—Plaintiff.

v.

Parmanand Menghraj and *another*—Defendants.

Suit No. 90 of 1931, Decided on 1st April 1932.

Bombay Land Revenue Code (1879), S. 137 — Sale by Government of land of abkari renter for recovery of abkari revenue is subject to prior mortgage on land — Bombay Abkari Act (1878), S. 34.

Section 137 of the Code in no way extends the right of forfeiture and sale to those lands of the defaulter in respect of which no land revenue is due. Although arrears of abkari licence fees are recoverable as land revenue under S. 34, Abkari Act, arrears of abkari revenue are not due upon any specific land owned by the abkari renter. Hence a sale by Government of the land of the renter for recovery of abkari revenue is a sale subject to any prior mortgage on the land: 7 *Mad.* 434; 28 *Mad.* 420; 25 *Mad.* 572; and 26 *Mad.* 230, *Foll.* [P 122 C 1; P 122 C 2]

W. Lobo—Plaintiff.

Partabrai D. Punwani—for the Collector of Karachi.

Order.—This is an application by the Collector of Karachi for a declaration that Government have a paramount charge on the half undivided share of defendant in a plot of land with buildings bearing Survey No. 54, sheet N P 13, Napier Quarter, Karachi, or its sale proceeds regarding a sum of Rs. 10,650 due as balance of license fee, and for an order for the payment of the Government claim and costs out of the sale proceeds:

Section 137, Land Revenue Code, provides as follows:

"The claim of Government to any moneys recoverable under the provisions of this chapter shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage, judgment, decree, execution or attachment, or otherwise, against any land of the holder thereof."

Section 187 provides:

"All sums due on account of land revenue, all quit rents, nazranas, succession duties, transfer duties, and forfeitures, and all cesses, profits from land, emoluments, fees, charges, penalties, fines, and costs payable or leviable under this Act or under any Act or Regulation hereby repealed or under any Act for the time being in force relating to land revenue; and all moneys due by any contractor for the farm of customs duties or of any other duty, or tax, or of any other item of revenue whatsoever, and all specific pecuniary penalties to which any such contractor renders himself liable under the terms of his agreement; and also all sums declared by this or by any other Act or Regulation at the time being in force (or by any contract with the Secretary of State) to be leviable as an assessment, or as a revenue demand, or as an arrear of land revenue, shall be levied under the foregoing provisions of this chapter (and all the foregoing provisions of this chapter shall, so far as may be applicable thereto). And any money ordered by a liquidator appointed under S. 42, Co-operative Societies Act, 1912, to be recovered as a contribution to the assets of a society or as the cost of liquidations may, notwithstanding anything contained in sub-S. (5), S. 42 of the said Act, be levied under the foregoing provisions of this chapter and all the foregoing provisions of this chapter shall so far as may be applicable thereto:

Provided that every application for recovery in such manner of any such sum shall be accompanied by a certificate signed by the Registrar appointed under S. 3, Co-operative Societies Act 1912, that the amount may be recovered as an arrear of land revenue.

And all persons who may have become sureties under any of the provisions of this Act or of any Act or Regulation hereby repealed, or for any such contractor as aforesaid for any sum of money shall, on failure to pay the amount or any portion thereof for which they may have become

liable under the terms of their security bond, be liable to be proceeded against under the provisions of this chapter as revenue defaulters (and all the foregoing provisions of this chapter shall, so far as may be, be applicable to such persons). And in the event of the resumption of any such farm as is aforesaid, no person shall be entitled to credit for any payments which he may have made to the contractor in anticipation. And any person who has received from Government a free grant of money for any agricultural purpose, subject to the proviso that he shall refund the same on failure to observe any of the conditions of the grant, shall, on failure to observe any such condition and to repay the said sum to Government, be liable to be proceeded against under the provisions of this chapter as a revenue defaulter; and all the foregoing provisions of this chapter shall, so far as may be, be applicable to such person."

Section 34, Bombay Abkari Act provides:

"All duties, taxes, fines and fees leviable under any of the foregoing provisions of this Act or of any license, permit or pass issued under it, and all amounts due from any farmer under this Act, may be recovered from (any person liable) to pay the same, or from his surety (if any) as if they were arrears of land revenue."

Defendant mortgaged his undivided half-share in plot No. 13 for Rs. 3,000 and the mortgagee obtained a preliminary decree on 20th November 1931, nearly two months before the date of the present application. On behalf of the Collector reliance is chiefly placed on S. 137, Land Revenue Code. It is contended, that since the claim of Government to the balance of the abkari license fee has been made recoverable as an arrear of land revenue (see S. 34, Bombay Abkari Act) S. 137 gives priority to the claim over any other claim whatsoever. In *A. I. R.* 1930 *Sind* 185, Wild, J. C., held that the claim of Government to the balance of an abkari license fee had precedence over that of a bank which had advanced money on the security of the wine in stock.

On behalf of the decree-holder reliance is placed on the fact that the Land Revenue Code makes a clear distinction in Ch. 11 between the land of the defaulter in respect of which land revenue is due; see S. 153 and other land of the defaulter, see S. 155. It even provides a different procedure with regard to crops of land in respect of which land revenue for the current year is due and in respect of which land revenue for other years is due: see S. 40. It is pointed out that although arrears of abkari license fees are recoverable as land revenue under S. 34, Abkari Act, arrears of abkari revenue are not due upon any specific land owned by the abkari renter. In this connexion see *Ramchandra* v. *Pitchaikani* (1) which is followed in *Ibrahim Khan* v. *Rangasami Naicken* (2): see also *Chinnasami Mudali* v. *Tirumalai Pillai* (3), *Kadir Mohideen Marakkoyar* v. *Muthukrishna Ayyar* (4).

I am of opinion that the view taken by the Madras High Court in the decisions above mentioned is right. S. 137, Land Revenue Code, no doubt gives precedence to the claim of Government for arrears of land revenue and to other claims of Government recoverable as such. But S. 137 must be read with the other sections in Ch. 11. If Government sells immovable property of a defaulter, other than the land in respect of which land revenue is due, a prior mortgage on the immovable property sold is not extinguished; the immovable property is sold subject to such prior mortgage. The right of forfeiture under S. 153 is only applicable to a holding in respect of which land revenue is due. S. 137 in no way extends that right of forfeiture and sale to other lands of the defaulter in respect of which no land revenue is due.

Applying this principle to the present case it appears to me, so far as concerns the immovable property of the renter, that all that the Collector is entitled to sell is the right, title and interest of the defaulter under S. 155, Land Revenue Code, and that since arrears of abkari revenue are not due upon any specific land of the renter, a sale by Government of the land of the renter for recovery of arrears of abkari revenue would be a sale subject to any prior mortgage on the land.

There will therefore be a declaration that if Government sells the lands of the defaulter for recovery of arrears due under the Abkari Act, the land will be sold subject to the rights of the mortgagee; if the mortgagee sells the land of the defaulter he will be entitled to recover his mortgage debt, and the balance if any of the sale proceeds will be payable to Government. Plaintiff to have costs.

S.N./R.K. *Order accordingly.*

(1) [1884] 7 Mad. 434.
(2) [1905] 28 Mad. 420.
(3) [1902] 25 Mad. 572.
(4) [1903] 26 Mad. 230=12 M. L. J. 368.

* A. I. R. 1932 Sind 123

RUPCHAND, A. J. C.

Kishinchand Pursanomal—Plaintiff.

v.

Secy. of State—Defendant.

Suit No. 508 of 1928, Decided on 25th February 1932.

(a) Railways Act (1890), S. 72—Negligence —Burden of proving it is on plaintiff.

The burden is always on the consignor to prove that the damage was caused by negligence of the bailee or his servants. In doing so, it is open to the consignor to ask the Court to draw a presumption against the bailee for failure to call material witnesses who had to deal with the goods while in his custody. But when such evidence is led, it is for the Court to decide whether an inference can be drawn in favour of the consignor or not; of course in fit cases it being open to the Court to draw a presumption of negligence from the fact of loss or damage to the goods, if there is no evidence to explain the circumstances under which the loss or damage was caused. But that is something different from saying that the burden is on the bailee to prove want of negligence. Whether in any particular case the Court will infer negligence must therefore necessarily depend upon the facts of such case: *A.I.R.* 1917 *P.C.* 173, *Rel. on.* [P 124 C1, 2]

*** (b) Tort—Negligence— Failure to take best step in emergency does not necessarily amount to negligence.**

Good sense and policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. In a moment of extreme peril and difficulty you are not to expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best: *A. I. R.* 1917 *P. C.* 173, *Foll*; 26 *Cal.* 398; 37 *Bom.* 1 and 39 *Bom.* 191, *Dist.* [P 125 C 1]

Dipchand Chandumal—for Plaintiff.

Choithram Devandas—for Defendant.

Judgment.—This is a suit for recovery of damage done to 55 bales of cotton while in transit from Toba Teksing to Karachi. The first set of the plaintiffs are the consignors of cotton and the second set of plaintiffs are the consignees. The cotton was consigned for carriage through the North Western Railway. It is common ground that the damage was caused by fire and water used for the purpose of extinguishing the fire. The following issues were raised by the Court:

(1) Is the suit bad for reasons alleged in para. 1 of the written statement? (2) Have plaintiffs 1 no right to sue? (3) Was the consignment in question carried under risk note A? If so, what is the result? (4) Was the alleged damage due to the negligence and / or misconduct of the railway administration and / or their servants? Did the railway administration and / or their servants exercise due care and caution? (5) Is the survey held by the defendant binding on the plaintiffs? (6) To what damages, if any, are the plaintiffs or any of them entitled? (7) General.

Issues 1 and 2 were decided against the defendants by Kalumal, A. J. C., by his order dated 9th July 1929.

Issue 3 was raised as the parties were not ad idem as to the terms on which the cotton was accepted for carriage. The defendants have exhibited the risk-note Ex. 7/2 containing the terms. It is on form A; and therefore my finding on the first part of the issue is against the plaintiffs.

This form was used as the bales were insufficiently packed within the meaning of the rules of the railway. They were fully pressed and iron bound bales, protected on four ends with gunnies, but not so protected towards the ends, rendering the contents liable to be stained and to burst near the ends. This fact is recited in the risk note and it purports to protect the defendants from damage caused by insufficient packing. In this case, as the damage was due to fire in no way connected with insufficient packing, it is of no consequence. On the second part of this issue, I therefore hold that the risk note does not affect the liability of the defendant one way or the other.

Issue 5: At first the parties were not agreed as to the extent of the damage. The defendants had got an ex parte survey of the goods held by Mr. Panas who assessed the damage at Rs. 4,555. The plaintiffs claimed more, but they have now limited their claim to Rs.4,555. This issue is therefore unnecessary and is struck off.

Issue 4 is the principal issue in the case, and raises a mixed question of law and fact.

In the Commentary of Pollock and Mulla on S. 151, Contract Act, under the heading burden of proof, it is said that in cases governed by the provisions of

Ss. 151 and 152 of the Act, the loss or damage of goods entrusted to a bailee is prima facie evidence of negligence, and the onus therefore lies on the bailee to disprove negligence; and that the same rule applies by reason of S. 72, Railways Act, to a railway administration. A number of rulings have been cited in support of this proposition. But, with all respect, I am afraid this proposition is too broadly stated, and cannot be accepted without qualification, in view of the decision of their Lordships of the Privy Council in *Dwarkanath Rai* v. *Rivers Steam Navigation Co. Ltd.* (1), where it is said at p. 738 (of 20 *Bom. L. R.*):

"The weight to be attached to the judgment of the learned Judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it was, in his opinion, incumbent upon the defendant company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This in their Lordships' view is not a correct statement of the law. It is true that under the law of Evidence Act of 1872, S. 106: 'When any fact is especially within the knowledge of any person, the burden of proving that fact is on him'; and it was therefore right that the defendant company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence, of the servants of the defendant company. It may be for the company to lay the materials before the Court; but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve."

If I am able to appreciate properly the dictum of their Lordships, the burden is always on the plaintiff to prove that the damage was caused by negligence of the bailee or his servants. In doing so, it is open to the plaintiff to ask the Court to draw a presumption against the bailee for failure to call material witnesses who had to deal with the goods while in his custody. But when such evidence is led, it is for the Court to decide whether an inference can be drawn in favour of the plaintiff or not of course in fit cases it being open to the Court to draw a presumption of negligence from the fact of loss or damage to the goods, if there is no evidence to explain the circumstances under which the loss or damage was caused. But that is something different from saying that the burden is on the bailee to prove want of negligence. Whether in any particular case the Court will infer negligence must therefore necessarily depend upon the facts of such case. It is in the light of these observations that I propose to examine the evidence. The following facts appear to have been satisfactorily established.

On 3rd July 1928, the bales in question were handed over to the railway staff at Toba Teksing. On the same day, they were put in a covered waggon of the type used for carriage of such goods after it was examined by Ramlal witness 7 and found to be fit and its windows closed. After it was loaded, its doors were properly locked, rivetted and sealed.

On 4th July at 12 noon, the waggon was attached to a goods train and was the fourth waggon from the engine. On the same day at 6 p. m. the train arrived at Khanewal and was examined by the defendant's staff; and everything was found to be in order. The train was then broken up and the waggon shunted to and fro for the purpose of making up a full load of another train intended for Karachi. At 8.30 p. m. the Yard Foreman Gopaldas found smoke coming out of the waggon. He immediately ordered the waggon to be handshunted to the main line below the water column. The usual alarm was given. The Assistant Station Master who arrived on the scene first, had the rivets of the door of the waggon broken. The door was opened and the contents were found to be ablaze. The water column was not intended for extinguishing fires. It was not fitted with a hose pipe and was of no use in extinguishing the fire. The Station Master came up immediately and he had the waggon shunted in front of the fire hose which was at a short distance, and by using it had the fire brought under control. The bales were then taken out of the waggon and removed to the goods shed where they were loaded in two instead of one waggon and brought down to Karachi. This took about four days and the waggon in which the bales were re-loaded took another four days to be railed to Karachi.

On these facts it is abundantly clear that the fire was not due to a lighted match or a cigarette having been thrown into the waggon before it was sealed at

(1) A. I. R. 1917 P. C. 173=46 I. C. 319 (P.C.).

Toba Teksing as no smoke was detected for more than a day after the waggon was sealed. There was no negligence therefore in handling the bales while they were being loaded into the waggon.

It is suggested that the fire was probably due to a live spark from the engine of the train to which the waggon was attached or of a train standing at a crossing getting into the waggon. But that in itself would not be sufficient to prove negligence in view of the fact that the waggon was a covered waggon and of a type used for the carriage of such goods. On certain answers given by the Station Master in cross-examination it was suggested that the live sparks got in, in consequence of a door of the waggon being possibly out of alignment, but there is no evidence that the doors were not in order and no questions were put on that point to Ramlal who examined the waggon before it was loaded.

From the evidence on the record I am therefore unable to infer that the servants of the defendant acted negligently in loading the bales in the waggon in question or in handling the waggon up to the time the fire was noticed.

It was suggested that the damage might have been minimized if the waggon had been placed in front of the fire hose before its door was opened. On this point reliance has been placed on the evidence of Mr. Panas who was of opinion that the damage done to the goods in forty minutes after the door was opened and before the fire hose was applied was equal to damage done during four hours when the doors were closed. But again, as said by their Lordsnips at p. 739 in the case of Dwarkanath referred to above:

> " Good sense and the policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency . . . In a moment of extreme peril and difficulty you are not to expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best."

The defendant had provided for the necessary appliances for extinguishing fire and his servants working at Khanewal station were men with a long service behind them. If on the spur of the moment orders were issued for the waggon being placed below the water column and the door opened there for the purpose of extinguishing the fire instead of the waggon being placed in front of the fire hose, these orders cannot possibly be said to be proof of negligence.

The cases relied upon by the learned pleader for the plaintiffs are all distinguishable.

In *River Steam Navigation Co.* v. *Choutmull* (2), the consignment damaged by fire was jute and as pointed out at p. 3 it was the common case that fire did not arise from spontaneous combustion. The case of cotton is different. There is always a possibility of cotton catching fire by itself owing to its inherent vice and without any external cause whatsoever.

In *Lakhmichand Ramchand* v. *G.I.P. Ry. Co.* (3), the defendants were exonerated from liability quo ad the outbreak of fire, but were held liable as their servants had acted negligently in not sending appliances to extinguish fire in proper time.

In *Hirji Khetsey & Coy.* v. *B. B. and C. I. Ry. Co.* (4), the bales were carried in an open truck covered with two or three sheets which were in no way fireproof.

It need hardly be added that such of the observations in the last two recited cases as are not consistent with the dictum of their Lordships of the Privy Council are not now good law.

I am not therefore able to draw an inference that there was negligence on the part of the defendants' servants or want of such care as was required of them in dealing with the goods even after the fire was detected.

For these reasons I hold on this issue against the plaintiffs.

Issues 6 and 7.—The plaintiffs are not entitled to recover anything, and their suit is therefore dismissed with costs.

K.N./R.K. *Suit dismissed.*

(2) [1898] 26 Cal. 398=26 I.A. 1 (P.C.).
(3) [1913] 37 Bom. 1=14 I.C. 793.
(4) A.I.R. 1914 Bom. 154=39 Bom. 191=25 I.C. 241.

* A. I. R. 1932 Sind 126

ASTON, A. J. C.

Khemchand Mewaram and *others*—Plaintiffs.

v.

Mulchand Assanmal and *another*—Defendants.

Suit No. 210 of 1928, Decided on 3rd March 1932.

*** (a) Partnership— Dissolution— Partnership accounts—Partners cannot be allowed to charge for services rendered by them.**

The general rule is that in the absence of a contract to the contrary, partners in taking the partnership accounts cannot be allowed to charge for services rendered by them, and the fact that services rendered by the partners have been exceedingly unequal is immaterial. In such cases the question of remuneration is considered as left to the honour of the partner.

Where a surviving partner carries on the business for the benefit of the firm, after the death of his partner, he is entitled to remuneration for his trouble. But the circumstances would have to be very exceptional to justify a Court allowing a partner remuneration for his services in winding up the partnership after dissolution, e. g., deliberate or wilful withholding of services by other partners : *Singhal's Law of Partnership in British India, 2nd Edn., p.* 224, *Ref.*; *Case law discussed.* [P 126 C 2]

(b) Partnership— Dissolution—No interest should be charged—Upto date of dissolution however 6 per cent should be allowed.

In the absence of an agreement no interest should be charged after dissolution. Interest should however be allowed at 6 per cent upto date of dissolution : *Barfield* v. *Loughborough* (1872) 8 *Ch. App.* 1, *Foll.* [P 127 C 1]

(c) Partnership — Dissolution— Sums received after dissolution.

Sums received after dissolution must be devoted first to reduction of interest and not of capital : *A. I. R.* 1922 *P. C.* 233 and *Barfield* v. *Loughtourgh* (1872), 8 *Ch. App.* 1, *Ref.* [P 127 C 1]

(d) Partnership — Dissolution— Interest is payable from date of final decree and not before.

In the case of dissolution of a partnership, interest is payable from the date of the final decree and not between the date of dissolution and the date of final decree : *A. I. R.* 1930 *P. C.* 185, *Ref.*; 18 *Cal.* 616, *Dist.* [P 127 C 2]

(e) Partnership— Dissolution — Interest at 6 per cent on partner's overdrawings, upto date of dissolution held proper.

As to the overdrawings of a partner in the case of a dissolution of a partnership interest on overdrawings should be allowed at 6 per cent upto date of dissolution : *A. I. R.* 1930 *P. C.* 185, *Ref.* [P 127 C 2]

Dayaram Lokmandas—for Plaintiffs.

Pahlajsingh B. Advani—for Defendants.

Judgment.—Both plaintiff and defendant have filed objections to the Commissioner's report.

The plaintiff's second objection is, that the learned Commissioner erred in allowing him only 2 per cent commission instead of 5 per cent for his trouble in winding up the partnership and that commission should have been calculated on Rs. 76,370-9-9 instead of on Rupees 62,942. In this connexion defendant has filed an objection in which he contends that no commission should have been allowed at all. The general rule is that in the absence of a contract to the contrary, partners in taking the partnership accounts cannot be allowed to charge for services rendered by them, and the fact that services rendered by the partners have been exceedingly unequal is immaterial : see Singhal on the Law of Partnership in British India, 2nd Edn., p. 224, and the case cited, viz. : *Thornton* v. *Proctor* (1). In such cases the question of remuneration is considered as left to the honour of the partner. In exceptional cases, as for instance where a partner in breach of his duty wilfully left his partner to carry on the business alone, *Gokul Krishna Das* v. *Sashimukhi Dasi* (2) and *Krishnamachariar* v. *Shankar Sah* (3), it was held that an allowance should be made for the fact that services were deliberately withheld : see Singhal, pp. 223 and 224. This principle was approved of by their Lordships of the Privy Council in *Krishnamachariar* v. *Shankar Sah* (3).

On behalf of the defendants reliance is placed on the case of *Tibbits* v. *Phillips* (4) in which it was held that allowance for management during the conduct of a business is not payable for interim management between dissolution and the sale and distribution of assets. Plaintiff on the other hand relies on the observations at p. 452 of Lindley on Partnership that a Court is not precluded from making an allowance after dissolution. There is no doubt that, where a surviving partner carries on the business for the benefit of the firm after the death of his partner, he is entitled to remuneration for his trouble : see *Brown* v. *De Tastet* (5) cited in Singhal p. 225 ; see also the decision of the Privy Council in *Haji Hidayatulla* v. *Mahomed Kamil* (6), but I am of opinion that the circumstances would have to be very exceptional to justify a

(1) 3 R. R. 558.
(2) [1912] 13 I. C. 23.
(3) A. I R. 1921 P. C. 91=57 I. C. 713.
(4) 10 Hare 355.
(5) 23 R. R. 59.
(6) A. I. R. 1924 P. C. 93=81 I. C. 525 (P.C.).

Court allowing a partner remuneration for his services in winding up the partnership after dissolution. In the present case there was no deliberate or wilful withholding of his services by the defendant. The evidence clearly shows and the learned Official Commissioner has held that the defendant helped to recover outstandings and rendered any other help he was asked to give. He recovered debts, sold goods, and gave advice to the plaintiff. In addition to the stock which defendant induced G. V. Rattanchand to take over, defendant sold the goods Ex. 73 to Sabal Nebhan. Plaintiff does not allege any agreement that he was to be given remuneration by way of commission and reasonable grounds for allowing the plaintiff commission for winding up do not appear to me to be established. I accordingly hold that plaintiff is not entitled to any commission.

The defendant's ninth objection relates to the question of interest. He contends in the first place that no interest was to be charged on the first Rs. 5,000 contributed by the plaintiff as capital. This is denied by the plaintiff whose evidence is believed by the learned Commissioner, and Gordhandas was not questioned on this point. I see no reason for coming to a different conclusion from the learned Commissioner on the point. The Commissioner has allowed 6 per cent interest which he held was the usual rate. In his objection defendant contended that 7 annas 6 pies per cent per mensem was the rate, but the defendant admitted before him that 6 per cent was the interest payable and Mr. Dayaram for the plaintiff stated before me that plaintiff was willing to accept interest at 6 per cent. With regard to the period during which interest is to be charged, it was held in *Barfield* v. *Loughborough* (7) that in the absence of an agreement no interest should be charged after dissolution.

Plaintiff has not alleged any agreement that interest was to be charged after dissolution. I am of opinion that interest should be allowed at 6 per cent up to date of dissolution. I have already upheld defendant's objection that the learned Commissioner should not have allowed the plaintiff commission at 2 per cent on Rs. 61,942. Defendant's next objection with regard to interest is that sums received after dissolution must be devoted first to reduction of interest and not of capital. Reliance is placed on *Barfield* v. *Loughborough* (7) and *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao* (8) in which their Lordships of the Privy Council observed that when there is a debt due it is well established that money paid is first applied to reduction of interest. The contention of the defendants appears to me correct. Defendant also challenges the correctness of Rs. 6,749-15-3 awarded for interest. This Court has no means of checking the interest figure, or of ascertaining how it has been arrived at by the learned Official Commissioner. The objection is allowed.

Defendant lastly contends in his ninth objection that interest is payable from the date of the final decree and not between the date of dissolution and the date of final decree. Plaintiff relies on the decision of the Privy Council in *Mutia Chetty* v. *Subramania Chetty* (9), but there the question of interest was not specifically raised. The latest ruling of the Privy Council is *Suleman* v. *Abdul Latif* (10). I uphold the defendant's contention on this point and hold that interest is to be payable from the date of the final decree.

The case of *Mutia Chetty* v. *Subramania Chetty* (9) is also relied on by defendant in support of his tenth objection that interest should not be charged on the overdrawings of a partner. It was pointed out by their Lordships (see p. 333) that ordinarily a partner is not charged with interest on overdrawings, but the learned Official Commissioner points out that interest at 6 per cent was admittedly allowed in previous potamels on overdrawings. I therefore allow interest on overdrawings at 6 per cent to date of dissolution.

B.V./R.K. *Order accordingly.*

(7) [1882] 8 Ch. A. 1=42 L. J. Ch. 179=27 L. T. 499=21 W. R. 86.

(8) A. I. R. 1922 P. C. 233=61 I. C. 31=48 I. A. 150=44 Mad. 570 (P.C.).

(9) [1891] 18 Cal. 616 (P.C.).

(10) A. I. R. 1930 P. C. 185=124 I. C. 891=57 I. A. 245=24 S. L. R. 328 (P.C.).

* A. I. R. 1932 Sind 128

FERRERS, J. C. & RUPCHAND, A. J. C.

M. R. Desa—Applicant.

v.

Messrs. Girdharilal Ghanshamdas — Opposite Parties.

Revision Application No. 51 of 1929, Decided on 16th March 1932.

* (a) **Transfer of Property Act (1882), S. 130—Power given by submission clause in contract cannot be assigned— Assignee cannot enforce submission clause on strength of assignment in his favour—Arbitration, Clause in contract.**

Power given by a submission clause in a contract, being a personal covenant, cannot be validly transferred. Where a contract therefore contains a submission clause and one of the parties thereto assigns the subject-matter of the contract, the assignee cannot enforce the submission clause on the strength of the assignment of the subject-matter of the contract in his favour, though, no doubt, he may be compelled, by a stay of proceedings instituted by him, to go to arbitration : *Cottage Club Estates* v. *Woodside Estate Co*, (*Amersham*), (1928) 2 *K. B.* 423, *Foll.*; *A. I. R.* 1926 *Sind* 209, *Dist.* [P 130 C 1]

(b) Civil P. C (1908), S. 115 — Court adjudicating on validity of reference—Decision is open to revision.

In so far as the Court is required to adjudicate on the validity of the reference, its decision is not final and is open to revision : *A. I. R.* 1927 *Sind* 239 and *A. I. R.* 1930 *Sind* 170, *Rel. on.* [P 131 C 1]

Srikishendas H. Lulla — for Applicant.

Asudomal Rewachand — for Opposite Parties.

Rupchand, A. J. C.—The facts giving rise to this revision application are not in dispute. The applicant M. R. Desa had dealings with the firm of Dhanasingh Sundersingh in respect of certain contracts made by him through the latter firm on the pakka adat system. Before these contracts were entered into, a written agreement was made between the parties containing the terms of the agency. That agreement inter alia provides :

"Any dispute of whatsover nature arising out of and touching the commission agency business shall, at your option, be referred to the arbitration of two Indian merchants, members of the Karachi Indian Merchants Association in accordance with the provisions of the Arbitration Act 9 of 1899 as subsequently amended. Within seven days of the notice calling upon us to nominate an umpire, we shall appoint one on our behalf. If we fail to do so within seven days, your arbitrator shall act as sole arbitrator. . . . . "

On the dealings between the parties a sum of Rs. 66,755-12-0 was said to be due to Dhanasingh Sundersingh. In October 1924, the firm of Dhanasigh Sundersingh entered into a composition with its creditors and appointed the opponents as trustees. The composition deed inter alia reads :

"(1) That the debtors, the firm of Dhanasingh Sundersingh do hereby transfer, convey and assign absolutely to the trustees all their assets and property including outstandings. A list of the outstandings is hereto attached."

* * * *

"(10). That the trustees are empowered to bring and defend suits, compromise or refer them to arbitration and generally to act in such manner they consider best in the interests of the estate. It shall be solely in the discretion of the trustees not to take legal steps to recover such outstandings as they deem to be bad or doubtful and to compromise or refer to arbitration any outstandings they think fit "

In pursuance of the powers transferred to them under the composition deed and on the strength of the submission clause contained in the agreement of agency referred to above, the trustees called upon the applicant to appoint an arbitrator. He failed to comply with that notice and accordingly the person nominated by the opponents as the arbitrator was called upon to act as the sole arbitrator in the matter and the arbitrator passed an award for the full amount claimed by the opponents and filed it in Court. The applicant then applied to the Court to take the award off the file on several grounds. But he failed to convince the learned Additional Judicial Commissioner Mr. A. H. S. Aston, that there was substance in any of them and his application was accordingly dismissed. He has now come to us in revision.

All the grounds taken in the Court of first instance have been urged before us ; but it would be sufficient to deal with only one of them which goes to the very root of the case. It is urged that the opponents had no power to compel a reference to arbitration because, in the first place, the power contained in the submission clause was a personal covenant which was not assignable, and, in the next place, it had, as a matter of fact, not been assigned by the firm of Dhanasingh Sundersingh to the opponents. In the trial Court reliance was placed upon the case of *Cottage Club Estates* v. *Woodside Estates Co.* (*Amersham*) (1), as an authority in support of this contention, but it did not find favour with the learned Additional Judicial Commissioner.

(1) [1928] 2 K. B. 463=97 L. J. K. B. 72=139 L.T. 353=44 T.L.R. 20=33 Com. Cas. 97.

In that case, there was a contract between builders and owners for the erection of houses which contained an arbitration clause. The builders executed a mortgage in favour of their bankers by which they assigned "all moneys due or to become due under the contract" as security for an overdraft, and due notice was given of this assignment to the owners. On the completion of the houses, disputes arose as to the amount payable to the builders ; and upon an arbitration between the builders and owners, the owners contended that the builders could not maintain their claim, because under the assignment and notice their rights had passed to the bank by virtue of the Law of Property Act 1925, S. 136, sub-S. 1, which corresponds to a certain extent to the provision of S. 130, T. P. Act. The arbitrator made an award that the builders were entitled to recover a certain sum of money from the owners, but as it was urged before him that the builders having assigned their interest in the money could not recover, he made an alternative award that if the Court should hold in favour of the owners, then the builders were not entitled to recover anything.

Wright, J., said that the point raised before him appeared to be free from authority, and held that the arbitration clause being a personal covenant, could not be transferred. He further pointed out that, as a matter of fact, the power contained therein had not been transferred by the builders, and that therefore although the original clause remained in full force and the builders could go to arbitration, the arbitrator was bound not merely to consider the terms of the contract within the limits of the document, but to consider the application and enforcement of these terms having regard to the legal position which the parties had created and that in view of the fact that the builders by their own act had divested themselves of their right to claim the debt, the arbitrator was bound to give effect to that legal consideration and could not pass the award in their favour.

If therefore a submission contains a personal covenant which may not be assigned, it would follow that the firm of Dhanasing Sunder Singh could not transfer the power given to them of enforcing the submission to trustees appointed by them. Moreover, as in the case referred to above, the composition deed does not purport to confer on the trustees the right to enforce the submission clause in question. All that it purports to transfer to the trustees is the assets and property of the debtors including their outstandings. It was urged that under Cl. 10 the trustees were empowered to compromise or refer to arbitration the outstandings But that does not mean that they are empowered to compel arbitration in respect of such outstandings in pursuance of a submission clause contained in the contract of agency which had resulted in a constituent being found indebted to the agents in respect of dealings entered into in pursuance of the contract of agency. Cl. 10 is a usual clause inserted in composition deeds empowering trustees to settle by private treaty claims which have vested in them without necessarily going to a Court of law. The above case is referred to with approval in a footnote to para 1074 of Halsbury's Laws of England, Vol. 1, new edition.

The learned Additional Judicial Commissioner has expressed no opinion one way or the other with regard to the points on which the decision in that case turned, but he has based his judgment on the provisions of S. 4, English Arbitration Act and S. 19, Indian Arbitration Act, and has said that as the provisions of these sections contemplate the enforcement of a submission not only against the parties but against persons claiming under parties to the submission, it was competent for the trustees who were claiming under the firm of Messrs. Dhanasing Sunder Singh, one of the parties to the submission, to enforce the submission clause against the applicant.

With all due respect to the learned Additional Judicial Commissioner, this argument is not convincing. S. 19 deals with an application for stay of a suit brought by one of the parties to the submission or by a person claiming under such party. In the latter case, it is no doubt open to the other party to apply for stay of the suit; and the Court will in fit cases grant a stay. The reason of this rule is obvious. A party cannot back out of his agreement to submit disputes to arbitration or avoid submitting disputes to arbitration by the simple process of transferring his right under the

contract containing the submission clause to another. Nor is it open to the transferee to enforce the claim on the strength of the contract containing the submission clause and at the same time refuse to be bound by that clause which was an essential term of the contract. If the transferee wishes to enforce the contract by a suit he stands in the same shoes as those of the transferor and is subject to the same equities as the transferor. He cannot be permitted to blow hot and cold, to enforce one part of the contract and to repudiate another. That being so, he cannot avoid going to arbitration if so required. But the position is quite different where the transferee claims the right of enforcing arbitration. In that case he is met by the plea that that right being a personal right could not be assigned in law; and there is, so far as I am aware, nothing to prevent the other side to take advantage of this plea and to refuse to go to arbitration at the instance of the transferor.

The transferor has to thank himself for the consequence of his own act in transferring his claim under the contract which he is permitted to do under the law, and thus rendering the submission clause practically of no use either to himself or to his transferee. If he wishes to transfer the right of enforcing the submission clause, he may do so by obtaining the consent of the other party to the contract but not otherwise; and there is nothing either in S. 136, English Property Act or in S. 130, T. P. Act, in force in India which can be of help to him or to his transferee in that behalf.

Paragraph 1074 of Halsbury, Vol. 1 is as follows:

"The submission is binding on the parties thereto, and where the subject-matter of the reference is capable of assignment, the assignee of a party to the submission would be likewise bound."

If this passage is read in the light of the observations made above, it affords no difficulty. The assignee may no doubt be compelled by a stay of proceedings instituted by him to go to arbitration, but that does not mean that it is open to him to enforce the submission clause on the strength of the assignment of the subject-matter of the contract in his favour.

I am therefore of opinion, that in the first place, it was not competent for the firm of Dhanasing Sundersingh to transfer their powers of enforcing the submission clause contained in the contract of agency, and, in the next place, that firm has not purported to transfer to the opponents that power. On both these grounds the reference to arbitration which was made by the opponents in exercise of their supposed powers was without jurisdiction and the award based thereon was likewise without jurisdiction and cannot therefore be maintained.

Before leaving this part of the case, I wish to make it clear that the point now before us arises out of a transfer of the subject-matter of a contract by an act of one of the parties to the contract, and whatever I have said above refers to the effect of such a transfer and not to the effect of a transfer by operation of law. I have already discussed the effect of a transfer by operation of law of property of a bankrupt in *Official Receiver* v. *Karsondas* (2). There are other cases of transfer by operation of law, e. g., by death, and the effect of such transfers on the submission clause can only be considered when there is an occasion for it.

In the end it was faintly suggested that as the learned Additional Judicial Commissioner had jurisdiction to go into the questions whether the reference was duly authorized or not, we have no jurisdiction to interfere in revision with that finding, although it be manifestly wrong. Reliance was placed on the dictum of their Lordships of the Privy Council in *Ghulam Jilani* v. *Muhammad Hussan* (3), observations at p. 60 (*of* 29 *I. A.*) where it is said:

"That award having been duly made and not having been corrected or modified, and the application to set it aside having been refused, the Subordinate Judge had no option but to pronounce a decree in accordance with it. The Subordinate Judge does not appear to have exercised a jurisdiction not vested in him by law or to have failed to exercise the jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with material irregularity. He appears to have followed strictly the course prescribed by the Code.

"Inasmuch as their Lordships hold that the application in revision was incompetent, it would be a work of supererogation to discuss the various objections raised by the appellants in the High Court."

(2) A. I. R. 1926 Sind 209 = 95 I. C. 750 = 19 S. L. R 24.
(3) [1901] 29 Cal. 167=29 I. A. 51=8 Sar. 154 (P.C.).

These observations were considered in the case of *Bhikalal* v. *Acharatlal* (4), where it was held that these observations were not intended to deprive the Court of revision of interfering with findings of a trial Court in arbitration cases where such findings fall within the purview of S. 115 and the present case comes clearly within that section. It has been pointed out that the provisions of the Arbitration Act are in several respects faulty and oftentimes cause great inconvenience, and the desirability of amending the provisions of the Arbitration Act, at an early date has been suggested several times: see *Manilal Motilal* v. *Gokal Das Raoji* (5) at p. 265 (*of* 45 *Bom*), but nothing has been done so far.

One of the points of difference between the English and the Indian Acts is that under the English Act an award filed in Court may be enforced as a decree only after leave of the Court is obtained. No such leave is required under the Indian Act. The result is that where an award is alleged to have been improperly procured, the Court has not merely to refuse leave to enforce the award and refer the parties to a regular suit, but it must go into the question and finally decide the matter. This the Court is required to do when the person against whom an award is made moves the Court to take the award off its file, and unless he does that, the award is liable to be enforced against him as a decree except in those rare cases where the award is on the face of it unenforceable in law and the Court declines it suo motu to enforce. In dealing with an application to take an award off the file, the Court is oftentimes required to deal with points which affect its own jurisdiction and not merely with points admittedly within its jurisdiction. Where points arise which affect the jurisdiction of the Court itself, the Court may no doubt adjudicate upon them but its decision on those points is not final and is subject to interference in revision : see *Hassomal* v. *Kodumal* (6) and *Dattaram Munshi* v. *Harjimal & Sons* (7).

If there was no valid reference the Court had no jurisdiction to file the reference and the award based thereon. In so far as the Court was required to adjudicate on the validity of the reference, its decision is not final and is open to revision. There is therefore no substance in this plea. For these reasons, we hold that the reference and the award were improperly procured by the opponents in so far as they had no power to enforce the submission clause, and we accordingly order the award to be taken off the file. In the circumstances of this case, and in view of the fact that the point in issue was not covered by any Indian decision on the point, we think each party should bear his own costs throughout.

S.N./R.K. *Application allowed.*

(4) A. I. R. 1925 Bom. 341 = 87 I. C. 910=49 Bom. 535.
(5) A. I. R. 1921 Bom. 310 = 59 I. C. 53 = 45 Bom. 245.
(6) A. I. R. 1927 Sind 239=104 I. C. 342 = 22 S. L. R. 135.
(7) A. I. R. 1930 Sind 170 = 121 I. C. 161=24 S. L. R. 145.

✻ A. I. R. 1932 Sind 131

MILNE, J. C. AND RUPCHAND, A. J. C.

(*Bhai*) *Partab Dialdas* and *others*— Appellants.

v.

The Hyderabad Municipality — Respondents.

First Appeal No. 61 of 1928, Decided on 15th October 1931.

(a) Tort—Negligence — Damages — Statutory powers — Corporation is not liable in damages unless these powers are negligently exercised.

A corporation in the exercise of powers derived from statutes is not liable in damages unless these powers are negligently exercised. The same principle applies even where the powers are permissive. [P 136 C 1]

✻ (b) Tort—Negligence—Burden of proof is on plaintiff — He must prove facts inconsistent with due diligence.

The ordinary rule applicable to a suit based on negligence not arising out of contract is that the burden is always on the plaintiff to prove that he suffered the loss complained of in consequence of the negligence of the defendant. In order to discharge the burden he must prove facts inconsistent with due diligence : where evidence adduced by him is equally consistent with the existence or non-existence of negligence, he is out of Court. [P 132 C 2]

P owned a plot of land with a building thereon. To the north of the building there was a small narrow municipal street in which the Municipality had in 1877-80 laid its main pipe for supply of water to the residents of the locality. The pipe was at a depth of 8 or 9 feet below the surface of the street. There was a leakage from the pipe and owing to the pipe being at such a long distance from the surface the water did not come up to the surface but collected under *P's* building and percolated in all directions. Damage was caused to *P's* building and he sued, the Municipality in damages. Evidence showed that the damage was caused by a blow out of one of the lead joints at the connexions of two

pipes and that the displacement was due probably to settlement of the ground of a lane above the pipes. But no further attempt was made to give evidence of : (a) the condition of the surrounding surface of the street at the time of the accident, (b) the ordinary life of such pipes and joints, and (c) the condition in which the pipe line and its joint were when it was removed after the accident.

Held : that the burden of proof was on *P* to establish that the leakage was due to the negligence of the defendant, and as there was no evidence to prove definitely the cause of the leakage, the mere fact that the leakage took place under the circumstances which were consistent both with the existence and non-existence of negligence would be insufficient to shift the onus on the defendant to establish the real cause of such leakage : 1 *I. A.* 364 (*P.C.*) ; *Blyth* v. *Birmingham* 25 *L. J.* 212 ; *Green* v. *Chelsea Water Works* 70 *L. T.* 547 and 35 *Bom.* 492, *Rel on.* ; *Kearney* v. *London, Brighton* and *South Coast Ry. Co* (1870) 5 *Q B.* 411 ; *Piggot* v. *Eastern County Ry. Co.* (1846) 71 *R. R.* 327 ; 24 *Cal.* 786 ; *Scott* v. *London Dock Co.* 140 *R. R.* 627 and *Wing* v. *London Gen Omnibus Co.* (1909) 2 *K. B.* 652, *Dist.* ; *Case law referred.*

[P 134 C 2, P 135 C 1]

Khanchand Gopaldas—for Appellants.

Tahilram Maniram—for Respondents.

Rupchand, A. J. C.—This appeal arises out of a suit instituted by the plaintiffs-appellants for recovery of damages caused to their building. The following facts are either admitted or have been proved by reliable evidence :

(a) That the damage was caused by water which had leaked from a water main of the defendants ; (b) that this main was laid prior to the year 1880, that is to say, more than 48 years before the date of the accident ; (c) that it had been laid about six feet below the level of the street and that therefore the leakage was not detected as early as it might otherwise have been ; (d) that the leakage was due to a lead joint between two pipes having given way ; (e) that shortly before the present leakage there had been leakage of water from the same water main, but at a different place which was due to the bursting of a pipe ; and (f) that six months after the leakage in suit the defendants renewed the whole pipe line by another.

There is no reliable evidence on the record to prove affirmatively the cause of the lead joint having given way. On this point all that we have is the evidence of the Engineer of the defendants who was examined on commission, which is contained in the following three questions, Nos. 10, 12 and 13, and their answers :

Q. After the ground was dug and the pipe exposed, what did you see ?

A. I found that a lead joint on the Sonara lane main had blown.

Q. What was the condition of the lead joint ?

A. The lead joint had been displaced. This displacement was due probably to settlement of the ground of the Sonara lane above the main pipe.

Q. What did you do when you found the lead joint blown out and the water leakage ?

A. I pushed the same joint back and chaulked it in 15 minutes.

No attempt appears to have been made by either party to give evidence of : (a) the coudition of the surrounding surface of the street at the time of the accident, (b) the ordinary life of such pipes and joints, and (c) the condition in which the pipe line and its joints were when it was removed. There is therefore no reliable evidence to prove definitely the cause of the leakage ; and the whole case depends on the question whether the onus of proving that the leakage was due to negligence or such want of care as was required of the defendants to maintain their water-works in efficient condition, and if so, has that onus been duly discharged ?

Now, the ordinary rule applicable to a suit based on negligence not arising out of a contract is, that the burden is always on the plaintiff to prove that he suffered the loss complained of in consequence of the negligence of the defendant. In order to discharge that burden he must prove facts inconsistent with due diligence ; where evidence adduced by him is equally consis tent with the existence or non-existence of negligence he is out of Court : *Wakelin* v. *L. & S. W. Ry.* (1), *Bird* v. *G. N. Roy Co.* (2), *Czech* v. *G. S. N. & Co.* (3), *Smith* v. *Midland Ry. Co.* (4). Where however negligence on the part of the defendant, which might have caused the injury is established, it is sufficient to prove facts which show a greater likelihood that the injury was due to the defendant's negligence than otherwise: *Fenna* v. *Clare Co* (5), *Smith* v. *Midland Ry. Co.* (3). In the present case, there is no evidence to prove that the defendants were as a matter of fact negligent

(1) [1887] 12 A. C. 41=56 L. J. Q B. 229=55 L. T. 709=35 W. R. 141=51 J. P. 404.
(2) [1858] 28 L. J. Ex. 3.
(3) [1868] 37 L J. C. P. 3=3 C. P. 14=17 L. T. 246=16 W. R. 130.
(4) [1887] 57 L. T. 813=52 J. P. 262.
(5) [1895] 1 Q. B. 199=64 L. J. Q. B. 238=15 R. 220.

and therefore, if the general rule of proof of negligence applies, the mere fact that the leakage took place under the circumstances which are consistent both with the existence and non-existence of negligence would be insufficient to shift the onus on the defendant to establish the real cause of such leakage.

The general rule stated above, is no doubt subject to several exceptions: one of such exceptions is that established by the leading case of *Rylands* v. *Fletcher* (6). In that case the plaintiffs, the owners of a mine, sued for damages, the defendants, owners of some adjacent land who had constructed a reservoir on their own land, for the purpose of working a mill, from which reservoir the water flowed through some disused mining works into the plaintiffs' mine and flooded it. It was held by the Exchequer Chamber and the House of Lords that the plaintiffs were entitled to damages against the defendants.

In the Exchequer Chamber Blackburn, J., said:

"We think that the true rule of law is that the person, who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of the escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God, but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes, and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there) harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on to his neighbours, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water or filth or stenches."

(6) [1869] 3 H. L. 330=37 L. J. Ex. 161=19 L. T. 220.

These observations received the approval of the Lord Chancellor (Lord Cairns) and Lord Cranworth in the House of Lords. In support of this principle Lord Cranworth further said:

"If a person brings and accumulates on his land anything which, if it should escape may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been and whatever precautions he may have taken to prevent the damage . . . and the doctrine is founded in good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uteri tuo ut alienum non laedas.*"

But as pointed out by their Lordships of the Privy Council in the *Madras Ry. Co.* v. *Zamindar of Carvetnagaram* (7) the principle laid down in the above case that a man, in exercising a right which belongs to him may be liable, without negligence, for injury done to another person has been held to be inapplicable to rights conferred by statute.

An attempt has been made to distinguish the Privy Council case by arguing that the power conferred by the Bombay District Municipal Act on the defendants to maintain water-works was permissive and not obligatory. But the observations of their Lordships of the Privy Council equally apply to permissive powers. For as observed by their Lordships, the legislature may be presumed to have conferred special powers on persons or companies not without being satisfied that the exercise of them would be for the benefit of the public as well as of the parties. Reference was made by their Lordships to the case of *Blyth* v. *Birmingham Water Works Co.* (8) which was a case of permissive powers.

In several reported cases both Indian and English, the rule in *Rylands* v. *Fletcher* (6) has not been applied where damage has been caused by the works carried out and maintained by defendants in exercise of permissive powers vested in them by statute. It will be sufficient to refer to the case of *Green* v. *Chelsea Water Works* (9) a case more or less similar to the present. In that case damage was caused to the plaintiff's property by a burst in a main belonging to the water works company and in dealing with the

(7) [1874] 1 I. A. 364=22 W. R. 279=14 Beng. L. R. 209=3 Sar. 391 (P. C.).
(8) [1856] 25 L. J. Ex. 212=11 Ex. 781=2 Jur. (n. s.) 333=4 W. R. 294.
(9) [1894] 70 L. T. 547.

applicability of the rule laid down in *Rylands* v. *Fletcher* (6) Lindley, L. J., has observed:

"That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it was extended so far as straight logic might require it would be a very oppressive decision. Here the defendant company were only doing what they were authorized to do by Act, and, as they were not guilty of negligence, they are not liable."

It was no doubt open to the plaintiffs to rely upon the presumption of law that the mischief complained of should be deemed to have been caused by the defendant's act or omission when the cause of such mischief was apparently under their control or the control of their servants. This rule was declared by the Exchequer Chamber in 1865 in the case of *Scott* v. *London Dock Co.* (10) in the following terms:

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care."

Before the above rule can be applied both conditions laid down above, namely, (1) the thing should be under the management of the defendant and (2) that in the ordinary course of events the accident should not have happened if the defendant had taken proper care must be satisfied: *Wing* v. *London General Omnibus Co.* (11).

The present case stands on a different footing than that of *Chout Mal* v. *The River Steam Navigation Co.* (12) where both these conditions may be said to have been fulfilled. In that case, the plaintiff's goods which were destroyed by fire were in the possession and control of the defendant company and it was held that the occurrence of the fire under the circumstances disclosed in that case was in itself evidence of negligence. It is true that the water mains of the defendants are under their control and management but the same thing does not apply to the soil where they are laid. The buildings on either side of the street are subject to constant changes. It is in evidence that the plaintiff's own building had undergone several changes shortly before the accident. The soil of the street itself is often removed to permit of water connexion being given to adjoining owners and is subject to heavy traffic of men and materials passing over it. These factors can hardly be said to be under the control of the defendants. No negligence can fairly be attributed to the defendants in laying the water mains. The water mains had existed there for a period of 48 years, and the only proof of leakage is that of the accident in suit and one more leakage shortly before this accident which was due to a burst in a pipe according to the Chief Officer, and which was due to a leakage in a private water connexion according to the Engineer. It may therefore be fairly presumed that the pipes had been properly joined together when they were laid. That being so the possibility of the joint giving way might be due either to its being worn out by use for such a long period or by surface of the street having subsided or by both. Had there been evidence as to the life of a lead joint, a good deal might have been said in favour of one or the other of these three possible theories but that evidence is unfortunately wanting. The only complaint alleged to have been made by the plaintiffs to the defendants before the accident was not that of the pipe line being old but of its being imbedded below a certain depth the idea being that in the event of leakage the water was not likely to come up to the surface of the street but to flow into foundations of adjoining properties causing damage.

Assuming that this complaint was made, it is by itself no proof of the pipe line being worn out so as to raise the presumption of want of due care in keeping the pipe line in good order and condition. It is, at most evidence of the fact that slightly more damage was caused to the plaintiffs in consequence of the leakage not being discovered earlier. This is one of those difficult cases on the border line where on account of want of evidence the Court cannot help a plaintiff although it may sympathize with him. After all he and his legal advisers are to blame for not placing such evidence on the record as was in their power. It was within their competence to lead expert evidence and to question the Muni-

(10) 140 R. R. 627.
(11) [1909] 2 K. B. 652=78 L. J. K. B. 1063=101 L. T. 411=73 J. P. 429=7 L. G. R. 1093=53 S. J. 713=25 T. L. R. 729.
(12) [1897] 24 Cal 786=1 C. W. N. 500.

cipal expert witness on such points as might have helped to clear the issue, and I am not prepared to hold that this is a case in which it can be said that no further evidence could possibly have been adduced on the point.— It is rather unfortunate that the plaintiffs have suffered a loss for which they can obtain no redress for failure on their part to discharge the onus which was placed on them. Their suit must therefore, fail but taking into consideration the circumstances of this case and the fact that the plaintiffs had a just cause to come to Court, we think that each party should bear his own costs throughout.

Milne, J. C.—This is an appeal against the decision of the learned First Class Sub-Judge, Hyderabad, in Suit No. 35 of 1925 brought by the plaintiffs-appellants against the Hyderabad Municipality. The plaintiffs own a plot of land with a building thereon situated in the main Bazar, Hyderabad. To the north of the building there is a small narrow municipal street in which the Municipality had in 1877-1880 laid its main pipe for supply of water to the residents of the locality. The pipe was at a depth of about 8 or 9 feet below the surface of the street. Some time before the accident in question in the present suit this pipe had burst and caused some damage to the plaintiff's building. The Municipality repaired the pipe but relaid it in the same position about nine feet below the surface of the street. About the end of December 1924 there was leakage from the pipe and owing to the pipe being at such a long distance from the surface the water did not come up to the surface but collected under the plaintiff's building and percolated in all directions. Damage was caused to the plaintiff's building to the extent of over Rs. 9,000 odd.

It is alleged that the Municipality having laid the pipe at a depth of nine feet was guilty of misfeasance and gross negligence and has committed a breach of its ordinary statutory duty and was liable in damages to the plaintiff. The Municipality in their written statement said that the accident was due to the fact that the lead joint of the water pipe had blown out; therefore there was leakage; they stated there was no misfeasance or negligence on their part; the leakage was due to pure accident for which the Municipality could not be held responsible. The learned Sub-Judge held that the defendants were not guilty of misfeasance or breach of their ordinary and statutory duties, that the leakage in question was purely accidental and that the plaintiffs were not entitled to damages. On appeal the appellants have in the first place contended that the Municipality is a mere licensee and is therefore liable as an individual ; for this the appellants rely on Halsbury Vol. 8, para. 856:

"If the statute is permissive only in its terms, the corporation will be liable, even in the absence of negligence in the same way as an individual."

Also on Halsbury Vol. 21, para. 879, and on the case of *Rama Rao* v. *Maratha Sequeira* (13). It has however been clearly laid dawn by their Lordships of the Privy Council in the case of the *Madras Railway Co.* v. *The Zamindar of Carvetinagaram* (7) that the principle that a man in exercising a right may be liable, without negligence, for injury done to another person is inapplicable to rights conferred by statutes. Their Lordships in particular relied on the case of *Vaughan* v. *The Tariff Vale Railway Co.* (14) and on *Blyth* v. *The Birmingham Water Works Co.* (8). The case of *Fletcher* v. *Rylands* (6) was distinguished on the ground that the defendants had no power to do away with the tanks from the bursting of which the damage was alleged to have been caused but were charged by reason of their tenure with the duty of preserving and repairing them. The appellants rely on *Charing Cross, West End and City Electricity Supply Co.* v. *London Hydraulic Power Co.* (15). But in that case the defendants had been definitely deprived of the immunity which they had enjoyed previously of not being liable for damage done by the bursting of the main even in the absence of negligence. In *Municipal Committee, Lahore* v. *Nand Lal* (16) it was held that where leakage from a Municipal water pipe cracks a house and the cause of the bursting of the pipe is beyond the control of the committee, the committee will not be held to have been negligent in respect of the actual

(13) [1919] 42 Mad. 796=52 I. C. 921.
(14) 5 H. & N. 679=29 L. J. Ex. 247.
(15) [1913] 3 K. B. 442 = 83 L. J. K. B. 116= 109 L. T. 635=77 J. P. 378 = 29 T. L. R. 649=11 L. G. R. 1013.
(16) [1913] 88 P. R. 1913=18 I. C. 816.

breaking of the pipe. If the damage to a house is chiefly the result of negligence on the part of the servants of the committee in failing to take proper action when damage is brought to its notice, the committee will be responsible.

There is sufficient English and Indian authority then for holding that a corporation in the exercise of powers derived from statute is not liable in damages unless these powers are negligently exercised. The question then arises on whom the burden of proof will lie. In the case of *The Municipality, Hubli* v. *Ralli Brothers* (17) the suit had been brought against the Municipality to recover damages on the ground of injury caused by defendants in carrying out reclamation works; it was held that the onus of proof of negligence lay on the plaintiffs and if neglect in the exercise of their statutory powers and duties was not brought home to the Municipality, a suit against them must fail as being unsustainable in law. Tha contrary view has been suggested by Pollock in his Law of Torts, Edn. 13, p. 512, relying on the case of *Piggot* v. *Eastern County Railway Co.* (18). In that case it was held that the damage was causel by the escape of sparks from one of the defendant's engines: there was no proof that precautions were taken to avoid such a mischance. The fact of the buildings being fired by sparks established a prima facie case of negligence which called upon defendants to show that they had adopted some precautions to guard against such accidents. But even here a prima facie case of negligence was required. In the present case the plaintiffs were in a position to know what had been done by the Municipality to keep the pipe in proper repair as it was close to their house : and to prove what steps if any were reasonably required to keep the pipe in proper repair and whether the Municipality had taken them. I would hold that the onus is on plaintiffs and that they have not been able to show any prima facie case of negligence.

The appellants further contend that even on the assumption that the burden of proof is on them, they have discharged it : *res ipsa loquitur*. The strongest case in their favour quoted by them is *Kearney* v. *The London Brighton and South Coast Railway Co.* (19). In that case the plaintiff was injured by a brick falling from the top of one of the pilasters on which one of the girders rested. It was held that, the defendant being bound to use due care in keeping the bridge in proper repair so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was prima facie evidence from which the jury might infer negligence in the defendants. But even in that case the property which they were bound to repair was much more under the eye of the Railway Co. In the present case the pipe was at a depth of eight or nine feet under the ground. No evidence has been led to show that it was usual or necessary for the Municipality to dig up the mains at stated intervals for the purpose of ascertaining the condition of the pipes. There is nothing to show that the pipe was in bad condition. The evidence of the Municipal Engineer is that the damage was caused by a blow out of one of the lead joints at the connexions of two pipes. He was of opinion that this displacement was due probably to settlement of the ground of Sonara lane above the pipe.

The appellants contend that there have been previous accidents to the pipe which should have put the defendants on the alert. One of the plaintiffs (Ex. 46) states that the main burst in 1923, his property was damaged then. He did not see the pipe which had burst; he saw the ground excavated. Mr. Richards the Municipal Engineer states that to the best of his recollection the damage then caused was due to a flaw in a private connexion. Ex. 86 also gives evidence of the previous burst but he does not know the reason for the leakage. Even if the previous accident had been due to a burst in the pipe, the evidence as regards the accident in question was that it was caused by a blow out at the joint. The road was dug up on these two occasions but there is no evidence that the pipe was not in good condition. There is nothing to show that the accident would not have happened had proper care been taken : cf. *Scott* v. *London and St. Katherine Docks Co.* (10). There is nothing to show that the pipe was known or ought to have been known to be in an

(17) [1911] 35 Bom. 492=12 I. C. 884.
(18) [1846] 71 R. R. 327.
(19) [1870] 5 Q. B. 411.

insecure state : *Withers* v. *The North Kent Railway Co.* (20). I hold therefore that there is no presumption of negligence and that there is no proof of any negligence on the part of the defendants. I concur therefore in the order proposed by my learned brother.

P.N./R.K. *Suit dismissed.*

(20) 114 R. R. 114.

A. I. R. 1932 Sind 137

MILNE, J. C. AND RUPCHAND, A. J. C.

Karamalishah—Appellant.

v.

Hussainalishah and *others* —Respondents.

First Appeals Nos. 53 and 55 of 1927, Decided on 25th September 1931, against decrees passed by First Class, Sub-Judge, Sukkur.

(a) Mahomedan Law—Marriage—Presumption—Issues by woman who is proved to be wife of another cannot be presumed to be legitimate—They have to establish divorce of their mother by first husband—Nature of evidence leading to presumption of marriage from long cohabitation with habits and reputation considered.

Legitimacy of marriage can be established either by direct evidence of a legal marriage between the father and mother or by indirect evidence of circumstances from which the existence of a valid marriage can be presumed. Where certain children are by a woman who is proved to be the wife of another there is no presumption in favour of their legitimacy. Again merely because a person has been living with the wife of another a presumption does not arise that she was divorced by her first husband. The issues from such connexion claiming to be legitimate have to prove that there was divorce by the first husband. Further there must be some definite evidence before a presumption of marriage from long cohabitation with habit and repute can arise. First of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again the habit and repute which alone is effective is habit and repute of that particular status which in the country in question is lawful marriage : 35 *Cal.* 232 (*P.C.*) ; *A. I. R.* 1929 *P. C.* 212 and 10 *Mad.* 218, *Rel. on.* ; *A. I. R.* 1921 *Lah.* 20, *Appl.* [P 138 C 1, 2]

(b) Limitation Act (1908), Art. 91—Suit merely disputing legal effect of award and not seeking to cancel or to set it aside does not fall within Art. 91.

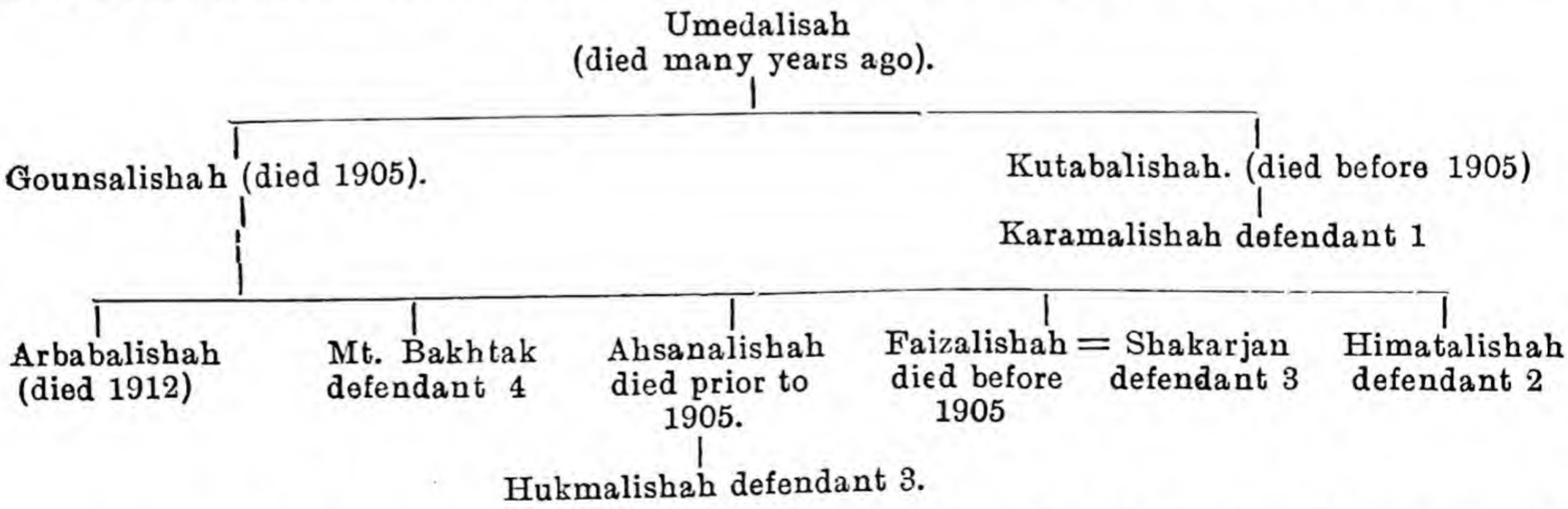
Where the plaintiff merely seeks to dispute the legal effect of the particular clause in the award but does not seek to cancel or set aside the award, the suit does not come within Art. 91. The arbitrator has no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Mahomedan law in the absence of a special custom prevailing in the family. He has no power to make property which is divisable by law, indivisible for ever. Whatever may be the legal effect of such a clause in the award on the party to the reference and the award, the arbitrator has no power to pass an award so as to affect the heirs of the parties : 23 *All.* 383 (*P.C.*), *Foll.* [P 142 C 2]

Asudamal Rewachand and *Dipchand Chandumal*—for Appellant.

Tahilram Maniram —for Respondents.

Rupchand, A. J. C.—These appeals arise out of a decree passed by the learned First Class Sub-Judge, Sukkur, decreeing the plaintiff's suit for partition of some of the properties in suit. Plaintiffs 1 to 3 claim to be the sons and daughters of one Arbabalishah. Plaintiff 4 is an assignee from plaintiffs 1 to 3 of 1/4th share of their alleged inheritance in Arbabalishah's estate in consideration of his having agreed to finance them in this litigation.

The chief contesting defendants are defendants 1 to 5 and their relationship with the deceased Arbabalishah is shown in the following tabular statement :



Defendants 6 to 14 are either co-owners with or alienees from defendants 1 to 5 in some portions of the property. The main question at issue between the parties was as to the legitimacy of plaintiffs 1 to 3 and that was decided in their favour by the trial Court. We are afraid the evidence on which this finding is based is indefinite and is not of a reliable nature ; and however disinclined we might be to hold that plaintiffs 1 to 3, are not proved to be the legitimate chil-

dren of the deceased, we can see no way out of it. It was open to the plaintiffs to establish their legitimacy either by direct evidence of a legal marriage between the deceased and their mother Chuti or by indirect evidence of circumstances from which the existence of a valid marriage could be presumed. The only direct evidence of the marriage is that of Tagi, the maternal grandmother of plaintiffs 1 to 3. Apart from the fact that she is deeply interested in her grandchildren her evidence is thoroughly unreliable. She has made contradictions on various points. She admits that one of the alleged vakils to the marriage is living and still that witness has not been called. She also admits that two of her sons are living but wishes the Court to believe that they had gone to ply their boats and were not present at the marriage of their sister with the deceased. The plaintiffs had summoned one Mulla Pir Bux to prove the marriage. Plaintiff 1 admits (at 1.172) that he was called to depose to the marriage of Chuti and that he was alive but still no explanation has been offered why he was not put in the witness-box.

With regard to the presumption arising in favour of marriage from evidence of conduct and repute, again it would appear that the main difficulty in the way of the plaintiff is the fact that Chuti was admittedly married to Khudabux before she went to live with the deceased, and that Khudabux outlived the deceased. The plaintiffs were cognizant of this difficulty. They led evidence to prove that Chuti had been divorced by her first husband before she went to live with the deceased. But that evidence again is that of Tagi, alone, and on this point it is altogether hopeless. In her examination-in-chief she said that Khudabux divorced his wife by putting clods of clay in her skirt. In cross-examination she attempted to improve upon that story and said that Khudabux divorced his wife by a written deed, that he took her for that purpose to Sukkur and that at no time did she see the deed of divorce. The alleged deed of divorce has not been produced and no further evidence called either to prove its execution or even to prove by hearsay that there was a divorce. Although Khudabux and Chuti were dead before the institution of this suit all their relatives and other neighbours were not dead, and no attempt appears to have been made to prove the factum of the divorce either by direct or indirect evidence. If therefore Chuti was the wife of another man who had not divorced her no rule of presumption of legitimacy of marriage can avail plaintiffs 1 to 3 who must be held to be illegitimate.

No authority has been cited before us to show that merely because a person has been living with the wife of another a presumption arises that she was divorced by her first husband. On the contrary the authorities are the other way.

In *Taylor* v. *Taylor* (1) it was held that a legal marriage cannot be inferred from mere cohabitation when the actual fact of an earlier marriage is proved.

In re Millard (2) at p. 221, their Lordships said:

"The second question is, whether that marriage had been legally dissolved at the date of the alleged Christian marriage. Mr. Laing contends that it is dissoluble by Canon law and that though there is no evidence on record that it was so dissolved, there is a legal presumption—the marriage having been performed—that all the necessary preliminaries were properly observed.

We are clearly of opinion that in this case there is no such presumption. The rule we are asked to apply to the facts before us is, that when once a marriage in fact has been proved, there arises a presumption, in the absence of evidence to the contrary, that there has also been a marriage in law. There can be no such presumption as to a form of marriage gone through, when a former valid subsisting marriage has been proved. In such case the onus is entirely upon the defence to show that the earlier subsisting marriage has been validly dissolved."

In *Indar Singh* v. *Thakar Singh* (3) at p. 395 (of 63 *I.C.*) Leslie Jones, J., observed:

"There is, in my opinion, no room for any doubt, that Mt. Mithana was enticed away from her husband by Uttam Singh and that the husband survived the birth of the plaintiff by many years. There is nothing surprising in the fact that the husband did not take legal action against Uttam Singh having regard to the relative positions of the two men, and to the fact that this incident took place many years ago at a time when social status was a more important factor than it may be now . . . and the continued existence of her husband formed an insurmountable impediment to his legitimacy."

These observations apply equally to the present case. Khudabux was after all a petty boatman and the fact that he did not reclaim his wife, from the deceased, an influential zamindar and a

(1) 2 Lee 274=161 E. R. 339.
(2) [1887] 10 Mad. 218=1 Weir 566.
(3) A.I.R. 1921 Lah. 20=63 I.C. 387=2 Lah. 207.

Sayed does not count for much and does not raise a presumption of divorce. Mr. Tahilram has contended that according to Mahomedan law marriage with a woman who has got her husband living is not illegal but invalid. He has drawn our attention to the passage appearing at p. 204, Vol. 2, Edn. 5, Ameer Ali's Mahomedan Law which reads as follows :

"A marriage contracted in the bona fide belief on the part of the husband that the woman was a widow or the divorcee of another man (when, as a matter of fact, the former husband of the woman was not dead, or had not divorced her, as the case may be) gave rise to the same consequences as an invalid marriage. The man is not subject to hadd or the punishment for fornication, and the issues of the union are held to be his legitimate offspring."

No authority has been cited by the learned author in support of this principle which therefore rests merely on the ancient Mahomedan texts. In view of the provisions of the Penal Code which provide punishment for adultery and bigamy it is difficult to see how this principle can be given effect to by our Courts. But it is not necessary to go into that point in the present case, because there is no evidence of an actual marriage between the deceased and Chuti. All that is relied upon is the general presumption of law in favour of a marriage arising from long cohabitation. So far as that is concerned it will appear that in the case of *Nur Ullah Khan* v. *Mahomed Shafiq Ullah Khan*, *A.I.R.* 1929 *P.C.* 212, their Lordships of the Privy Council did not raise any such presumption and held that where it is found that certain children were by a woman who was at the time proved to have been married to another, no rules of presumption of legitimacy of marriage can avail the children who must be held to be illegitimate.

It is no doubt true that in the *Bredalbane* case (4) it was held that a connexion commencing in adultery may, on ceasing to be adulterous by the prior marriage having been validly dissolved, becomes matrimonial by consent and may be evidenced by habit and repute the parties being at liberty to intermarry, that the alteration in the character of the connexion from adultery to matrimony need not be indicated by any public act or by any observable change in the outward demonstration and that it was not necessary to prove the specific period when the consent was interchanged. But that case again has clearly no application for want of proof that either before or after Chuti went to live with Khudabux there was a dissolution of marriage between her and Khudabux. In this connexion we might observe that the defendants have given evidence to prove that Chuti was never divorced and that she lived for some time with Khudabux and for some time with Arbabalishah. But we attach no weight to that evidence. We are of opinion that the burden was on plaintiffs 1 to 3 to prove a divorce by Khudabux of Chuti and having failed to prove that no presumption of marriage of Chuti with Arbabalishah and their legitimacy can be raised. That being so the evidence of conduct and habit however strong would not raise the presumption of marriage either under S. 114, Evidence Act, or under the Mahomedan law as interpreted by the rulings of the Privy Council.

In view of this finding the plaintiffs are out of Court. But apart from this insurmountable difficulty in their way the plaintiffs have not even led sufficient evidence of conduct and repute to warrant the presumption of marriage. Before dealing with the evidence in this case it is necessary to bear in mind the very weighty observations of their Lordships of the Privy Council in *Ma Wun Di* v. *Ma Kin* (5) at p. 239 where it is said:

"The case however deserved attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute. It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that first of all, there must be some body of neighbours many or few or some sort of public, large or small, before repute can arise. Again the habit and repute, which alone is effective is habit and repute of that particular status which, in the country in question is lawful marriage. The difference between English and original customs about the relations of the sexes makes such caution especially necessary. Among most English people open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as matter of fact, a repute of marriage. But, in countries where customs are different, it is necessary to be more discriminating, more especially owing to laxity with which the word "wife" is used by witnesses in regard to connexions not reprobated by opinion but not constituting marriage."

No maternal or paternal relation, neighbour or friend of the deceased has been called to prove that the deceased and Chuti lived as man and wife or that

(4) [1867] 1 Sc. App. 182=2 H.L. (Sc) 269.

(5) [1907] 35 Cal. 232=35 I.A. 41=4 L.B.R. 175 (P.C.).

they were treated as such. The whole of the evidence on this point consists of a certified copy of an entry from the Birth Register of 1897, and the testimony of (a) plaintiffs 1 and 2 (b) their grandmother Tagi and (c) one Tekchand a native physician who was sometimes called in by the deceased to attend on Chuti. The evidence of plaintiffs 1 and 2 and Tagi is not only interested but is too vague to carry conviction. They give no details whatsoever of the occasions when the deceased either declared or acted in a manner so as to represent himself to be the husband of Chuti or the father of plaintiffs 1 to 3. Plaintiff 1, like his grandmother was prepared to say everything that he thought would help his case. His version that Gounsalishah father of the deceased was present on his circumcision ceremony could not possibly be true in view of the proved fact that in 1905 the old man made a will declaring that he was displeased with the deceased and that he disowned him altogether. All that Tekchand states is that the deceased treated plaintiffs 1 and 2 as sons and that Chuti observed pardah. At the same time he has definitely stated that he does not know if the deceased and Chuti were legally married.

His testimony that the deceased treated plaintiffs 1 and 2 as sons is in no way inconsistent with their illegitimacy and is not without more sufficient proof either of their legitimacy or of the marriage of the deceased to Chuti. The evidence that Chuti observed pardah is equally consistent with her being a mistress and does not prove marriage. It is only a circumstance to be considered when the fact or marriage is in issue : see the observations of Lord Shaw in *Mahbbat Ali Khan* v. *Mahomed Ibrahim Khan* (1), an appeal from the North-West Frontier Province, *A. I. R.* 1929 *P. C.* 135, 138 at p. 209. The evidence of Tekchand, even if true, does not therefore form a substantial foundation from which a presumption of marriage may be validly raised, and more so when all the surrounding circumstances are the other way. The deceased was a Sayad with a large following of disciples. He was married to Bakhtal who was also a Sayad woman and a relative of his on his father's side. She lived in the family house at Sukkur. Chuti belonged to a low caste. She was a fisherwoman already married to a boatman. She was not brought into the family house but lived in the hamlet of Gounspur which consisted of 15 or 16 huts constructed on a portion of one of the agricultural lands belonging to the deceased and his co-sharers. The hut in which Chuti lived could hardly be called a house or be considered fit for a respectable Sayad family to live in. Plaintiff 1 admits (L. 199) that this hut which he calls a house has

"two outer doorways but no doors fitted to them and the wall in front of these doorways is as high as the height of a man."

Plaintiffs 1 to 3 did not marry during the lifetime of the deceased, nor were plaintiffs 1 and 2 given any education. It is true that shortly before the death of the deceased he was taken to his family house at Sukkur. Plaintiffs 1 and 2 say that they and Chuti also went with him to live in a part of the family house. Even if this be true, they admittedly left the family house within a short time after his death. When asked to explain the cause of it Ghulam Rasulshah plaintiff 2 has said :

"I can't say why the Sayads turned us out of their haveli here. We were deprived of our property and turned out of the haveli simultaneously."

They then went to live with their grandmother. Chuti died in her grandmother's house five or six years after. She was not buried in the family burial ground of the Sayads but in the burial ground near her mother's village by the side of the graves of other fishermen. It is somewhat amusing to read the explanation given by Tagi with regard to this. She states :

"Sayad Karamalishah said: if you had sent me a word I would have got a grave ready in advance, but now it is late. My sons also said: "Chutan is of our blood" let her be in our graveyard. We shall bury her here."

This evidence hardly requires any comment. Plaintiffs 1 and 3 have married since their father's death but they have admittedly married strangers to the family of the Sayads. On the top of this we have the admitted fact that plaintiffs 1 to 3 were excluded from enjoyment of the property of the deceased immediately after his death except in respect of a certain small portion of the property which they alienated and to which reference will presently be made, and that it was not until after the expiry of nearly nine years and about three or four years after the death of both Khuda Bux and Chuti that the present suit was filed.

It is at least arguable that had plaintiffs 1 to 3 instituted the suit before the death of Khudabux the fact whether Khudabux had divorced his wife or not would have been capable of proof by direct evidence. The entry in the Birth Register of 1897, which refers to plaintiff 2 as son of the deceased, is equally of no consequence. Apart from the fact that it does not show who reported the birth, it is not usual to distinguish between legitimate and illegitimate children in the birth register. They would equally be described as sons. No entry from the birth register of plaintiffs 1 and 2 has however been produced. In case of *Ma Wun Di* v. *Ma Kin* (5), referred to above, even the expression "wife" and the application for a passport was not considered in the circumstances of that case as sufficient evidence of repute. The evidence of the conduct subsequent to the death of the deceased relied upon by the plaintiffs stands on no firmer footing.

It appears that a very small portion of the property left by the deceased was entered in the revenue records in the names of two wives of the deceased each being shown as entitled to eight pies share therein. Their names were not mentioned, but it is said that the entries refer to Chuti and Bakhtal. But none of the properties appears to have been transferred to the names of plaintiffs 1 to 3. Except the certified copies of the Record of Rights which have been exhibited no other papers have been produced to show under what circumstances these entries came to be made. It is therefore difficult to know how these entries were made. But they do not prove much. If the deceased left no issue Bakhtal was entitled to 1/4th share in his estate and it was within her competence to give one-half of her share in some of the property of the deceased to Chuti whether she was the wedded wife of the deceased or not. If she did that none of defendants 1 to 3 could object to it.

No questions have been put to the plaintiffs to show under what circumstances these entries were made, and also why they did not ask for their names being entered as heirs. In 1918 plaintiffs 1 and 2 dealt with a part of the property entered in the names of the widows of the deceased. The sale deed (Ex. 154) which is for Rs. 1,000 reads as follows:

"Where as the share out of one plot of land bearing City Survey No. 1 of Sheet D No. 9. * * * was required by the deceased Sayad Arababalishah * * *and the said share was subsequently on the death of the said Arbabalishah acquired by his two (i. e. first and second) wives and we the executants being the sons of the said Arbabalishah by his second wife who having died away have acquired her share out of the said plot we have hereby sold, etc."

Plaintiffs 1 and 2 were identified by defendant 2 before the Registrar. On the same day plaintiffs 1 and 2 received Rs. 50 as consideration for the excess area found on measurement of a portion of the same survey number which had been sold by the deceased to one Boolo butcher, and passed a sale deed in favour of Boolo's transferring him the excess area of land which was already in his possession. This deed is Ex. 215. It is attested by defendant 2. Considerable reliance has been placed on these two pieces of conduct. But what is the legal effect. In the first place there is no presumption that defendant 2 knew the contents of the documents and all that his conduct shows is that he did not object to the executants representing themselves to be as sons of the deceased. But they were his sons although not legitimate. Even if he be presumed to know the contents of the documents, Ex. 154 recites that plaintiffs 1 and 2 had inherited their mother's share which they were selling; and if their mother got that share as a gift from Bakhtal, or as a matter of that from the deceased himself, defendant 2 could not object to the sales.

The only other piece of documentary evidence upon which plaintiffs 1 to 3 have relied is the proceedings in the suit of 1915. That suit was filed by a mortgagee. The mortgage deed was admittedly executed by the deceased and his brother Faizal Shah, plaintiffs 1 to 3. Chuti and defendants 2 to 5 were all sued as co-defendants. Plaintiffs 1 to 3 and defendants 1 and 2 were represented by the same pleader. The written statement filed by the pleader is not on the record but it is said that it contained no averment on behalf of defendants 1 to 3 that plaintiffs 1 to 3 were not the legitimate sons of the deceased and that Chuti was not legally his wedded wife, although a plea was taken in that case that defendant Shakar Jhan was not the

wedded wife of Faizalshah. Be that as it may, it is not of much value to plaintiffs 1 to 3 in this suit. The deceased was a co-mortgagor and his estate was liable for the claim in suit. Failure to raise this plea does not attract the applicability of the doctrine of res judicata or of estoppel by record. Nor does it amount to an estoppel by conduct. It is, at most, a negligent omission to mention a fact which was in no way material for the purposes of that suit. No presumption arises that plaintiffs 1 to 3 and their mother were meant by the other defendants to believe that they were legitimate sons and wedded wife respectively of the deceased. Nor has anything been shown or suggested that plaintiffs 1 to 3 or their mother acted upon this omission in the pleadings to their prejudice as to avail themselves of the plea of estoppel. As a matter of fact no plea of estoppel has been raised in the pleadings.

For these reasons we hold that plaintiffs 1 to 3 have failed to prove that they are legitimate sons of the deceased and that their suit therefore fails. In view of this finding it is hardly necessary for us to go into the other points in issue between the parties. But as the case is likely to go in appeal to their Lordships of the Privy Council, it will be as well if we briefly deal with the other points.

It is argued on behalf of defendant 1 that the suit is not in proper form, that in view of the award of 1911 the only relief which plaintiffs 1 to 3 are entitled to claim is under that award, and that if this suit is treated as a suit for setting aside the award, it is barred by Art. 91, Lim. Act. None of these grounds is well founded. It is no doubt true that plaintiffs 1 to 3 claimed partition of the whole property which was possessed by Gounsalishah as a tenant-in-common with defendant 1, but plaintiffs 1 to 3 failed to convince the trial Court that they could be behind such portions of the award as were legal or reopen the partition which was effected in pursuance thereof. The only relief awarded to them in this suit is in respect of property held by the award to be alienable. So far as the relief which has been granted to the plaintiffs is concerned, the case of *Jafri Begam* v. *Ali Raza* (6) is a complete answer to all the arguments advanced by the learned pleader. In that case their Lordships have said at p. 391 :

> " Neither does the contention that Cl. 5 is ultra vires and invalid brings the case within the Act (Art. 91, Lim. Act). The plaintiff disputes the legal effect of that particular clause, but does not seek to cancel or set aside the award. On the contrary he seeks to enforce it so far as it is operative in point of law. As regards the effect of Cl. 5, their Lordships agree with the Judicial Commissioners that it affords no defence to the present action. It may have bound the parties who agreed amongst themselves to abide by it. But as against the present plaintiff the clause has no effect whatever. The arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Mahomedan law in the absence of a special custom prevailing in the family. He had no power to make property which was divisible by law, indivisible for ever. "

Paragraph 5 of the award in the present case reads as follows :

> " The property mentioned in Sch. G hereto annexed shall remain the joint ownership of the parties from generation to generation, and the same shall never be partitioned nor shall any party have any right to partition the same nor shall any party or any heir or representative of theirs mortgage, gift or dispose of the said property. Any such act of theirs shall be deemed null and void and the property shall not be liable therefor. Neither the present nor the future heirs of the parties shall be able to partition the same. "

Whatever may have been the effect of this clause on the deceased Arbabalishah who was a party to the reference and the award, the arbitrator had no power to pass an award so as to affect the heirs of the deceased. And as was pointed out by their Lordships of the Privy Council in the passage quoted above disputing the legal effect of a clause is different from seeking to set it aside.

The only other point which remains to be considered is that raised by the plaintiffs with regard to the partition of the Otak referred to in para. 4 of the award. But that paragraph must be read in the light of certain provisions contained in the will in that behalf. The will recites :

> " In connexion with the entertainment of guests at the otak and the expenses of servants and service I will that the arrangements and the scale of the otak shall continue to remain as in my lifetime, and I provide as under for the expenses, etc., of the said otak and place the responsibility of all such arrangements and expenses of the otak upon my nephew Karamalishah a two annas share shall be credited separately for the entertainments of guests and expenses of the otak and disciples, etc., and in this neither Karamalishah nor any of my heirs and representatives shall have any right or interest. . . . . "

It would appear that the otak was used not only for members of the family

(6) [1901] 23 All. 383=28 I. A. 111 (P.C.).

but as a guest house for the disciple of the Sayads. The directions given in respect of the otak stood on the same footing as those relating to the other property declared by the will as wakf property. The arbitrators had jurisdiction to decide whether or not the declaration that the otak was in perpetuity to be used as a free guest house for the disciples rendered it wakf property and as such inalienable and impartible. The directions given by the arbitrator in that behalf cannot therefore be said to be ipso facto invalid, and we think the learned Judge below was in error in ordering partition of the otak. We accordingly dismiss the suit with costs throughout. The plaintiffs will bear the costs of both appeals and cross-objections.

P.N./R.K. *Suit dismissed.*

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* A. I. R. 1932 Sind 143

FERRERS, J. C. AND ASTON, A. J. C.

Udharam and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 13 of 1932, and Criminal Reference No. 47 of 1932, Decided on 11th May 1932, against decision of First Addl. Sess. Judge, Hyderabad.

(a) Criminal Trial — Appeal—Findings of trial Court will not be interfered with in absence of strong grounds.

Courts are always reluctant to interfere with the findings of a trial Court unless strong grounds are made out for so doing. [P 143 C 2]

*** (b) Whipping Act (1909), S. 4 (b)—S. 4 (b) imposes special penalty upon offences of sodomy with aggravating circumstances.**

According to the Whipping Act the sentence of whipping in lieu of imprisonment appears to have been regarded as a sentence to be reserved for graver form of offences.

Section 4 (b) does not contemplate the offence of sodomy only. It imposes a special penalty upon the offence of sodomy combined with aggravating circumstances. [P 144 C 1]

(c) Penal Code (1860), S. 377 — Courts should comply fully and carefully with requirements of S. 377 — Criminal Trial, Duty of Court.

All Subordinate Courts should comply fully and carefully with the requirements of S. 377. Every officer, who has a judgment to write, will do well to set forth the points for decision in such shape that at a first glance it may be apparent both to himself and also to any appellate tribunal that nothing which is material has been overlooked. [P 144 C 2]

(d) Criminal Trial—Sentence.

Justice should be even-handed, other things being equal, the same offence should receive the same punishment. [P 144 C 2]

Partabrai D. Punwani — for Appellants.

C. M. Lobo—for the Crown.

Aston, A. J. C.—This is an appeal by Udharam and Thaku from the conviction and sentence by the First Additional Sessions Judge, Hyderabad, who convicted the appellants under S. 377, I. P. C., and sentenced them each to three years rigorous imprisonment. A notice has been served on the other accused who were convicted in the same case, namely, Chuhar, Mahmud and Shahan, and who were sentenced respectively to 20 stripes, 12 stripes, 12 stripes and to show cause why the sentences should not be enhanced. The facts of the case are clearly set out in the judgment of the learned First Additional Sessions Judge. It is not necessary for me to recapitulate them. (The judgment then discussed the evidence and proceeded). The learned First Additional Sessions Judge saw the witnesses in the box and he was in a position to note their demeanour, and Courts are always reluctant to interfere with the findings of a trial Court unless strong grounds are made out for so doing.

The alleged discrepancies and weaknesses referred to on behalf of the appellants do not appear to me to constitute a sufficient reason for coming to a different conclusion from that arrived at by the learned First Additional Sessions Judge. (The judgment here discussed evidence and concluded that there was no reason whatever for interfering with the conviction of the accused.) In the matter of sentences which the learned Additional Sessions Judge has inflicted, the case is somewhat different. Two of the accused in the case before him were proved to have been juveniles, namely Mahmud and Shahan. These accused were sentenced by him to 12 stripes. The medical evidence shows that the remaining three accused were about the same age. There was nothing to distinguish those accused except the fact that one of them happened to be a student. And in view of the fact that he was a student Chuhar was sentenced to receive 20 stripes while his two companions were given a sentence of three years rigorous imprisonment each. There appears to me no reason why different sentences should have been inflicted on Chuhar, Udharam and Thaku. According to the Whipping Act the sentence of

whipping in lieu of imprisonment appears to have been regarded as a sentence to be reserved for graver form of the offences. On the other hand imprisonment for three years is a long term and both Udharam and Thaku would prefer sentence of whipping to that of imprisonment for three years. As their circumstances are exactly similar to those of Chuhar there seems to me no reason why the sentence inflicted on them should not be the same. They have already undergone four months' rigorous imprisonment.

I would therefore set aside the sentence which has been inflicted on Udharam and Thaku and in lieu of a sentence of three years rigorous imprisonment impose a sentence of 15 (fifteen) stripes each and the imprisonment which they have already undergone. Chuhar has already been sentenced to 20 stripes four months ago. I do not think it necessary for us to interfere with the sentence which has already been suffered. The remaining two accused namely Mahmud and Shahan, were juveniles and the sentence inflicted on them of 12 stripes appears to me to have been a correct sentence in the circumstances of the case. This would therefore discharge the notice served on Chuhar, Mahmud and Shahan.

Ferrers, J. C.—I concur. The observations which I wish to add are two only. The first is this: The learned Judge began his judgment by setting out the points for determination in these words:

"(1) Whether sodomy was committed on Ochi Boy? (2) Whether the accused are guilty of this offence?"

He adds:

"My finding on both these points is in the affirmative,"

and he proceeds to order that one of the accused should receive 20 stripes according to rules under S. 4 of the Whipping Act, in lieu of sentence of imprisonment. Now S. 4 (b) of the Whipping Act is in these words:

"compels, or induces any person by fear of bodily injury, to submit to an unnatural offence as defined in S. 377 of the said Code."

It will be observed that the section does not contemplate the offence of sodomy only. It imposes a special penalty upon the offence of sodomy combined with aggravating circumstances. The learned Judge would have done well if he had made it clear in his judgment that he had considered the question whether those aggravating circumstances had or had not been proved. Now in the present case the evidence which has been believed to be true is clear. If the learned Judge had set down among his points for decision this question: Has the Crown proved that the accused compelled or induced Ochi by fear of bodily injury to submit to the unnatural offence? then he could no doubt have answered this question affirmatively. This is the answer which we should ourselves give to the same question. We therefore think that there has been no miscarriage of justice and I advert to the point for this reason only. We desire all Subordinate Courts to comply fully and carefully with the requirements of S. 377. Every officer who has a judgment to write will do well to set forth the points for decision in such shape, that at the first glance it may be apparent, both to himself and also to any appellate tribunal that nothing which is material has been overlooked. The second point is the disparity of the sentences.

The Medical Officer who examined Thaku, Chuhar and Udharam was unable to differentiate between their ages. The learned Judge however has differentiated in a marked and conspicuous manner between their sentences. Now it appears that the three boys are of the same age. They belong to the same class. They live in the same village. They are such intimate friends that they combine together to commit an offence which any man who had any spark of decency left in him would prefer to undertake in seclusion. Justice should be even-handed. Other things being equal the same offence should receive the same punishment. We think this principle important; and we observe that in this case it has been infringed. (The judgment then discussed the question of sentences and proceeded). We are reluctant to reopen the case of Chuhar. For this reason only we have as far as we now can assimilate the sentences passed upon the other two to the sentence which Chuhar has already undergone. I therefore concur in the order proposed by my learned brother.

R.M./R.K. *Order accordingly.*

* A. I. R. 1932 Sind 145

FERRERS, J. C. AND MEHTA, A. J. C.

Natho Khan and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 21 of 1932, Decided on 15th April 1932.

*** (a) Criminal P. C. (1898), S. 356 — Inquiries under Ch. 12 are governed by S. 356—Provisions of S. 356 are imperative—Criminal P. C. (1898), S. 145.**

Inquiries under Ch. 12 are governed by S. 356; the Magistrate is bound to record evidence in the manner prescribed by S. 356. The provisions of S. 356 are imperative and where the Magistrate omits to record evidence prescribed by the section, there is material error sufficient to set aside the proceedings: 42 *Cal.* 381, *Rel. on.* [P 146 C 1]

(b) Criminal Trial—Duty of Court — Imperative rule of procedure broken — Trial is not vitiated unless there is failure of justice.

It is no longer open to Courts in India to hold that a trial is vitiated by the mere fact that an imperative statutory rule of procedure has been broken. The Court must also consider whether such failure has in fact occasioned a failure of justice. [P 146 C 1, 2]

Where in an inquiry under S. 145 the evidence of witnesses was recorded in full in English but not in vernacular and there was on record a full and accurate account of what the witnesses said.

Held: that the irregularity was not such as to occasion failure of justice: *A. I. R.* 1927 *P. C.* 44, *Rel. on.* [P 146 C 2]

(c) Criminal P. C. (1898), S. 145—Failure to state grounds of satisfaction does not vitiate trial if there is sufficient compliance with provisions of S. 145.

The failure of the Magistrate to set forth explicitly the grounds of his being satisfied that a dispute exists which is likely to cause a breach of the peace will not vitiate the proceedings if there is otherwise a sufficient compliance with the requirements of S. 145.

Where the Magistrate did not in so many words set forth his grounds of satisfaction but recorded his order at the foot of a statement made by the petitioner and signed by both the petitioner and the Magistrate the statement confirmed the contents of the petition and the petition very clearly stated the grounds upon which an early breach of peace might be reasonably apprehended:

Held: that the omission of the Magistrate expressly to state the grounds of his satisfaction was not such an irregularity as would make it necessary to set his order aside. [P 147 C 1]

*** (d) Criminal P. C. (1898), S. 145 (4)—Proceedings under S. 145 — Court is concerned only with question of possession.**

In proceedings under S. 145 the Courts have no concern with title. Possession is the only matter to which the Magistrate has to give attention. The main object must be to decide first which of the contesting parties should be considered to be in actual possession of the disputed property on date of the preliminary order. Where there has been no dispossession the case does not fall under S. 145 (4) and the question of dispossession does not arise. [P 147 C 2]

(e) Criminal P. C. (1898), Ss. 145 and 439—Proceedings under S. 145—Refusal by Court to grant adjournment held did not amount to irregularity as to render order liable to be set aside.

Where a Magistrate refuses to grant adjournment for filing a sale deed in a proceeding under S. 145 in which the dispute has reached a stage so critical that a breach of peace is immediately to be apprehended and the case does not admit of procrastination or delay and the parties have had opportunity to say what they have to say his action does not amount to an irregularity which renders his order liable to be set aside. [P 147 C 2]

(f) Criminal P. C. (1898), S. 145 — Reason why grounds should be stated by Magistrate is that higher Court should be able to see whether recourse to summary proceedings was justified.

The noncompliance with the requirement as to stating the grounds, if it has caused no injustice, does not necessarily take away the jurisdiction of the Magistrate to proceed under the chapter and does not vitiate the whole proceedings. The reasons why the grounds are primarily required to be stated in the order is that in case the matter comes up subsequently before a higher Court it can be seen whether there was or was not any justification for recourse to this sort of summary proceedings for deciding a question which is more or less of a civil nature, namely, the question of the right to the immediate possession of some immovable property: 36 *Mad.* 275 and *A. I. R.* 1926 *Sind* 53, *Rel. on.* [P 148 C 1]

T. V. Thadani—for Applicants.

C. M. Lobo—for the Crown.

Nehchaldas Vazirani—for Opponent.

Ferrers, J. C. — On 20th November 1931 the Subdivisional Magistrate, Tatta, held in inquiry under S. 145, Criminal P. C. He decided and declared that Phatanmal was in possession of the land in dispute and was entitled to retain such possession until ousted by due course of law. The opponents were named Natho and Sukhio. They did not choose to proceed in the civil Court, which is the course indicated by the Magistrate's order. They have preferred to come to this Court and to ask us to set aside the said order. In their memorandum they urge four grounds in support of their application. But in his speech the learned counsel who appears for them has given the first place to a fifth argument which is not to be found in his memorandum. That argument is to this effect: Inquiries under Ch. 12 are governed by S. 356, Criminal P. C. The Magistrate is bound to record evidence in the manner prescribed by that section. It has been held

in *Sadananda Mandal* v. *Krishna Mandal* (1) and elsewhere that the provisions of this section are imperative. Where the Magistrate omitted to record evidence in the mode prescribed by this section, it was held there was a material error sufficient to set aside the proceedings. Now there is no doubt that proceedings under S. 145 of the Code are enquiries under Ch. 12. It is clear therefore that under S. 356 (1) evidence of each witness should have been taken down in writing in the vernacular by the Magistrate himself or in his presence and hearing and under his personal direction. This record should have been signed by him. Now in the present case the learned Magistrate has kept a record of the evidence in English only. He has in fact recorded the evidence in so much that his memorandum has very much the appearance of a verbatim record. Nevertheless this record is in English and not in the vernacular. It must therefore be conceded that there has been no complete compliance with the requirements of S. 356. This concession is in fact made by the learned public prosecutor who appears to support the order. He argues however that the bare fact of such an omission as has occurred in the present case unaccompanied by any probable suggestion of any failure of justice thereby occasioned is not enough to warrant the quashing of the order which can be supported by S. 537. The provisions of S. 537 are these. "No order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or in revision on account of any error, omission or irregularity unless such error, omission or irregularity has in fact occasioned a failure of justice" and an explanation is appended which says:

"In determining whether any error, omission or irregularity has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

Now since the decision of the Privy Council in *Abdul Rahman* v. *Emperor* (2), it is no longer open to the Courts in India to hold that a trial is vitiated by the mere fact that an imperative statutory rule of procedure has been broken. The Court must also consider whether such failure has in fact occasioned a failure of justice.

Now in the present case the evidence of the witnesses has been recorded in full. There is no suggestion that the record does not contain a full and accurate account of those depositions. It is to be observed that the memorandum sets forth four illegalities or irregularities of which the applicants complain. But it does not set forth as one of such irregularities the fact that the depositions had not been recorded in the vernacular. The learned counsel who supports the application has explained that at the time when he drafted the memorandum the proceedings were not before him. This explanation we have so far allowed that we have permitted him to take a point which is not to be found in his memorandum. But after hearing all he had to say on this point, we have not been convinced that the irregularity, such as it is, has in fact occasioned a failure of justice. There is on record a full and accurate account of what the witnesses said, and the fact that that record is in English only and not also in the vernacular does not give the applicants any reasonable ground for complaining that they have suffered a failure of justice. The next point taken by the applicants, which is the first point in their memorandum, is that the learned Magistrate has failed to comply with that part of S. 145 which requires him to state the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists in regard to the survey numbers in question. Here again the learned Magistrate does not appear to have followed the provisions of the Code with great exactitude. The law does undoubtedly require that a Magistrate should make an order in writing stating the grounds of his being satisfied that a dispute exists which is likely to cause a breach of the peace. The order which the learned Magistrate has actually recorded is in these words:

"I am satisfied that a dispute likely to cause a breach of the peace exists concerning land within the local limits of my jurisdiction and hereby order, etc."

The Magistrate has contented himself by stating the fact of his satisfaction. But as to the ground upon which that

(1) [1915] 42 Cal. 381=16 Cr. L. J. 192=27 I. C. 672.
(2) A. I. R. 1927 P. C. 44=100 I. C. 227=54 I. A. 96=5 Rang. 53 (P. C.).

fact is based he has been silent. It cannot be denied that a Magistrate's order in instituting proceedings under this section ought to set out the grounds upon which he is satisfied. In *Nittyanand Roy* v. *Paresh Nath Sen* (3) it has been held that where a Magistrate omits in the preliminary order to state the grounds of his being satisfied as to the likelihood of a breach of the peace the final order is without jurisdiction and must be set aside. But the other High Courts have taken a different view. Allahabad has held that the failure of the Magistrate to set forth explicitly the grounds of his being satisfied will not vitiate the proceedings if there was otherwise a substantial compliance with the requirements of this section. The same view has been taken by our own Court.

Now in the present case, though the Magistrate has not in so many words set forth his grounds of satisfaction, yet he has recorded his order at the foot of a statement made by the petitioner and signed both by the petitioner and the Magistrate. That statement refers to and confirms the contents of the petition and that petition very clearly states the grounds upon which an early breach of the peace might reasonably be apprehended. We think therefore that the omission of the Magistrate expressly to state the grounds of his satisfaction is not such an irregularity as would make it necessary to set his order aside. The next two grounds taken in the memorandum may conveniently be disposed of together. The memorandum says:

"Proviso to sub-S. 4, S. 145, clearly lays down that the Magistrate's jurisdiction extends only to the determination of wrongful dispossession within two months next before the date of the order under S. 145. The learned Magistrate has failed to determine this question and his order is therefore without jurisdiction."

The proviso referred to is not exactly as it has been stated in this clause. What the law actually says is that:

"if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed, as if he had been in possession at such date."

But the present case does not fall within this clause. According to the Record of Rights Assanmal is shown to be still in possession of the numbers in dispute. This Assanmal is the vendor from whom Natho and Sukhio profess to have purchased a four annas share of the land. Assanmal admits that he has sold four annas but he says he has received no consideration and given no possession. Possession was to be given after the receipt of the whole amount. In these proceedings we have no concern with title. Possession is the only matter to which the Magistrate could give his attention. That possession is claimed by Assanmal to be with him and Natho himself has confirmed this claim in a statement which he made before the Second Class Magistrate at Mirpur Sakro on 18th November 1931. He complained that Assanmal had given the land on lease to Phatanmal and that he is not giving possession to Natho and to Sukhio. Natho and Sukhio therefore clearly said that they had not possession and this is the only question which the Magistrate was required to decide.

The fourth point is that the learned Magistrate in declining to grant adjournment for the filing of a written statement committed an irregularity which renders his order liable to be set aside. This contention we cannot accept. Reference has been made to a case in which no evidence was produced on either side and the Magistrate, finding himself unable to come to a decision, attached the subject of the dispute. It was held that in such a case as that, it would have been proper to grant time. But such a case as that has no resemblance to the case which we are now dealing. We have here a dispute which had reached a stage so critical that a breach of the peace was immediately to be apprehended. A case such as this does not admit of procrastination or delay. Natho and Sukhio had an opportunity to say what they had to say. Their request for an adjournment to file their sale deed was a request which the Magistrate could not be expected to grant. The sale-deed would be no doubt valuable evidence if and when the question of title comes under the consideration of a proper forum. But the question before the Magistrate was one of actual possession only. On that question the sale-deed could throw nothing but a reflected and distorted light. These five points are all those which were argued before us. We find that the applicants are not successful upon any one of the

(3) [1905] 32 Cal. 771=9 C. W. N. 621=2 Cr. L. J. 342.

five and we therefore dismiss this application.

Mehta, A. J. C.—After the exhaustive judgment of the learned Judicial Commissioner very little remains for me to add. The grievance which is given the place of honour in this application is that the Magistrate has stated no grounds in his first order as required by Cl. (1), S. 145, Criminal P. C. There is no doubt that the grounds upon which a Magistrate is satisfied that proceedings should be taken under Chap. 12 should be specifically set forth in the first order which he has to make in writing. At the same time it appears to me that non-compliance with this requirement, if it has occasioned no injustice does not necessarily take away the jurisdiction of the Magistrate to proceed under the chapter. I am inclined to think that the reason why the grounds are primarily required to be stated in the order is, that in case the matter comes up subsequently before a higher Court it can be seen whether there was or was not any justification for recourse to this sort of summary proceedings for deciding a question which is more or less of a civil nature, namely, the question of the right to the immediate possession of some immovable property. In the present case the grounds do exist. Of that there can be no doubt. The mere non-inclusion of the grounds in the first order cannot therefore vitiate the whole proceedings. In *Kamal Kutty* v. *Udayavarma Raja* (4) it has been held that an omission to set forth in a preliminary order under S. 145, Criminal P. C., the grounds of a Magistrate's opinion does not affect the jurisdiction of the Magistrate. The rulings in *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (5) and *Subrahmania Ayyar* v. *Emperor* (6) have been distinguished. There is also a decision of our own Court in *Mahomed Mahdishah* v. *Wahdalshah* (7) which is to the effect that the only two essential conditions which not only confer jurisdiction on a Magistrate, but make it incumbent on him to start proceedings under S. 145, Criminal P. C., are that there should be a dispute concerning land, and a likelihood of a breach of the peace, and that if a Magistrate is once seized of jurisdiction by reason of the above two conditions being established he cannot be divested of it on account of errors or omissions which relate to the procedure adopted.

It has been urged on behalf of the applicants that in the present case the Magistrate had only one question to decide: if there had been dispossession within two months. I fail to see what warrant there can possibly be for such a proposition. The relevant clause of S. 145 which is Cl. (4), provides that after perusing the statements put in and after hearing the parties and receiving all such evidence as may be produced by them respectively, the Magistrate has to consider the effect of such evidence take such further evidence, if any as he thinks necessary, and if possible decide whether any and which of the parties was at the date of the order beforementioned in sueh possession of the property in dispute. So that the main object of the Magistrate holding proceedings under S. 145 must be to decide first which of the contending parties should be considered to be as in actual possession of the disputed property on the date of the preliminary order. Since the proviso is to the effect that if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed, as if he had been in possession at such date, the Magistrate has also to decide if there has been any wrongful dispossession within the two months. In other words, if the party in de facto possession of the disputed property on the date of the order be found to have obtained possession by wrongfully dispossessing the other party within two months next proceeding that date, then the Magistrate is to regard the other party, i. e., the dispossessed party as in actual possession on the date of the order.

In the present case it was required of the Magistrate only to decide which party was in actual possession on the date of the order. There was no dispossession, and therefore it was not necessary for the Magistrate to decide whether the present applicants had been dispossessed by the opponents.

(4) [1913] 36 Mad. 275=13 Cr. L. J. 753=17 I. C. 65.
(5) [1906] 33 Cal. 357=9 C. W. N. 1068=2 C. L. J. 259 (F.B.).
(6) [1902] 25 Mad. 61.
(7) A. I. R. 1926 Sind 53=89 I. C. 156=26 Cr. L. J. 1292.

I do not wish to deal with the other grounds upon which the learned counsel for the applicants has endeavoured to secure a reversal of the Magistrate's order. They have been discussed at length in the judgment just delivered by the learned Judicial Commissioner. I therefore concur in the order proposed that this application should stand dismissed.

R.M./R.K. *Application dismissed.*

A. I. R. 1932 Sind 149

MILNE, J. C. AND RUPCHAND, A. J. C.

Haroon and *another*—Appellants.

v.

Emperor—Opposite Party.

Confirmation Case No. 6 of 1931 and Criminal Appeal No. 252 of 1931, Decided on 16th September 1931.

Evidence Act (1872), S. 26—"Custody of a police officer"—Substantial test to decide whether accused is under custody is whether he is or is not at liberty to move from particular place where he was when he made confession.

The expression "custody of a police officer" does not only mean that the accused should be under actual arrest when he makes the confession nor does it necessarily indicate that the presence of a police officer at the time of the confession is essential to constitute custody. The substantial test is whether the accused is or is not at liberty to move from the particular place where he was when he made the confession. [P 145 C 1]

Where the police after securing the accused hand them over to the masters with instructions that the accused should not be allowed to escape and also with instructions to ascertain from the accused the facts of the case and are under close supervision under instructions from the police, the accused are under custody of the police within S. 26. Such procedure is open to the attack that the accused are handed over for the purpose of being coerced or at any rate being induced to make a confession and should be avoided: 3 *M. H. C. R.* 318; 20 *Bom.* 165; 42 *Bom.* 1; *Confirmation Case No.* 3 *of* 1929 and *Cr. Appeals Nos.* 188 and 193 *of* 1925, *Rel. on*; *A. I. R.* 1921 *Sind* 145 and *A. I. R.* 1924 *Rang.* 173, *Ref.* [P 151 C 2; P 152 C 1]

Motiram Idanmal—for Appellants.

C. M. Lobo—for the Crown.

Milne, J. C.—In this case three accused were committed for trial under S. 302 and S. 326 read with S. 34, I.P.C. Accused 3 was acquitted; accused 1 and 2 were convicted and sentenced to death. The prosecution story is that the brother of accused 1, Abdul Rahim, had married one Fatma. He subsequently married a second wife and his first wife Fatma went to live in the village of Dost Mahomed Khoso. After seven or eight years her brother and mother gave her in marriage to the deceased Abdul Rahman Chandio representing that Fatma had not been married to Abdul Rahim. The matter was brought before a jirgah, the parties being Khosos. The jirgah held that Abdul Rahman's marriage with Fatma was illegal as she had already been married to Abdul Rahim. They decided that Fatma's brother should pay compensation and that Fatma should be handed over to the sardan of the Khosos who should give her in marriage to some one who was not a Chandia. Fatma remained with the Khoso Sardar of Thul but in October 1930 Abdul Rahman brought her from Thul and kept her in the village of Shahpur Chekar, taluka Shahdadpur. On 5th January 1931 Abdul Rahman with Fatma and his daughter were sleeping in a room of the house with the door closed. In the verandah five persons were sleeping Mahomed Bux, his sister Mt. Bai, Khan Mahomed, Dost Mahomed and Sohrab. About 11 p. m. Sohrab heard a gunshot and saw three persons in the court-yard. Mahomed Bux caught one of them and threw him down. One of the remaining two persons caught Mahomed Bux and felled him on the cot. Then two of them caught hold of Mahomed Bux and the third man struck him with a hatchet and lathi. Dost Mahomed who was sleeping on the same cot with Sohrab saw three men fighting with Mahomed Bux. He ran to inform Abdul Rahman deceased but saw the fourth man catching hold of the door. The fourth man kicked Dost Mahomed and he fell down. He went and concealed himself behind a reed wall at a distance of four or five paces. The three persons then came to the door and broke the door open with hatchets. They entered the room and killed Abdul Rahman, Fatma and her infant daughter. The murderers then climbed the southern wall of the house and fled.

Two chowkidars, Jio and Kaisro, were on duty that night and were going their rounds in the bazar when they heard the first gunshot. They ran towards the house going first to the southern side where they cried out but got no reply. They then went to the northern side and got a reply: "We are among ourselves." Kaisro kept Jio at the northern side while he himself went again to the southern side. There he saw accused 2 sitting on the wall. Kaisro inquired from accused 2 who he was but he made no reply. The man sitting on the wall and three others

jumped over the wall and accused 2 fired a gun at Kaisro. Kaisro ran back and hid himself in the western lane. He had a gun with him. He came back followed up the thieves and fired at them from a distance of 25 yards. One of the thieves fell down injured but the other thieves got hold of him and took him away. Kaisro had only one cartridge with him and could not fire again. Assumal (Ex. 13) and Jhamutmal (Ex. 25) came up on hearing the sound of the gun. Jhamatmal came first and met Kaisro and Jio who told him what had happened. Assumal on coming up was told by the three of them what had happened. Jhamatmal went to the thana which is in the same village and made the first report.

This report was made on 6th January 1931 at 1 a. m. The head constable came to the scene. The Sub-Inspector arrived at 10 a. m. on 6th January, saw the scene of the offence, examined the witnesses and with the Peri tracked the footprints. The footprints were lost in some low-lying ground used for paddy cultivation. The search was resumed on the morning of 7th and the prints of two men were found which led to a kot and inside this kot two persons were found accused 1 and 2. The tracks of these persons are said to have tallied with the prints which they had tracked. One of the men accused 1 had injuries including gunshot wounds on his head, right arm, left hand, and foot. The Sub-Inspector handed over the two accused to the Mashirs Khuda Bux and Shah Mahomed who had accompanied them to make inquiries from them as they gave no reply to the inquiries made by the Sub-Inspector. The Sub-Inspector went in search of the other offenders. The two mashirs took accused 1 and 2 to the otak of Kandu Khan at a distance of one and half miles from the kot where they were found and spent the night there. On the 8th morning the mashirs made inquiries from accused 1 and 2 who admitted the part they had played in the offence. They also agreed to produce articles used in the commission of the offence. The Sub-Inspector was sent for and in his presence and in the presence of the mashirs the accused produced a bloodstained shirt, a turban, a small tin containing percussion caps and gunpowder and a small gun from the heap of chaff. This place was at a distance of two miles from the kot. The two accused were sent to Shahpur in custody. Accused 3 was arrested later.

The case against accused 1 is very clear. The evidence against him is his judicial confession before Mr. Kewalram and his extra judicial confessions before the mashirs and Pheri witnesses. The extra-judicial confession before the mashirs cannot be relied on for reasons which will be given later in discussing the case against accused 2. There is the circumstantial evidence of his having gunshot injuries on the body, the evidence of footprints and the evidence of motive. In the Committing Magistrate's Court accused 1 said that he did not remember whether he had made the judicial confession; and in the Sessions Court he retracted it. It was proved by the evidence of Mr. Kewalram the Resident Magistrate who had recorded it. The confession is substantially in accordance with the prosecution case except in one particular; accused 1 said that he was alone in the crime. It is clear that there were more persons than one concerned in the murders; accused 1 was anxious to screen his accomplices. There were two gunshot wounds on his person: one on the left ring-finger and the other on the right big toe. It is the evidence of the witness Kaisro that one of the assailants was shot by him and he had to be helped way. Accused 1 has made no attempt to explain away this evidence. There is also the extra judicial confession by accused 1 to Pheri in which he gave substantially the same story: he says that accused 1 told him there were four assailants. This witness is a Khoso by caste and was a Hari of Faiz Mahomed Khoso cousin of accused 1. There is no reason why he should give false evidence against accused 1. The learned Sessions Judge does not place much reliance on the evidence of the footprints but in view of the very strong evidence against the accused we agree with him that the case against accused 1 is fully proved and in view of the deliberate and brutal nature of the murder we see no reason to reduce his sentence. We therefore confirm the convictions and sentences passed on accused 1

The case against accused 2 is entirely different. He made no judicial confession. The evidence against him is that he made an extra-judicial confession before the mashirs Khuda Bux and Shah Maho-

med that he produced a small gun and a small tin containing percussion caps and gunpowder. There is also evidence that his foot prints tallied with those at the scene of the offence and the fact that he was identified by the witness Kaisro. The learned Sessions Judge has stated that the evidence of footprints against accused 2 is very meagre. It depends solely on the word of Gulu Peri who saw the footprints of the accused at the kot and said that they were the footprints of the men who they had tracked.

The learned Sessions Judge has also rightly discarded the evidence of production of certain property. According to the mashirnama both accused showed the heap of rice chaff, both the accused dug in this heap and produced therefrom the articles which they stated to be buried there. The learned Sessions Judge held that as both the accused together took the police to the spot and pointed out the property, the production of property in this case could not be said to be by either of them. An attempt was made in the Court of Session to show that it was accused 2, who produced these articles but this subsequent modification was rightly discredited by the learned Sessions Judge.

Next we come to the extra-judicial confessions made by this accused to the mashirs. The story as to the confession is to be found in the evidence of mashir witness Khudabux Ex. 36: He accompanied the police in their investigation and went inside the kot with them when he found accused 1 and 2. They caught accused 1 and 2 and took them out of the kot. The two accused would not tell the Sub-Inspector of Police anything. The Sub-Inspector of Police then handed over accused 1 and 2 to the two mashir witnesses who took them to Jatoi which is two miles from the kot. The Peri had identified the footprints as the footprints of the two persons whom they had tracked. One of the accused was severely injured. He had gunshot wounds. The Sub-Inspector of Police said that accused 1 and 2 appear to be concerned in the murders and inquiries should be made from them. It is clear then that the Sub-Inespector of Police had sufficient grounds to take the accused in custody. The Sub-Inspector of Police told the mashirs also to take care of accused 1 and 2 so that they might not escape. The two mashirs and others watched over the accused day and night so as to make sure that they should not escape. It was held in *Emperor* v. *Pir Mahomed Bux* (1) that the words "in custody of the police" should not be extended by implication to cases beyond what is absolutely necessary, that is to say when the man is really under arrest or under strict supervision and is merely allowed to go for a few moments to converse with the mashirs. In *Wahiddino* v. *Emperor* (2) it was held by a Bench of this Court that the accused were at the time practically in police custody; and as the zamindars were accompanying and helping the police, in so far as the statement of the accused admitted the guilt either of himself or any of the co-accused, that confession would no doubt have been inadmissible. In *Emperor* v. *Rawat* (3), it was held by my learned brother Rupchand that:

"In my opinion no hard and fast rule can be laid down in that behalf and the question whether an accused person was in custody within the meaning of S. 26 at any particular moment must depend on the particular circumstances of each case. In the present case however there is no evidence that the accused were not free to go anywhere they wished at the time when the zamindars tackled Sato. At that time she was not being detained by the police. It is no doubt true that the police were investigating the offence and they were outside the place where she was living. But these facts alone are not sufficient to warrant the interence that she was being prevented from going anywhere she liked or that she was being kept in custody.

Similarly with regard to accused Rawat and Ali it is no doubt true that at the time of investigation a crowd of people including these two accused had collected outside the scene of offence but in the absence of any evidence that they had been sent for by the police or that they were told by the police not to depart therefrom their voluntary presence in the midst of the crowd would not amount to custody."

The learned Public Prosecutor admits that the substantial test is whether the person was or was not at liberty to move from the particular place where he was when he made the confession. It is clear from the facts of the present case that they were not at liberty. The police had sufficient grounds to take them in custody. The mashir witnesses admit that the Sub-Inspector of police had handed over the two accused to their custody with instructions that they should not be

(1) A.I.R. 1921 Sind 145=35 I.C. 833=26 Cr. L.J. 609=16 S.L R. 143.
(2) Criminal Appeals Nos. 188 and 193 of 1925.
(3) Confirmation Case No. 3 of 1929.

allowed to escape and also with instructions to ascertain from the accused the facts of the case. They were under close supervision and that supervision was under instructions from the Sub-Inspector. I must therefore hold that for all practical purposes the accused were in the custody cf the police at the time the extra-judicial confessions were made to the mashirs and these confessions must therefore be left out of consideration. (Here his Lordship discussed the other evidence against accused 2 and considered it not sufficient to sustain his conviction and concluded as follows.) The convictions and sentences of accused 2 are therefore set aside; he should be set at liberty.

Rupchand, A. J. C.—On the evidence it is abundantly clear that the murders were pre-conceived and that they were committed by four persons who came fully armed. The motive of the murders is also hardly in doubt.

The deceased, Mt. Fatma was a Khoso woman formerly residing in the Frontier District. She at first married one Abdul Rahim, a Khoso of Doulatpur in the Nasirabad District. As Abdul Rahim married a second wife, Fatma left him and went to live with her parents. After a lapse of seven or eight years she married the deceased Abdul Rahman, a Chandio by caste. On this her first husband made a complainant to the jirgah. The decision of the jirgah which was composed of seven Sardars of Khosos, the Extra Assistant Commissioner Nasirabad and the Deputy Collector Kandhkot, was given on 10th November 1930. It ordered Fatma's brother to pay money compensation to the first husband and declared that Fatma should be handed over to the Sardar of the Khosos that is to say, the Sardar of the community to which she and her first husband belonged who was at liberty to give her in marriage to any person he wished, provided such person was neither a Chandio nor a relative of the first husband. This decision did not satisfy Fatma. She managed to go back to her second husband and lived with him in the village of Shahpur. Her infant daughter born to her from the second husband also lived with them. This act on her part required to be avenged by the Khosos. On the night of 5th January 1931, four persons fully armed entered his house. He, his wife and daughter were sleeping in the hall. The deceased Muhammad Baksh, the sister of Abdul Rahman, and two boys Suhrab and Dost Mahomed, were sleeping outside in the court-yard. The murderers at first attacked Muhammad Baksh and did him to death. They then entered the room and after brutally murdering Abdul Rahman, Fatma and their daughter jumped out of the house by scaling the southern wall and made good their escape. It appears that one of these men was armed with a gun. He made use of it in doing Muhammad Baksh to death as proved by the post mortem examination which showed that he had two gun shot wounds on his body. The village watchman Kaisro and Jio and the Banias Jhamatmal and Assanmal were attracted to the scene of the offence by the firing of the gun and the cries from the house; but the only person who saw the murderers running away from the house was Kaisro; and he fired at the murderers hitting one of them, but all of them made good their escape. These facts are hardly in dispute.

The two appellants and one Ahmad, also a Khoso, were put on their trial as being three of the four murderers. Ahmad has been acquitted, and the only serious question before us is whether the two appellants were amongst the four who committed the murders. Now the evidence against the appellant Haroon consists of: (1) the extra-judicial confession made by him to Pheri; (2) the extra-judicial confession made by him to the zamindars Khuda Bux and Shah Mahomed; (3) the judicial confession made by him in the hospital; (4) the pointing out by him of the place wherefrom the gun and certain bloodstained clothes were found, (5) circumstantial evidence that he had a gunshot wound and other injuries on his person, and (6) the motive.

I am not inclined to place much reliance upon the extra-judicial confession to Pheri. He is the person to whose hut it is said, accused 1 and 2 went that night after the murder, and in whose hut they were found by the police on the morning of the 7th, that is to say, on the second day after the murders. Pheri was not in the house at the time when the police arrived there. The story given by him to the police differs from that given by him in the Sessions Court. To the police he said that he was sleeping in his house when he was called from out-

side, that he went out and saw Rahim and Abdul Ghafur Khosos, that Rahim said that he, Haroon, Alu and Mahomed, Khosos, had killed Abdul Rahman, Fatma, her daughter and Abdul Rahman's brother, that Rahim told him that his leg had been injured by shots of the gun of chowkidars. In the Sessions Court he has said that he got up on the barking of a dog and saw only accused 1 who on inquiry said:

"Muhammad Baksh and Abdul Rahman have fought with me. We were four men, viz. I, Ahmed, Alu and Abdul Rahim. I have received injuries, so I will stay here."

His explanation why he left his house is also somewhat difficult to believe. If accused 1 was alone, it is hardly likely that Pheri would leave him in the house unattended, or that he would leave the house on the pretext of informing his landlord who was partner of accused 1 and would not return until after the police had arrived at the house. It is not impossible that Pheri made a statement to the police about the alleged confession with the object of saving himself and his landlord from being prosecuted as persons concerned in the murder. Taking into consideration his status in life, the divergence in the story given by him to the police and in the Sessions Court, and the fact that he is not speaking the whole truth, I am not prepared to attach much reliance on his evidence. With regard to the extra-judicial confession made to the zamindars again, there can be no doubt that it is not admissible in evidence in view of the provisions of S. 26, Evidence Act, which reads as follows:

"No confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

What is "custody of a police officer" has been the subject of several decisions. It does not only mean that the accused should be under actual arrests when he makes the confession nor does it necessarily indicate that the presence of a police officer at the time of the confession is essential to constitute "custody." In *Rechoda* v. *Achenath* (4), it was pointed out that no formal arrest by the police was necessary and that it was sufficient to constitute custody of a police officer if the accused could not depart of his own free will. In *Empress* v. *Lester* (5), it was held that the confession made by the accused to the person with whom she was travelling in a tonga under police guard was inadmissible in evidence, although it was made at a time when the police guard had left the tonga and had gone away to some distant place to change his horse. In *Emperor* v. *Mallangowda* (6), a confession made by the accused to the doctor in the hospital while the police officer who had brought him was keeping guard outside in the verandah was likewise excluded on the ground that the accused who was in police custody up to his arrival in the hospital remained in that custody while the policeman was standing outside in the verandah. In the case of *Maung Lay* v. *Emperor* (7), at p. 615 (of 1 *Rang.*) May Oung, J., has said:

"I have come across several cases in which police officers have, after detaining a person accused of an offence, put forward the plea that the latter was not in custody because he had not yet been formally arrested. The object of this seems to be either to avoid operation of S. 26. Evidence Act, or to shorten the period of time between the arrest and the confession subsequently made to a Magistrate. This idea of 'free detention' is, in my view, altogether mistaken sometimes even hypocritical. It is an infringment of the spirit, while appearing to conform to the strict letter of the law, and I would lay down that, as soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of Ss. 26 and 27, Evidence Act."

This decision perhaps goes much further than any other decided case, and in so far as it raises a presumption that the accused must be deemed to be no longer at liberty after he comes into the hands of the police, it is somewhat contrary to the rulings of this Court. In *King-Emperor* v. *Pir Mohamedbux* (1) at p. 145 (of 16 *S. L. R.*) Kennedy, J. C., has said:

"I am not inclined to extend the meaning of words 'in custody of the police' by implication to cases beyond what is absolutely necessary, i. e. where the man is really under arrest or in strict supervision and is merely allowed to go for a few moments to converse with the mashirs. It seems to me that would be probably considered to be a case in which any statement to the mashirs is made while he is in police custody. But where the case is not so and the accused is not arrested or under supervision, and he is

(4) [1867] 3 M. H. C. R. 318=2 Weir 735.

(5) [1895] 20 Bom. 165.

(6) [1917] 42 Bom. 1=42 I. C. 597=18 Cr. L. J. 981.

(7) A. I. R. 1924 Rang. 173=77 I. C. 429=25 Cr. L. J. 381=1 Rang. 609.

merely being invited to explain certain circumstances, it seems to be going further than the section warrants to exclude the statement that he makes on the ground that he is deemed to be in police custody."

In *Crown* v. *Rawat* (3) I had occasion to consider the effect of S. 26 and I observed:

"* * * * * It has been said that for the purpose of excluding an extra-judicial confession under S. 26, Evidence Act, it is not necessary to prove formal arrest and that if an accused person is present before the police and cannot depart at his own free will, such presence amounts to sufficient custody. In my opinion no hard and fast rule can be laid down in that behalf, and the question whether an accused person was in custody within the meaning of S. 26 at any particular moment must depend on the particular circumstances of each case."

Nothing has been said in argument to make me change that view, and I think that the true criterion in all such cases is, whether the accused is free to depart where he likes or not. If not, he is in custody. It is immaterial whether his freedom of action is restrained directly by a police officer or by persons to whom his care is entrusted by a police officer. In the present case, there can be no doubt that both the accused were under police supervision at the time when they are alleged to have made their confessions to the zamindars, and were not free to go where they liked. This was not a case of mere suspicion attaching to the accused. Accused 1 had a gunshot wound and other marks of injury on his person. Accused 2 was found with him. He was a Khoso and footprints of two persons had led up to the outskirts of the kot where they were found. In the mashirnama (Ex. 40) it was definitely stated that the police had secured them, which could only mean that the police had restricted their free movements.

This is not the first case of its kind in which it has been brought to my notice that police officers often neglect to do their duty of collecting proper evidence in murder cases and that, as soon as they have been able to hit upon a probable offender they think that their task is over; and that they invariably hand over the accused to zamindars with the object of getting a confession from him, and then work down the case on the strength of such confession instead of working up the case themselves and finding for themselves farther clues which might help them in obtaining a conviction irrespective of the alleged confession which is, in most cases, retracted at the trial. In this case, the mashirnama recites in clear terms that the accused who had been secured, were handed over to the mashirs for the purpose of inquiring from them about the true facts.

A note to that effect is open to the attack that the accused were handed over for the purpose of being coerced or, at any rate, induced to make a confession. In my opinion, this procedure is open to serious objections and should be avoided. When the evidence of the extra judicial confessions to zamindars was being tendered, the learned pleader for the accused objected to its admissibility. The Court questioned the zamindar Khuda Buksh as to the circumstances under which the confessions were made, and the witness stated :

"The police did not arrest the accused in the kot but they handed them over to us. We had taken two private men from Kando Khan Jatoi to watch over the accused."

On that the learned Sessions Judge passed the following order :

"In my opinion, the accused cannot be said to be in police custody when they were with the witness at Jatoi village."

The learned Sessions Judge was, in my opinion, clearly in error in admitting the evidence of the extra-judicial confessions. Both the accused were not only secured by the police, but they were handed over to the zamindars with directions to keep them under the private guard supplied by the zamindars and were not free to go where they liked, as is clear from the admission of Khuda Bakhsh at line 169 p. 47, where he says :

"I also watched them during the first pahar of night. When I went to sleep I kept Shah Muhammad and others on the watch."

It is also worthy of note that although the zamindars say that the accused confessed to them their guilt, no attempt was made by them or by the police to have those confessions recorded at once by a Magistrate. I am afraid I cannot leave this point without observing that, in my opinion, the procedure adopted by the police in this case, of handing over the accused one of whom had serious injuries on his person and was prima facie one of the persons concerned in the raid, in charge of the zamindars who were helping the police in their investigation "to enable them to inquire" from the accused "about the true facts" while they were being kept under restraint and were being watched by the private guard sup-

plied by the zamindars, is hardly commendable. The judicial comfession made by accused 1 however stands on a different footing. It is not only admissible in evidence but is of considerable value. It is no doubt true that while inculpating himself he has tried to show that he was the only assailant. It is also true that he has resiled from it. But the circumstances under which he made it make it abundantly clear that so far as it relates to his being a murderer, it is true, and may be safely relied upon. He was then lying in a very serious condition in the hospital, and the Magistrate was sent for at the request of the doctor to record the confession which the accused wanted to make. He had several injuries on his person, three of them caused by a sharp weapon such as a hatchet and two of them by gunshots as deposed to by the Medical Officer. He knew well that so far as his case was concerned he had no chance of getting out of a conviction. He also felt that he would die, and perhaps thought that it was better for him to make a confession inculpating himself and exculpating the other offenders. Although he has retracted from his confession in the Sessions Court, he has offered no explanation whatsoever with regard to the injuries on his person. All that he has said is that he did not make the confession before the Resident Magistrate and that he was not in his proper senses when he was in the hospital.

The truthfulness of the confession, so far as it concerns him, is more than amply vouchsafed by the injuries on his person, his failure to explain them and by the first report which shows that the assailants had been fired at by the chowkidar Kaisro. Without more, this evidence would be sufficient to warrant his conviction. The fourth piece of evidence against him is with regard to the pointing out of the gun and certain stained clothes. This has not been relied on by the lower Court but I see no reason why this evidence should be excluded from consideration in the circumstances of the present case. It is no doubt true that in the mashirnama it was stated that both the accused had pointed out the place and had taken out the property, but in the evidence it was explained that accused 2 took out these articles at the instance of accused 1 who was in a bad condition of health, and could not bend down to take them out from the place where they were hidden. It is not unlikely that although in the mashirnama both accused persons are said to have shown the place and to have taken out the articles, it was really accused 1 under whose directions the articles were taken out and were discovered in consequence of the information given to the police by him and not by accused 2. Of course the probative value of this piece of evidence is not much, but it may well be considered as one of the links in the chain of circumstances proving that this accused was concerned in the raid.

The fifth point is again a very strong piece of circumstantial evidence against him. Kaisro had fired a shot at the culprits injuring one of them. The accused had recent injuries of a gun shot on the leg. He was found hiding in the house of another man away from his own relatives at a time when he was badly injured. The presumption of innocence having been rebutted, it was for him to explain these circumstances, and his failure to do so augments the presumption of his guilt almost to a certainty. Lastly, there is the evidence of motive. Accused 1 is brother of Abdul Rahim Khoso, the first husband of Fatma. One of the main terms of the jirgah decision had been broken. Fatma had gone back to Abdul Rahman Chandio. This could not be permitted by the relatives of the first husband. It is no doubt true that compensation had been awarded to Abdul Rahim but that was not enough. Abdul Rahman and Fatma had become "karo" and "kari" at any rate by going to live together as husband and wife after the jirgah decision, and according to the inhumane custom of these border tribesmen, it was incumbent on accused 1, as one of the nearest relatives to take revenge. I agree therefore with the learned Judicial Commissioner that the evidence against accused 1, Haroon, is very strong and that looking to the circumstances of the case, the only punishment which can be awarded to him is one of death.

I would accordingly dismiss his appeal and confirm the sentence of death under S. 302, I. P. C., and also confirm the sentence passed against him for the other offence with which he was charged. With regard to accused 2, the evidence adduced by the Crown consists of (1) the extra-judicial confession made to the

zamindars (2) production of property (3) identification by Kaisro and (4) identification of footprints. I have already pointed out that the extra-judicial confession is inadmissible under S. 26, Evidence Act. (Here his Lordship discussed the other items of evidence and concluded as follows.) I agree therefore with the learned Judicial Commissioner that accused 2 is entitled, at any rate, to the benefit of the doubt, and that his convictions and sentences be set aside and that he be set at liberty.

P.N./R.K. *Order accordingly.*

* A. I. R. 1932 Sind 156

FERRERS, J. C. AND MEHTA, A. J. C.

Saleh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. 18 of 1932, Decided on 25th May 1932.

***(a) Criminal P. C. (1898), S. 250—S. 250 does not apply to case instituted at the instance of police.**

The operation of S. 250 is restricted to cases instituted upon complaint or upon information given to a police officer or to a Magistrate. It will not apply to a case instituted on a police report or on information given by a police officer. [P 156 C 2]

(b) Criminal P. C. (1898), S. 250 — While making order under S. 250 Court should see that complaint was false etc.

The law requires that before making an order under S. 250, the Magistrate shall record and consider any cause which complainant may show; and if he is satisfied that the accusation was false and either frivolous or vexatious, he may for reasons to be recorded make an order for compensation. [P 156 C 2]

Where all that the Magistrate did was as follows: He called upon the complainant who appeared and gave his explanation. The Magistrate then said: "I find nothing in his explanation to justify that the complaint was not false and either frivolous or vexatious."

Held: that it was not a satisfactory order. There should have been in the first place, a definite finding that the complaint was false. The Magistrate should, in the second place have made up his mind whether he considered it to be frivolous or whether he considered it to be vexatious. That frivolity was one thing and vexation quite another. It was not satisfactory to leave it ambiguous upon which of these two counts the order was being made. Upon whichever ground the Magistrate intended to proceed, it was incumbent upon him to set forth his reasons. [P 157 C 1]

***(c) Criminal P. C. (1898), S. 250—Powers under S. 250 are to be exercised in fit and proper cases.**

The powers under S. 250 of the Code are to be exercised only in fit and proper cases, and not indiscriminately in every case in which the accused is discharged, since the virtual effect of any order of compensation is that it amounts to a summary conviction of the complainant. Injudicious adoption of this measure which is solely intended to check false accusations preferred recklessly and maliciously may inhibit timid people from coming to Court or complaining to the police to have even their legitimate grievances redressed. [P 157 C 1]

Tahilram Maniram—for Applicant.

C. M. Lobo—for the Crown.

Ferrers, J. C.— The Additional City Magistrate of Karachi, has made an order under S. 250, Criminal P. C. He has directed a complainant to pay an accused person Rs. 40 only as compensation and in default to undergo two week's simple imprisonment. Against such an order no appeal is competent but the party damnified has come to us in revision. We are satisfied that the Magistrate's order cannot be sustained. It is bad for more reasons than one. In the first place the proceedings were not instituted upon complaint or upon information given to a police officer. The applicant had on two occasions found that goods had been stolen from his house. He reported the loss of these goods to the police but he did not know whom to suspect, and did not in his report mention the name of the accused. It was the police who first began to suspect Chakoo. They searched his house. They found there a carpet which was identified by the Manager of Messrs. Phillip & Co. as one of the carpets which the applicant had hired from them and which had afterwards been stolen from his house. After this the accused was challaned by the police.

Now the operation of S. 250 is restricted to cases instituted upon complaint or upon information given to a police officer or to a Magistrate. It will not apply to a case instituted on a police report or on information given by a police officer. The Magistrate's order is also bad on other grounds. The law requires that before making an order under S. 250 the Magistrate shall record and consider any cause which complainant may show and if he is satisfied that the accusation was false and either frivolous or vexatious, he may for reasons to be recorded make an order for compensation. Now in the present case all that the Magistrate has done is this. He called upon the complainant who appeared and gave his explanation. The Magistrate then said:

"I find nothing in his explanation to justify that the complaint was not false and either frivolous or vexatious."

This is not a satisfactory order. There should be in the first place a definite finding that the complaint is false. The Magistrate should in the second place, make up his mind whether he considers it to be frivolous or whether he considers it to be vexatious. Frivolity is one thing and vexation quite another. It is not satisfactory to leave it ambiguous upon which of these two counts the order is being made. But upon whichever ground the Magistrate intends to proceed it is incumbent upon him to set forth his reasons. This he has not done. In view of the fact that the Magistrate who heard this case in the first place thought it necessary after hearing the prosecution to frame a charge against the accused we do not think that the Magistrate who took up the same case for the second time and heard it de novo was well advised in taking action under S. 250. It is conceded by the Public Prosecutor that the order made under that section cannot be defended. We therefore allow this application and set that order aside. Compensation, if paid, to be refunded.

Mehta, A. J. C.—It has been held time and again that the powers under S. 250, Criminal P. C., are to be exercised only in fit and proper cases, and not indiscriminately in every case in which the accused is discharged; since the virtual effect of an order of compensation is that it amounts to a summary conviction of the complainant. Injudicious adoption of this measure which is solely intended to check false accusations preferred recklessly and maliciously may inhibit timid people from coming to Court or complaining to the police to have even their legimate grievance redressed. In the present case the order of compensation is altogether unjustifiable. The name of the accused was never given by the complainant. The police were really responsible for the prosecution of the accused. The Magistrate who first heard the case thought fit even to frame a charge against the accused. No motive is suggested, much less proved why the complainant should suppress the name of the real thief and let the police proceed against the wrong person. I therefore concur in the order setting aside the order of compensation.

B.V./R K. *Application allowed.*

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* A. I. R. 1932 Sind 157

RUPCHAND, A. J. C.

Maniram Manghanmal and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 84 of 1932, Decided on 2nd June 1932.

***(a) Criminal P. C. (1898), S. 215—Question whether assuming that facts are proved, conviction is justified is question of law.**

In dealing with an application under S. 215 the High Court is not required to appreciate the evidence but it proceeds on the assumption that the facts as stated in the committal order will be proved at the trial. All that the High Court is required to apply its mind to is that assuming that the facts are proved, do they justify the conviction of the accused or not. As so stated the point at issue before the High Court is a point of law pure and simple. Prejudice to the accused is no ground whatsoever for refusing to quash a committal in fit cases: *A. I. R.* 1931 *Lah.* 467, *Diss. from*; *Case law discussed.* [P 159 C 1]

***(b) Criminal P. C. (1898), Ss. 215 and 273—High Court is empowered to quash commitment to Court of Session.**

Section 215 is intended inter alia to empower the High Court to quash a committal to a Court of Session in all such cases in which a Judge of a High Court trying a Sessions case would stay proceedings under S. 273 although a similar power has not been conferred on the Sessions Court itself. [P 159 C 2]

(c) Sind Judicial Commissioner's Court Rules, R. 2 (4)—Single Judge can quash commitment under Criminal P. C. (1898), S. 215.

Rule 2, Cl. 4 of the rules of the Court is clear and vests in a single Judge of the Judicial Commissioner's Court the power dealing with every application for quashing a commitment under S. 215. [P 159 C 2]

Partabrai D. Punwani—for Applicants.

D. N. O'Sullivan—for the Crown.

Rupchand, A. J. C.—The accused have applied under S. 215, Criminal P. C, that their committal to this Court on its Sessions Court side be quashed on the ground that there is no legal evidence in the case to justify their committal. There is to a certain extent, a divergence of judicial decisions on this question whether the total absence of legal evidence to justify committal is a point of law within the meaning of the section. But in most cases this divergence is more apparent than real. In *Empress* v. *Narotamdas* (1), *Jogeshwar Ghose* v. *Emperor* (2), *Sheobux Ram* v. *Emperor* (3), *Emperor* v. *Din Mahomed Sheikh* (4)

(1) [1883] 6 All. 98=(1883) A. W. N. 225.
(2) [1901] 5 C. W. N. 411.
(3) [1905] 9 C. W. N. 829=2 Cr. L. J. 534.
(4) [1905] 2 C. L. J. 48=2 Cr. L. J. 386.

and *Ghanshamdas* v. *Emperor*, *A. I. R.* 1930 *Lah.* 545, it has been held that the absence of evidence to warrant a commital does amount to a point of law. In the case of *Sheobux Ram* v. *Emperor* (3) referred to above Harrington, J., has said at p. 839 :

"The test which in my opinion should be applied to decide whether a committal ought or ought not to be made on the facts is this : assuming that the whole of the evidence telling against the accused is true, is there a case which a Judge at a trial could leave to a jury? If the evidence is such that a Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to be made. If there was any evidence which called for an answer however great the preponderance in favour of the prisoner might be, then the committal was proper."

On the other hand in *Emperor* v. *Sulleman Ibrahim* (5), Chandravarkar and Heaton, JJ., refused to quash a committal on the ground of want of evidence and the head note of that case reads :

"An order of committal to the Sessions Court cannot be quashed by the High Court on the ground that there is no evidence in the committing Magistrate's record to sustain the charges. The committal can be quashed on a point of law only."

The head-note no doubt supports the contrary view. But the judgment of Chandravarkar, J., which is the principal judgment in the case, if analyzed carefully, is much more circumscribed than the head-note. His Lordship has nowhere expressed the view that absence of evidence to support a committal is not a point of law. But he appears to have proceeded on the assumption that although no evidence might have been led before the committing Magistrate to justify the committal, evidence might be forthcoming in the Sessions Court and that therefore the responsibility in such a case is that of the Public Prosecutor who may if he thinks fit enter nolle prosequi. In that case the reference was made to the High Court by the Sessions Judge. There was no application by the accused themselves. Perhaps, there was in that case good ground for the High Court to leave it to the Crown to decide for themselves whether the trial should be continued to its finish or not. All that their Lordships have evidently held is that in the circumstances of that case the High Court cannot say that the order of committal ought to be interfered with by the High Court at that stage. The previous Allahabad and Calcutta rulings on the point at issue have not been referred to in the judgment of their Lordships ; and in my opinion the question whether absence of evidence where no evidence has been adduced in the committing Magistrate's Court and none is available for being adduced in the Court of Session so as to connect the accused with the offence is a point of law or not seems not to have been so clearly present in the minds of their Lordships.

In *Emperor* v. *Nga Taung Thu* (6) (a case decided by the Lower Burma Chief Court) all that has been held is that a committal order cannot be quashed merely on the ground that the evidence is doubtful. That is quite different from holding that a committal order may not be quashed when there is no evidence or that the absence of evidence is not a question of law.

In *Re Sessions Judge of Coimbatore* (7) again, a reference was made by the Sessions Judge and the ground on which he asked for the committal being quashed was that in his opinion the case called for further inquiry, and that if the trial was proceeded with in the Court of Session the accused would be acquitted and that would prevent the police from making further inquiry into the matter. Dealing with this point their Lordships have said:

"We are of opinion that on this ground it is not open to the High Court to quash a commitment. The accused is entitled to be acquitted if there is no evidence against him to support a conviction. The result of quashing the commitment will be that he may be charged again with the offence."

In the end their Lordships have referred to the case in *Empress* v. *Sulleman Ebrahim* (5) in support of their view and have not followed the case in *Emperor* v. *Narotam Das* (1). The ruling is no clear authority for the porposition that the absence of evidence is a point of law. In *Hassan Din* v. *Emperor* (8) Tapp, J., of the Lahore High Court has held that absence or insufficiency of evidence is not a point of law within the meaning of S. 215 of the Code. He has further held that even if it be a point of law it would be quite

(5) [1911] 10 I. C. 802=12 Cr. L. J. 256.

(6) A. I. R. 1914 L. B. 9=23 I. C. 478=15 Cr. L. J. 278.

(7) A. I. R. 1915 Mad. 24=25 I. C. 993=15 Cr. L. J. 665.

(8) A. I. R. 1931 Lah. 467=1931 Cr. C. 691=132 I. C. 380=32 Cr. L. J. 867.

wrong for the High Court to examine the evidence for the purpose of quashing the commitment as in doing so the High Court would be usurping the function of the Sessions Court. With all respect I am unable to accept the view taken by his Lordship. It goes much further than any of the decided cases from which it purports to find support. In dealing with an application under S. 215 the High Court is not required to appreciate the evidence but it proceeds on the assumption that the facts as stated in the committal order will be proved at the trial. All that the High Court is required to apply its mind to is that assuming that the facts are proved, do they justify the conviction of the accused or not? As so stated the point at issue before the High Court is in my opinion a point of law pure and simple.

Under the Code of Civil Procedure a judgment based on no evidence has always been treated as involving a point of law or to use the words of S. 100, Civil P. C., as being "contrary to law." The same meaning is attached to the expression under the English law both civil and criminal. There is no reason why absence of evidence should not be treated as a point of law under this section and if the dictum of Harington, J., in *Sheobux Ram* v. *Emperor* (3) is adhered to in considering whether a committal should be quashed or not the High Court will in no sense be assuming the function of the Court of Session of weighing the evidence in the case. In the present case the High Court has not been moved by the Sessions Court but by the accused themselves. And therefore the main consideration referred to in the Bombay case of not prejudicing the accused quashing the committal hardly arises. But with all respect I am inclined to the view that prejudice to the accused is no ground whatsoever for refusing to quash a committal in fit cases. In trials before the High Court S. 273 of the Code empowers the trying Judge to stay proceedings in respect of the charge or any part of the charge upon which an accused has been committed for trial and which in his opinion is unsustainable. An order of stay of proceedings does not amount to an acquittal and the accused may again be tried for the same offence. That being so there is no reason why when owing to a defective inquiry held by the police resulted in insufficient materials being placed before the committing Magistrate an accused person committed for trial to a Court of Sessions should be placed in a better position than an accused person committed for trial before a High Court. I think S. 215 was intended inter alia to empower the High Court to quash a committal to a Court of Session in all such cases in which a Judge of a High Court trying a Sessions case would stay proceedings under S. 273 although a similar power has not been conferred on the Sessions Court itself.

In the present case in view of an application having been made by the accused under S. 215, there has been no occasion for me to consider whether in view of the amended provisions of S. 266, Criminal P. C., a trial before this Court on its Sessions Court side being a trial before a High Court the powers under S. 273 may not be invoked. In view of the fact that I am passing an order in favour of the accused under S. 215 of the Code there is no occasion for me to consider this point. (The judgment then considered the merits of the case and proceeded.) With regard to the power of a single Judge of the High Court to quash committal it would appear that it depends upon the rules of each High Court. Although a good deal might be said in favour of the view that the power under S. 215 should be exercised by a Bench of the High Court, it seems that such power has been delegated to a single Judge in several High Courts. So far as this Court is concerned R. 2, Cl. (4), of the rules of the Court is clear and vests in a single Judge of this Court the power dealing with every application for quashing a commitment under S. 215, and I see no reason why I should not exercise the power so vested in me. Accordingly I quash the committal against both the accused.

K.N./R.K. *Application allowed.*

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* A. I. R. 1932 Sind 159

FERRERS, J. C. AND ASTON, A. J. C.

Emperor

v.

Koural Shah—Accused.

Criminal Ref. No. 42 of 1932, Decided on 9th May 1932.

*** Criminal P. C. (1898), S. 397—Two successive sentences of imprisonment — First conviction quashed on appeal — Second imprisonment runs from date of accused's acquittal in first conviction — On equitabe**

principles however sentence already undergone under first conviction was deducted by reducing sentence in subsequent conviction under Criminal P. C. (1898), S. 439.

K was convicted under the Arms Act and was sentenced to four months rigorous imprisonment on 19th September 1930. On 11th October 1930 he was again sentenced to four years rigorous imprisonment under S. 243, Penal Code. On appeal his conviction under the Arms Act was quashed and he was acquitted on 15th January 1931.

Held : that under S. 397, Criminal P. C., the second sentence commenced on 15th January 1931, the date of the accused's acquittal under the first conviction.

Held further : that equitable principles required that the period of imprisonment already undergone under the first conviction should be deducted from the imprisonment subsequently inflicted, and so sentence of 4 years should to that extent be reduced in exercise of the powers under S. 439, Criminal P. C. [P 160 C 2]

C. M. Lobo—for the Crown.

Aston, A. J. C.—This is a reference by the learned Additional Sessions Judge, Sukkur, who has referred to us the case of one Koural Shah. Koural Shah was convicted by the learned 1st Class Magistrate, Kandhkote, on 19th September 1930 and sentenced to four months' rigorous imprisonment and a fine of Rs. 100 under S. 19 (f), Arms Act. He was again sentenced by the learned Additional Sessions Judge, Sukkur, on 11th October 1930, and sentenced to four years' rigorous imprisonment under S. 243, I. P. C. He filed an appeal on 17th October 1930 with the result that his conviction under the Arms Act was quashed and he was acquitted on 15th January 1931. The learned Additional Sessions Judge has referred the matter to us for consideration of the period from which the sentence of four years' rigorous imprisonment under S. 273, I. P. C., is to run.

It has been held in two cases by the Bombay High Court referred to in *Ratanlal's Unreported Criminal cases at pp.* 139 *and* 523 that the sentence must commence to run after the expiration of the first sentence whether by reversal or completion of the sentence and not before. The Madras High Court in 2 *Weirs Criminal Rulings p.* 450, held that the imprisonment already undergone must be reckoned as imprisonment under the sentence in the conviction which was not reversed. The learned Additional Sessions Judge further points out that the Calcutta High Court has promulgated a rule that where a prisoner has been committed to jail under two separate warrants, the sentence in the one to take effect from the expiry of the sentence in the other, the date of such second sentence shall, in the event of the first sentence being remitted in appeal, be presumed to take effect from the date on which he was committed to jail under the first original sentence. The rulings are therefore in conflict. The learned Additional Sessions Judge observes that there is no authoritative decision of the Court of the Judicial Commissioner on this point and he has referred the question to this Court for such orders as it may deem fit to pass under S. 439, Criminal P. C.

We are of opinion that the legislature has clearly laid down in S. 397, Criminal P. C., that when a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence. We are of opinion that the second sentence in the present circumstances commenced on 15th January 1931, the date of the accused's acquittal of the first conviction under the Arms Act. Equitable considerations however require that the period of imprisonment already uudergone under the sentence inflicted on 19th September 1930 which has been set aside should be deducted from the imprisonment subsequently inflicted on 11th October 1930. We are of opinion that we have no power under S. 397, Criminal P. C., to alter the date on which the second sentence is to commence ; we are empowered however under S. 439 to reduce the sentence inflicted. We therefore in exercise of our powers under S. 439, Criminal P. C., reduce the sentence of 4 years rigorous imprisonment under S. 243, I.P.C., to 3 years and 8 months rigorous imprisonment.

S.N./R.K. *Sentence reduced.*

IMPORTANT

Our subscribers, who have got A. I. R. 1931 set, are requested to note the following correction in the Sind portion of A. I. R. 1931, Page 4, Col. 2.

I. *For*

(*F.O.*) *Ladhomal*—Appellants.
v.
Chandumal Rattanchand —
Respondents.

Substitute

Khushal Das Uderdinomal—Appellants.
v.
F. O. Harumal Tejumal and *another*—
Respondents.

II. The judgment is delivered by **Rupchand, A. J. C.** and *not* by **Wild, J. C.**

III. In the Nominal Index for A. I. R. 1931 Sind :

For Ladhumal v. Chandumal Rattanchand 4

Substitute Khushaldas Uderdinomal v. Harumal Tejumal 4

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A. I. R. 1932 Sind 161

ASTON, A. J. C.

Salamatmal Janimal—Debtor.

v.

Chetumal Bulchand—Creditor.

Insolvency Case No. 94 of 1930, Decided on 13th October 1931.

Presidency Towns Insolvency Act (1909), S. 92—Application under S. 92 held, could be allowed.

An application was made under S. 92 for substitution on the ground that original petitioning creditor was not proceeding with due diligence. The applicants alleged that he was the creditor of the debtors to the extent of Rs. 2,250 and Rs. 8,000 on over due hundis. The due date of the hundis on which Rs. 8,000 were due by the debtor to the applicant was less than three months from the date of the application for substitution :

Held : that the application could be allowed : *In re Maund ex parte Maund*, (1895) 1 *Q. B.* 194, *Dist.* and *A. I. R.* 1928 *Mad.* 608, *Rel. on.* [P 162 C 1]

Manghanmal Bhojraj—for Debtors.

Srikishendas H. Lula—for Creditors.

Order.—This is an application under S. 92, Act 3 of 1909. On 15th December 1930 the firm of Chetumal Bulchand made an application under Ss. 12 and 13, Act 3 of 1909, that the firm of Salamatmal Janimal Sadorasing Motiomal might be adjudicated insolvents. In the application they allege an act of insolvency on or about 18th September 1930, viz., the transfer of standing crops in various debs in favour of Panjoomal Salamatrai, the uncle of the opponents for an old debt alleged to be due and for an inadequate consideration. It was alleged that the transfer was void as a fraudulent preference. The opponents gave notice on 16th January 1931 that they intended to dispute the petitioning creditors' debt and their right to present the petition and the jurisdiction of the Court and the act of insolvency alleged. On 10th February 1931 the petitioning creditors applied for a commission.

On 16th June 1931 the present application under S. 92 was filed the applicants stating they were creditors of the debtors to the extent of Rs. 2,250 and Rs. 8,000 respectively on overdue hundis praying for substitution on the ground that the original petitioning creditors had settled with the debtors and had obtained an award against them and had stated to the Court the intention of withdrawing the petition on the award being registered. It was alleged that the original petitioning creditors were not proceeding with the petition with due diligence. The due dates of all the hundis except the last three hundis of the aggregate value of Rs. 2,250 were within three months of the date of the application for their due dates were between 7th April 1931 and 6th June 1931. Reliance is placed by the opponents on the case of *In re Maugham* (1) where, Carr, J., expressed the opinion that an order allowing two non-assenting creditors to have their names substituted for the original petitioning creditors more than three months after the act of bankruptcy on which the petition was grounded was not warranted by S. 107 or any other section of the Bankruptcy Act, The petition in that case had been dismissed and more than three months had elapsed since the act of bankruptcy. Accordingly no one could then present a petition grounded on the act of bankruptcy and the provisions of S. 6, S. 1 (c), Bankruptcy Act 1883 (26, 47 Vict. C. 52) applied.

In *In re Maund ex parte Maund* (2) Vaughan Williams, J., held that the Court will not amend a bankruptcy petition by adding as petitioners, after three months have elapsed from the date of the act of bankruptcy, upon which the petition is grounded, creditors whose debts were other than those in respect of which the petition was presented and Wright, J., held that every debt sought to be added as ground of the petition after three months from the date of the act of bankruptcy is unavailable for the purpose but if within that period a debt has been made ground of the petition and it afterwards becomes desirable to add another party to the petition in respect of that debt leave may be given to join that other party as a petitioner where it will not lead to any injustice. In the opinion of Vaughan Williams, J., the principle laid down in *In re Maugham* (1) was applicable even in a case where the petition had not been dismissed. The present facts are distinguishable from those in *In re Maugham* (1) both on the ground that petition has not as yet been dismissed and also on the ground that the due date of the nine hundis on which Rs. 8,000 are

(1) [1888] 21 Q. B. D. 21=57 L. J. Q. B. 487=59 L. T. 253=36 W. R. 846=5 Morrel. 152.

(2) [1895] 1 Q. B. 194=64 L. J. Q. B. 183=15 R. 159=72 L. T. 58=43 W. R. 207.

due by the opponent to the applicant was less than three months from the date of the application for substitution, several of them having become due cnly ten days before the application was made.

It is pointed out by Ramesam, J., in *Venkata Hanumantha Rao* v. *Gangayya* (3) that the object of S. 16, Provincial Insolvency Act, is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute the petition. If it is to be regarded as a new petition, this object is frustrated and there is no purpose of having a section of the kind. If the original petition had proceeded up to the adjudication or if another creditor whose debt was not barred by the date of substitution had been substituted and he obtained an order of adjudication the applicant's debt which was not barred by the date of the petition could be proved. Opponents contend that the original petition was invalid, for an upcountry constituent does not carry on business in Karachi by merely sending articles to a commission agent. It is contended however that the petitioner had a regular agent in Karachi and an office and that the agent was not a commission agent. This is a matter of evidence. On the grounds I have mentioned distinguishing the case *In re Maugham* (1) and for the reasons mentioned by Ramesam, J., I allow the application with costs.

P.N./R.K. *Application allowed.*

(3) A. I. R. 1928 Mad. 608=110 I. C. 611=51 Mad. 594.

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* A. I. R. 1932 Sind 162

RUPCHAND AND MEHTA, A. J. Cs.

Tulsidas Keshovdas—Appellant.

v.

Hanifabai and *others*—Respondents.

First Appeal No. 32 of 1930, Decided on 5th February 1932.

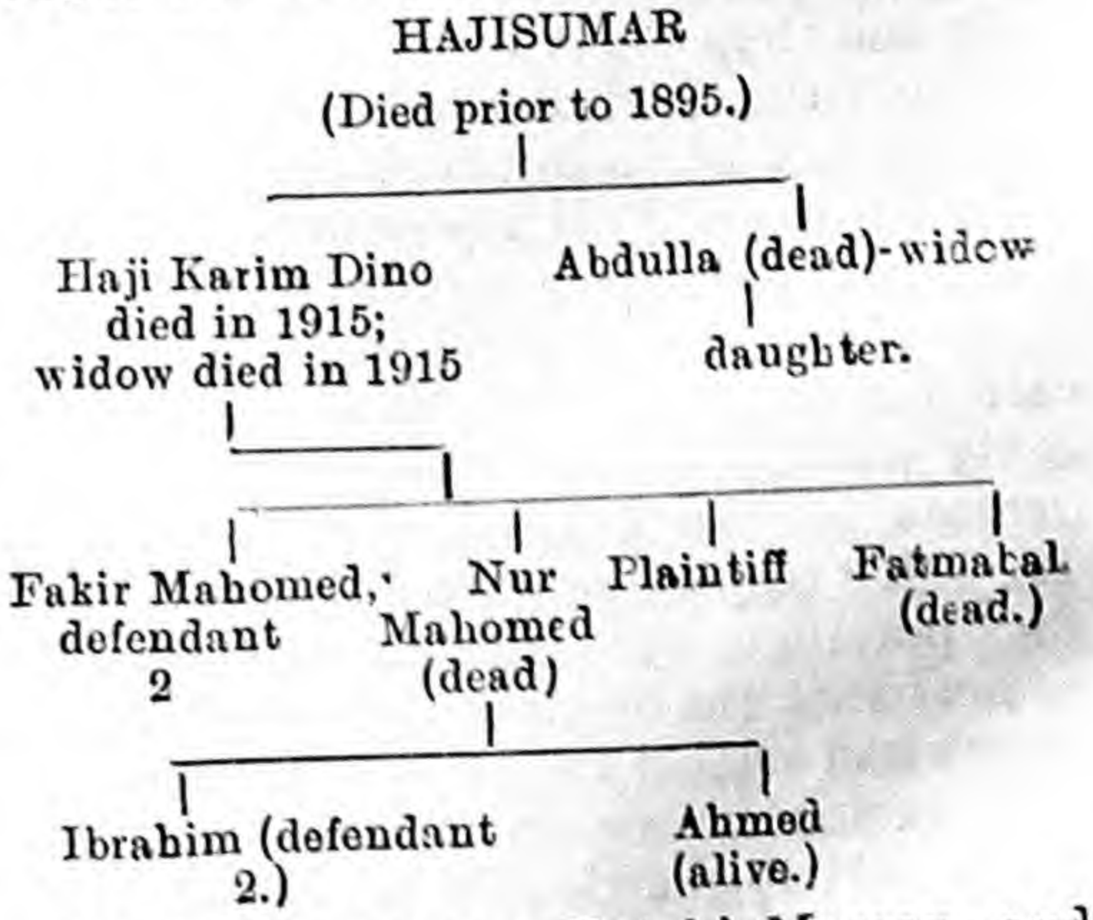
*** Hindu Law — Maintenance — Notice of claim for residence of daughter and fact that she is residing in ancestral family house is not sufficient to affect rights of mortgagee unless it is proved that he is not bona-fide mortgagee for value within Transfer of Property Act (1882), S. 39.**

In order to affect a bona fide purchaser for value with notice he must have notice not merely of the existence of a right of maintenance, that is, of the existence of persons who did or might require to be maintained but of the existence of a charge actually created and binding on the estate. The right of residence of a widow to live in the ancestral family house is a right to the provision for residence and is included in the general right of maintenance and like the right of maintenance, it is an equitable and not a legal right. The same principle applies in the case of an unmarried daughter. Consequently notice of a claim for residence of the daughter or of the fact that she is residing in family house along with her nephews is not sufficient to affect the rights of the mortgagee unless it is proved that he is not a bona fide mortgagee for value within the meaning of S. 39: 4 *S. L. R.* 278; *A. I. R.* 1926 *Sind* 135 and *A. I. R.* 1929 *Sind* 102, *Rel. on*; 12 *W. R. O. C.* 135, *not Foll.* [P 163 C 2]

Dingomal Narainsing—for Appellant.

Khanchand Gopaldas — for Respondents.

Judgment.—This appeal arises out of a suit instituted by one Hanifabai respondent 1, for a declaration that by an agreement arrived at between her and her brothers about 40 years prior to the suit she was given a right to reside in a part of the property in suit and to appropriate the rents of the rest of it for her maintenance during her lifetime, and for an injunction restraining the heirs of her brothers and the transferees from them of certain rights in the property from disturbing her from her possession and enjoyment of the property. The property in suit consists of Survey No. 18 and a divided part of Survey No. 19 which is referred to for the sake of brevity as Survey No. 19, the other part being owned and possessed by strangers to the family of the plaintiff. Survey No. 18 belongs to her father and Survey No. 19 was purchased in 1895 by her brothers after their father's death. The following is her family pedigree:



Haji Sumar was a Kutchi Memon and governed by Hindu law in matters of succession and inheritance. One Tulsi-

das claimed to be a mortgagee of the whole property under two deeds executed in his favour by Faker Mahomed and Ibrahim on the ground that they borrowed the money for family necessity and that the mortgage deeds executed by them were therefore binding on Ahmed who was a minor at the date of suit. In the suit filed by him for enforcement of his mortgage claim it was however held that the mortgagee did not bind the interest of Ahmed in the property. Ahmed is said to have transferred his interest in the property to one Umer. Tulsidas and Umer were defendants 1 and 4 in the suit. The only contesting defendant was Tuldidas, others being ex parte. The learned Additional Judicial Commissioner decreed the suit, and the legal representatives of Tulsidas have now come to us in appeal. The main point in controversy between the parties is, whether the plaintiff has proved the agreement set up by her. (After holding that the agreement was not proved, the judgment proceeded.) As the plaintiff has failed to prove the agreement, there is no occasion for us to discuss the further question whether a valid charge over the property in suit was created by the alleged agreement which was not in writing and was not registered and particularly over Survey No. 19 which was the self-acquired property of the plaintiff's brothers and as such not liable for her maintenance; or to discuss the further question whether the plaintiff had or must be deemed in law to have had notice of the said charge.

It is however argued that according to Hindu law which applied in this case it was not within the competence of the male members of the family of the plaintiff to transfer the property by way of mortgage or otherwise without making adequate provision for her maintenance and residence and that the transferees took Survey No. 18 which belongs to the plaintiff's father subject to her rights. It is further argued that as the plaintiff was actually residing in a part of the premises at the date of the transfer, she had a right to live there unless the transferors provided other premises for her residence. Now, it is well settled that in order to affect a bona fide purchaser for value with notice, he must have notice not merely of the existence of a right of maintenance, that is, of the existence of persons who did or might require to be maintained, but of the existence of a charge actually created and binding on the estate: see para. 4 of Trevelyan on Hindu Law, Edn. 3, and the authorities quoted thereunder. As pointed out by Mayne in para. 462 of his Treatise on Hindu Law at p. 97, were it otherwise, it is evident that an estate never could be purchased as long as there was any person living whose maintenance was or might become a charge upon the property. There is some divergence of opinion with regard to a claim for residence. It has been laid down by the Calcutta High Court that there is a distinction between the right of a widow to continue to live in the ancestral family house, and her rights over other parts of the property, and that a purchaser of the family house cannot evict the widow until he had provided for her some other suitable residence: *Mangala Debi* v. *Dinna Nath* (1). But so far as this Court is concerned it has taken a different view. In *Thakar Das* v. *Vani* (2), Pratt, J. C., held that the right of residence of a Hindu widow is a right to a provision for residence and is included in the general right of maintenance and that like the right of maintenance it is an equitable and not a legal right. This ruling was followed with approval by Kincaid, J. C., and Lobo, A. J. C., in *Kewal Mal* v. *Isribai* (3) and by me in *Radhibai* v. *Doongersi* (4). The same principles would apply in the case of an unmarried daughter. Notice therefore of the claim for residence of the plaintiff or of the fact that she was residing in Survey No. 18 along with her nephews was not sufficient to affect the rights of the mortgagee, unless it was proved that he was not a bona fide mortgagee for value within the meaning of S. 39, T. P. Act. We are therefore afraid that we cannot accede to the request of the plaintiff of upholding the decree either for maintenance or residence de hors the agreement set up by the plaintiff which has been held disproved.

The mortgagee has since the suit purchased three-fourths share in Survey

(1) [1869] 12 W. R. O. C. 35=4 B. L. R. O. C. 72.
(2) [1912] 4 S. L. R. 278=10 I. C. 985.
(3) A. I. R. 1926 Sind 135=93 I. C. 353.
(4) A. I. R. 1929 Sind 102=116 I. C. 105.

No. 18, and it might perhaps be still open to the plaintiff on the strength of the ruling in *Jogendra Chunder Ghose* v. *Ful Kumari* (5) and *Amrita Lal Mitter* v *Manick Lal Mullick* (6) and other allied rulings, to claim through the owner of the remaining one-fourth share for an adequate provision being made for her maintenance before a partition takes place and thus make the appellant provide for her maintenance in proportion to his share in the property. A good deal would depend upon the nature of the alienation made by Ahmad in favour of Umer defendant 4 and on several other questions of fact which have not been in issue. We cannot go into those questions and without expressing any opinion whatsoever on the questions of law or fact which might arise in the partition suit we hold that that is a relief which cannot be gone into in the present proceedings. We therefore dismiss the plaintiff's suit on the ground that she has failed to prove the agreement set up by her. She will bear the costs of the mortgagee throughout. As the other defendants are ex parte we make no order as to costs.

R.M./R K. *Suit dismissed.*

(5) [1900] 27 Cal. 77=4 C. W. N. 254.
(6) [1900] 27 Cal. 551=4 C. W. N. 764.

A. I. R. 1932 Sind 164

MILNE, J. C. AND MEHTA, A. J. C.

Lakhmichand—Appellant.

v.

Amirchand—Respondent.

Misc. Appeal No. 53 of 1927, Decided on 30th July 1931.

(a) Insolvency—Partner — Effect on partnership.

The insolvency or even the adjudication of a partner does not by itself dissolve the partnership. And therefore a partner even though adjudicated an insolvent can join the Official Receiver in validly assigning a decree which was the property of the firm. [P 164 C 2 P 165 C 1]

(b) Civil P. C. (1908), S. 64—Judgment-debtor can dispose of property before attachment.

Though a plaintiff obtains a decree, there is nothing to prevent a judgment-debtor disposing of any of his property before it has been attached in execution of the decree. [P 165 C 2]

Tahilram Maniram—for Appellant.

Pahlajsing B. Advani—for Respondent.

Judgment.—In this matter the firm of Nichalsing Mahtabsing had obtained a decree against the firm of Vishinji Gordhan. The managing partner of Vishinji Gordhan, Vishinji Devji, was adjudicated insolvent in proceedings of 1922. The firm of Nichalsing Mahtabsing on 24th June 1925, assigned their decree to the firm of Lakhmichand Chimanlal the managing partner of which was Lakhmichand Ghandamal. The name of the assignee was brought on the record on 10th August 1925. The said firm of Vishinji Gordhan, judgment-debtor in the above matter in 1924, with the Official Receiver brought a Suit No. 700 of 1924, against the aforesaid Lakhmichand Ghandamal assignee of the judgment-creditor in the above matter. In October 1924 a consent decree was passed in favour of plaintiffs for about Rs. 4,500. This decree was assigned by the plaintiffs to one Vazirchand. The first assignment of 11th May 1925 is said to have been defective and a fresh assignment was executed by the Official Receiver and the firm of Vishinji Gordhan represented by their managing partner Vishinji Devji on 11th July 1925. On 15th May 1925 Vazirchand brought an execution application on his first assignment and on 25th June 1925 Lakhmichand applied for execution on his assignment. Both applications were dropped on 30th June 1925.

Lakhmichand Ghandamal as the assignee of the decree against the firm of Vishinji Gordhan applied for the attachment of the amount due to the firm of Vishinji Gordhan in Suit No. 700 of 1924, and on 17th August 1925, the Court ordered attachment as prayed. Vazirchand then applied for the raising of this attachment and to have his name brought on record as assignee in Suit No. 700 of 1924 and to execute his decree against Lakhmichand Ghandamal. Both these applications have been dealt with by the learned Additional Judicial Commissioner in his order under appeal. The first ground that has been taken by appellant is that the assignment to Vazirchand by the Official Receiver and Vishinji Devji on behalf of the firm of Vishinji Gordhan is invalid as at that time Vishinji Devji was an insolvent. The appellant does not dispute the proposition laid down by the learned Additional Judicial Commisssioner that the insolvency or even the adjudication of a partner does not by itself dissolve the partnership: appellant however contends that the rights of an insolvent partner are

less than before his insolvency and that he could not on behalf of the firm join the Official Receiver in assigning the decree which was the property of the firm to Vazirchand. Mr. Tahilram for appellant admits that he has no direct authority for that proposition. He relies on general principles of law: but the principles which he has quoted refer to agents and not to partners. The working partner in the firm of Vishinji Gordhan had vanished and the capitalist partner was insolvent: the firm had therefore ceased to do business. The realization then of the assets of the firm was clearly necessary for the winding up of the business. No authority for holding that, though Vishinji Devji had been adjudicated insolvent, he was not still a partner of the firm; that he had not the authority of a partner to do all things necessary for the winding up the partnership has been cited. We therefore agree with the learned Additional Judicial Commissicner that the assignment by the Official Receiver and Vishinji Devji, on 11th July 1925, was a valid transfer.

The appellant has next contended that after the date of his assignment 24th June 1925, he was in the position of the decree-holder and was entitled to set off his claim under the decree assigned to him, against the amount due from him under the decree assigned to Vazirchand. The position taken by him before the learned Additional Judicial Commissioner was that the assignment to Vazirchand being invalid, he was still entitled to attach the decree of the firm of Vishinji Gordhan. He does not seem to have contested the position taken by Vazirchand that the assignment of the decree in Suit No. 700 of 1924 in favour of Vazirchand being long prior to the order of attachment issued in the execution proceedings in the other suit there was nothing to attach; the right, if any of the firm of Vishinji Gordhan having vested in Vazirchand before the date of the order. That proposition does not seem to have been contested in the lower Court, but the appellant has here contended that Vazirchand being aware of the transfer to Lakhmichand of the decree of Nichalsing Mahtabsing and having been aware of their first application under O. 21, R. 18, Civil P. C., subsequently dropped by them, on that account, it was not open to Vazirchand to claim that the order of attachment should be set aside. We are not here concerned with the order raising the attachment as it was for the appellant if he challenged that order to bring a suit within the period allowed by law. But the provisions of S. 64, Civil P. C. give a clear answer to appellant's contention. Though a plaintiff has obtained his decree there is nothing to prevent the judgment-debtor disposing of any of his property before it has been attached in excution of the decree. The assignment to Vazirchand was made long before the date of the order of attachment and Vazirchand was clearly entitled to have the order of attachment raised.

The appellant has further contended that he was entitled under O. 21, R. 18, Civil P. C., to have his claim set off against the claim under the decree obtained against him by Vishinji Gordhan and the Official Receiver. There is nothing in his appeal memo about this: and we do not propose to go into the merits of this contention. We would note however the objections which were raised before the learned Additional Judicial Commissioner in respect of this application: vide his order dated 1st September 1925. An initial objection was raised that the appeal was time barred as it had not been filed in time against the right person; but the mistake was merely one of misdescription. We therefore confirm the order of the learned Additional Judicial Commissioner and dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Sind 165

FERRERS, J. C. AND RUPCHAND, A. J. C.

Emperor

v.

Rihan Dodo—Accused—Opponent.

Criminal Ref. No. 64 of 1932, Decided on 11th July 1932.

*** (a) Criminal P. C. (1898), S. 342 — Accused stating that his statement is same as that of co-accused—Co-accused making two contradictory statements—Correct statement of co-accused not ascertained — Accused should get benefit of statement beneficial to him.**

Where an accused in his examination by the Court says that his statement is the same as that of his co-accused and the co-accused has made two contradictory statements and no question is put to the accused to ascertain which of the two contradictory statements made by the co-accused was true, the accused is entitled to benefit of the statement beneficial to him.

[P 166 C 1, 2]

*** (b) Criminal P. C. (1898), S. 342—After examination of accused, investigating officer examined—Accused should be further examined.**

Where after the accused has been examined under the provisions of S. 342 there is not only cross-examination of some of the prosecution witnesses but the investigation officer is examined, it is necessary for the Magistrate to examine the accused further under the provisions of S. 242 in order to afford him an opportunity of explaining the evidence recorded after the first examination. [P 166 C 2]

C. M. Lobo—for the Crown.

Hassaram Jashanmal—for Opponent.

Rupchand, A. J. C. — The learned Sessions Judge, Hyderabad, has referred the case of Rihan son of Dodo to us and has pointed out that as the accused was convicted of an offence under S. 326, I. P. C., it was incumbent upon the trying Magistrate to award a sentence of imprisonment in addition to the sentence of fine.

It appears from the record that the learned trying Magistrate experienced some difficulty in holding the charge proved. The prosecution evidence was discrepant and the learned Magistrate had to rely upon the statement made by Dodo, father of Rihan who was one of the co-accused in convicting Rihan. Dodo had said that the cattle of the complainant's party had trespassed over his land, that he directed Rihan and another boy to take the cattle to the cattle pound, that the complainant's party tried to take possession of the cattle which led to a fight between the complainant's party which consisted of the complainant and two others and Rihan and the boy and that both Rihan and the boy were injured while the complainant received a hatchet injury. With regard to the question who gave the hatchet blow to the complainant, Dodo had made two contradictory statements. On these facts the complainant was clearly in the wrong and the only question in the case was whether Rihan had exceeded his right of private defence.

Now, Rihan in his examination by the Court, under the provisions of S. 342, Criminal P. C., had said that his statement was the same as that of Dodo. But no question was put to him to find out which of the two contradictory statements of Dodo with regard to the person who gave the hatchet blow, was true. Rihan is therefore entitled to the benefit of the statement made by Dodo on that point which is beneficial to him. That being so, there is no reliable evidence to prove that he gave the hatchet blow. After Dodo and Rihan had been examined under the provisions of S. 342, Criminal P. C., there was not only cross-examination of some of the prosecution witnesses but the investigation officer was examined. Under the circumstances it was necessary for the learned Magistrate to examine the accused further under the provisions of S. 342 in order to afford him an opportunity of explaining the evidence recorded after the first examination. There is in the circumstances of this case a great probability of the accused having been prejudiced in consequence of this opportunity not being afforded to him.

The conviction cannot therefore stand. With regard to the question whether we should order a retrial we do not think that any useful purpose will be served thereby. There are sufficient materials on the record to show that the accused acted in self defence and that probably he did not exceed his right. Accordingly we set aside the conviction and sentence of the accused and order that the fine, if paid, be refunded.

K.N./R K. *Order accordingly.*

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* A. I. R. 1932 Sind 166

FERRERS, J. C. AND RUPCHAND, A. J. C.

Emperor

v.

Mulchand Choithram—Accused—Opposite Party.

Criminal Ref. No. 76 of 1932, Decided on 29th July 1932.

*** (a) Emergency Powers Ordinance (2 of 1932), S. 52—Sind Judicial Commissioner's Court cannot on reference convert sentence of simple imprisonment into rigorous one.**

The terms of S. 52 are not equivocal and do not admit of any two interpretations. They do not allow the Judicial Commissioner's Court, whose powers are not co-extensive with those of a Chartered High Court, any authority to convert a sentence of simple imprisonment passed under the Ordinance into one of rigorous imprisonment on a reference made by the District Magistrate. [P 167 C 2]

(b) Emergency Powers Ordinance (2 of 1932)—Validity of.

Ordinance (2 of 1932), in so far as it attempts to deprive a Chartered High Court of its powers under the Government of India Act, is ultra vires: (*Obiter*). [P 168 C 1]

C. M. Lobo—for the Crown.

Ferrers, J. C.—The District Magistrate of Nawabshah has forwarded to us

the record and proceedings in the case of *Crown* v. *Mulchand*. This case was disposed of under S. 21, Ordinance No. 2 of 1932. The papers disclose the following facts:

On 8th March 1932 three suspects of whom Mulchand was one were lying in the Central Prison, Hyderabad. The District Magistrate sent to the Superintendent three notices in duplicate. He ordered that one copy should be handed over to each of the suspects and the other signed by them and signed by the Superintendent. The suspects should be released immediately after the service of the notice. The contents of the notice in question were:

"Whereas the District Magistrate, Nawabshah, has reasonable grounds for believing that you Mulchand Choithram, resident of Bhiria taluka, Naushahro, are about to act in a manner prejudicial to the public safety cr peace or in furtherance of a movement prejudicial to the public safety or peace; in exercise of the powers vested in him under S. 4 of the Ordinance (2 of 1932), the District Magistrate Nawabshah is pleased to direct that for a pericd of one month from the date of this order you shall reside in Bhiria and remain in the area belonging to the Sanitary Committee, Bhiria."

There follow other restrictions with which we are not at present concerned. It seems that instructions were given to a mounted constable named Mahmoodshah to observe the accused so that he should not move out from the sanitary limits of Bhiria village. One Nenoomal came and informed Mahmoodshah that Mulchand had crossed the sanitary limits. Mahmoodshah went with him and saw that Mulchand had gone on the bridge of Barrage canal and was sitting there. Nenoomal gave evidence and said:

"I was member of Sanitary Board formerly. Yesterday at sunset I informed Mahmoodshah that Mulchand had left the sanitary limit and was sitting on the bridge of Rohri canal . . . That bridge is at a call's distance from the sanitary limit of the village and I have a personal knowledge of the fact."

Mulchand did not cross-examine either of these witnesses. He contented himself with saying that:

"I had been restrained from moving or going beyond the limits of the Bhiria village. I had gone for walking on the bridge not knowing that it was beyond the sanitary limits of the village. I had not gone out knowingly. I have no defence."

On this Mulchand was convicted of the offence of disobeying an order under S. 4, Emergency Powers Ordinance, 1932, and was sentenced to six months' simple imprisonment and Rs. 100 fine or in default further one month's simple imprisonment. This sentence has been referred to us by the District Magistrate with a recommendation that the sentence of imprisonment be altered from simple to rigorous. On this reference the first question to decide is whether we have any power to interfere in revision with an order passed under the Ordinance, The reference appears to have been made by the District Magistrate under S. 438, Criminal P. C. The learned Magistrate was apparently not satisfied as to the correctness, legality or propriety of the sentence passed. Now S. 439, Criminal P. C., provides that in the case of any proceeding, the record of which has been reported for orders, the High Court may in its discretion exercise various powers of revision. S. 53 of the Ordinance provides that:

"the provisions of the Criminal Procedure Code in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Ordinance shall apply to all matters connected with, arising from or consequent upon a trial by special criminal Courts constituted under this Ordinance."

Section 52 provides that:

"Notwithstanding the provisions of the Code, or of any other law for the time being in force or of anything having the force of law by whatsoever authority made or done, there shall, save as provided by this Ordinance, be no appeal from any order other than law or sentence of a Court constituted under this Ordinance and, save as aforesaid, no Court shall have authority to revise such order or sentence. . . . . "

These words are not equivocal. They do not admit of any two interpretations. It is clear that they allow us no authority to revise the sentence to which the learned District Magistrate has called our attention. We do not exercise the powers conferred by S. 15 of Vic. 24 and 25 Cap. 104 on High Courts chartered under that Act. We have no Letters Patent on which we can fall back. There is therefore nothing further which we can do. Nevertheless since our attention has been called to this Ordinance, we cannot help observing that extraordinary and very extensive powers have been conferred upon a large body of Magistrates. Our experience leads us to suppose that powers of this kind cannot safely be exercised without some sort of supervision. Authority to exercise such supervision has been expressly withheld from us. We must therefore disclaim any responsibility. We make no comments upon the facts which have been

rehearsed, nor do we attempt to raise or decide any of those questions which if we had power to revise these proceedings we should think it necessary to investigate. We cannot interfere with this order, but we are careful not to say that we uphold or confirm or maintain it. We find that we have no jurisdiction and we therefore return these papers with these remarks to the Magistrate from whom they come.

Rupchand, A. J. C.—This Court is the highest Court for the administration of justice both civil and criminal in the province of Sind, and yet its power of doing justice is not co extensive with that of a Chartered High Court. On more than one occasion I have referred to the anomaly that a person residing in the Presidency proper is in a much better position in getting relief in certain cases than a person residing here. The present case is only another instance of that anomaly. In the report given in the "Times of India" of a revision application made by Phansalkar against his conviction under the Ordinance, which is now attracting the attention of a Full Bench of the Bombay High Court presided over by the Chief Justice, the Chief Justice has said:

"Experience shows that irregularities and illegalities do creep in, in the administration of the law, and I think it would be very unfair, if the High Court had no power to direct and regulate any irregularity or illegality committed by the lower Courts. We must, therefore deal with the applications on their merits."

The observations of his Lordship with regard to the unfairness of depriving the High Court of its powers of revision apply with equal force to this Court. But all the same, we are afraid we cannot deal with the present applications on the merits. We derive our powers under the Code of Criminal Procedure, and not under any charter or under the Government of India Act. Although the Ordinance, in so far as it attempts to deprive a Chartered High Court of its powers under the Government of India Act, is ultra vires we are bound by it; and we must administer the law as it is, until such time as the Governor-General in Council or the legislature, as the case may be, considers it proper to place the subjects of this Province on the same level, so far as the administration of justice is concerned, with those in the Presidency proper. Under the circumstances, it is not open to us to go into the question either of the propriety of the conviction or of the sentence, which it would have been our duty to do before accepting the recommendation of the learned District Magistrate, or to go into the further question whether the sentence should be enhanced or not. I accordingly concur with the learned Judicial Commissioner that this reference should be returned as incompetent.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Sind 168

FERRERS, J. C. AND ASTON, A. J. C.

Sumar Khamiso—Applicant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 358 of 1931, Decided on 25th February 1932, against order of Addl. Sess. Judge, Hyderabad.

(a) Penal Code (1860), S. 300, Excep. 1—Grave and sudden provocation need not come from victim within hearing or sight of offender.

It is not necessary that the grave and sudden provocation within the meaning of Excep. 1, S. 300 must come from the victim within the hearing or sight of the offender. The only questions which arise under Excep. 1 are whether the provocation caused by the victim was grave enough or sudden enough to deprive the offender of self-control. [P 169 C 1]

(b) Penal Code (1860), S. 300, Excep. 1—Deceased raping sister-in-law of accused—Accused on hearing of it losing self-control and attacking deceased—His case comes within Excep. 1.

Where the deceased committed rape on the sister-in-law of accused and the accused on being informed of it then and there deprived of self-control by the provocation attacks the victim his case comes within Excep. 1, S. 300. [P 169 C 2]

Partabrai D. Punwani — for the Crown.

Aston, A. J. C.—This is an appeal from the conviction and sentence of the learned Additional Sessions Judge, Hyderabad, who convicted the appellant, Sumar, son of Khamiso under S. 302, I.P.C. and sentenced him to transportation for life, and a fine of Rs. 25 or in default to rigorous imprisonment for one month.

The Superintendent of the District Prison has also referred the matter to us under the Jail Manual for consideration of the sentence inflicted upon the prisoner in view of the fact that he is only 20 years of age and that a long term of 20 years imprisonment would be harmful to him. The facts briefly are that the accused Sumar has a brother named Bachu who is married to Dhani. He had

a friend named Adam. Adam paid a visit to the accused on an occasion when Bachu had gone away on some business. Accused and Adam went to hear some music. Adam left the accused saying he was sleepy and returned to the house. Accused subsequently followed him. The case for the prosecution is that Dhani informed the accused that Adam had raped her. Adam was then lying asleep just outside the hut after having committed the rape. The accused attacked Adam with a hatchet causing him a number of wounds on his face and head and killed him. Dhani ran to her uncle Umar. The accused produced blood-stained clothes and a hatchet. He made a confession to the First Class Magistrate, Sujawal, in which he stated that on returning he caught Adam and Dhani in the act of sexual intercourse and deprived of self-control by grave and sudden provocation he killed the deceased.

The learned Judge disbelieved the confession in part. He believed the story of Dhani that Adam went to sleep. He was influenced by the fact that all the injuries were on the front of the head and face of Adam close to each other and not on his back or on other parts of his body. In his judgment he expressed the view that grave and sudden provocation referred to in Excep. 1, S. 300, must come from the victim within the hearing or sight of the offender and not that the offender should work himself into a frenzy on information received. I am of opinion that the learned Additional Sessions Judge erred in holding that the grave and sudden provocation within the meaning of Expl. 1, S. 300, I. P. C., must come from the victim within the hearing or sight of the offender. It appears to me that the only questions which would arise under Excep. 1 are whether the provocation caused by the victim was grave enough; or sudden enough to deprive the offender of self-control. In the present case the number of injuries close together on the face of the deceased and on his head seem to me to indicate a great lack of self-control on the part of the accused. The fact that his guest had betrayed the trust placed on him and had made such evil return for the hospitality shown to him as to rape the sister-in-law of his host in his own house would I think be very great provocation.

In my opinion proof of the fact that the deceased had committed the act of rape and that the accused on being informed of it then and there deprived of self-control by the provocation attacked the victim would bring the case within Execp. 1. But in my opinion the defence case is even stronger, for the admitted fact that Dhani ran away to her uncle crying that the accused had come after her to kill her also throws a very grave doubt on the truth of her story that the deceased was attacked on her voluntarily informing the accused that she had been raped. The circumstances seem to me to show that there was truth in the accused's defence that he caught the deceased and Dhani in a compromising act. Taking all the circumstances into consideration I would set aside the conviction of the accused under S. 302 and convict the accused under S. 304, Part 1, and sentence him to ten years rigorous' imprisonment.

R.M./R.K. *Sentence reduced.*

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* A. I. R. 1932 Sind 169

FERRERS, J. C. AND ASTON, A. J. C.

Dharamdas Lilaram—Appellant.

v.

Emperor—Opposity Party.

Criminal Appeal No. 64 of 1932, Decided on 23rd June 1932.

***(a) Penal Code (1860), S. 409—Entrustment of goods creates trust on sale proceeds also.**

The views that an entrustment of goods creates no trust on the sale proceeds of the goods and that where goods have been entrusted for sale as soon as they are sold the trust ceases because the purchaser pays the money clothed with no trust are both fallacious. Where property is delivered under a trust the sale proceeds of property entrusted are also subject to the trust: *A. I. R.* 1928 *Bom.* 521 and *A. I. R.* 1923 *Mad.* 597, *Appr.*; 41 *Cal.* 844; *A.I.R.* 1927 *Rang.* 140; *A. I. R.* 1928 *Sind* 106 and *A. I. R.* 1914 *L.B.* 1 (*F.B.*), *Dist.* [P 172 C 2; P 173 C 1]

(b) Penal Code (1860), S. 24—Act, whether dishonest is determined by intention.

The question whether the act of the accused was dishonest or not does not as a matter of fact depend on the question whether wrongful gain or loss was actually caused. The determining factor is the intention with which payment is made : *A. I. R.* 1915 *Mad.* 600, *Ref.* [P 173 C 2]

Dipchand Chandumal—for Appellant.

D. N. O'Sullivan—for the Crown.

Aston, A. J. C.—This is an appeal from the conviction of the appellant by the learned Additional Judicial Commissioner of Sind under S. 409, I. P. C., in respect of two items, namely, Rs. 2,942-6-0

and Rs. 341-3-1, at a Sessions trial. The appellant was sentenced to 12 months simple imprisonment and a fine of Rupees 5,000 or in default to six months simple imprisonment. The case for the prosecution briefly was as follows : In the year 1925 an agreement was made between Messrs. W. T. Henley's Telegraph Works Company Ltd. of 11 Holborn Viaduct, London, and the accused's firm, the General Electric Trading Company, Karachi. The firm of Messrs. W. T. Henley's Telegraph Works was referred to in the agreement as the "Company" and the General Electric Trading Company, Karachi, as "the agents." The General Electric Trading Company Karachi were appointed sole agents of the Company for Sind and Baluchistan. Under the agreement the agents had to sell the goods on behalf of the Company within the limits given to them by the Company. The agents by way of remuneration were given a commission at the rate of 5% on actual cash received, but in those cases where the agents sold at a higher price than the price authorized by the company they were entitled to receive commission of 5% on the additional price. The goods sent by the company were to remain the property of the company until sold and delivered to a purchaser on the company's behalf. The agents were in no way to represent the goods to be their own ; the agents were to be responsible for proper care of the goods ; they were responsible for bad debts; all the goods sold by the agents were to be invoiced as the company's goods and in all correspondence and advertisements the agents were to describe themselves as the company's agents for Sind and Baluchistan. Monthly accounts had to be furnished showing the amount due and the price payable on the sales made by the agents was to be remitted within 30 days. The rights of the parties under the agreement were to be determined in accordance with the law of England.

In the year 1927 the period for making payments was extended from 30 to 60 days. In 1928 the accused was in arrears of payments and the suspicions of the company were aroused. Mr. Pilcher came to Karachi to investigate and a modification of the agreement entered into in the year 1925 was arrived at. It was arranged that all sums received from branch offices were to be paid by the accused at once into the bank. The goods of Messrs. Henley's were to be kept in separate godowns and not with the goods of the accused. In 1929 the period for payment was extended to 90 days. In February 1930 the company was dissatisfied with the position and wrote to the accused a letter dated 1st February. In the letter it was stated :

" We have given the matter very careful consideration and the only terms on which we are prepared to allow you to handle our copper business in Karachi, Lahore, Delhi, etc., are as follows."

Several clauses then followed, the more important of them were that all payments received by the agents for bare copper were to be paid immediately they were received into a banking account opened in Karachi in the names of Messrs. Henley's Telegraph Works Company Ltd. but in those cases where customers settled the bills for bare copper and other items on other bills by one cheque, the cheque was to be paid into the agents' account and a cheque then issued by the agents in favour of Messrs. Henley's Telegraph Works Company and paid in as soon as the customer's cheque was cleared. At the same time the commission of the agents was increased by 1¼ per cent on minimum prices and half the difference if a higher price than the minimum was obtained. In reply to this letter the accused wrote that he had considered the matter very carefully and although effect was being given to the instructions from the date of the receipt of the letter, namely, 4th February, certain counterproposals were put forward. The accused wrote :

" Should our suggestions be unacceptable to you then the writer is personally prepared to accept the conditions laid down by you and act on your behalf and then there would be no objection to your opening an account with your bankers at Karachi ..... Should all the suggestions be unacceptable to you, you are at liberty to withdraw all your stocks of copper wire at your convenience and our mutual arrangement for copper shall stand terminated on your decision being notified by you or on the date which you finally fix for the purpose."

One of the suggestions of the accused was that the purchasers from the agents should pay the purchase money direct to the banking account. The company wrote on 11th February stating that the suggestion presented several disadvantages, that unnecessary bank commission and charges would be incurred and the pro-

cedure might be injurious to the agents' prestige. The letter proceeded :

"We think it preferable that payment should be received by you on our behalf for payment into our banking account as stated in our letter No. C 3083."

The letter No. C 3083 referred to payments being made immediately they were received by the accused. Various other letters were exchanged between the parties on the subject of the new arrangement. The accused on 16th July 1930 wrote to the company :

"All payments received hereafter shall be paid into the banking account and you will duly be advised from time to time."

In the letter he added that no payment had been received "recently." The case for the prosecution is that on 1st August 1930 the accused received Rupees 2,942-6-10 from S. Mir Badshah and a sum of Rs. 341-3-1 from the National Electric Trading Company. He also received on 5th August according to the prosecution a sum of Rs. 634-11-6 from the Quetta Electric Supply Company. These receipts were all in respect of bare copper and under the agreement Ex. 4, as modified by the arrangement to which a reference had already been made in the correspondence Exs. 11 to 20, the accused should have paid these sums into Messrs. Henley's Telegraph Works Company's account at the Chartered Bank, Karachi. These sums however in violation of the agreement between the parties in violation of the trust imposed upon the accused were not paid into the banking account of Messrs. Henley's. The prosecution contend that the accused had therefore committed a criminal breach of trust. The accused was tried by the learned Additional Judicial Commissioner of Sind and a jury. The jury were sent out to consider their verdict, and according to the learned Judge, they returned after an absence of one hour. The jury were asked through their foreman :

"Mr. Foreman are you unanimous ?
Answer. No. We are divided, 5 to 4."

The jury were asked to retire for further consideration under S. 302, Criminal P.C. The jury returned after 22 minutes:

Q. Mr. Foreman, you are unanimous.

A. No. There is no likelihood of our being unanimous.

Q. What is the proportion ?

A. 6 to 3.

Q. What is the verdict of the majority ?

A. Six are for 'guilty' on the 1st and 2nd counts of the charge, three are of the verdict the accused is "not guilty." On the 3rd count we are unanimous the accused is "not guilty."

Mr. Lobo who appeared for the accused in the Sessions Court informed the Court that when the jury first returned the foreman stated in reply to the Court that they were divided 5 to 4 for "guilty" and unanimous as regards the 3rd count. The Court only heard the foreman say that they were divided 5 to 4 and noted the reply accordingly. The Court asked the foreman whether on the first occasion he had given the verdict as Mr. Lobo said or merely given the proportion and was about to give the verdict when stopped by the Court. The foreman replied that he only gave the proportion 5 to 4 and just as he was about to give the verdict he was stopped by the Court. The Court agreeing with the majority of the jury, namely 6 to 3, found that the accused was guilty of an offence in respect of the first two counts specified in the charge and had thereby committed an offence punishable under S. 409, I. P. C., and inflicted a sentence of 12 months' simple imprisonment and a fine of Rs. 5,000 or in default to 6 months simple imprisonment, directing that out of the fine recovered the amounts of the first two counts, namely, Rs. 2,942-6-10 and Rs. 341-3-1, shall be paid to the complainants.

It was contended on behalf of the appellant that the prosecution had failed to prove a trust of any kind ; that if there was a trust it did not relate to the sale proceeds of the goods delivered to the accused ; or if there was originally a trust it was subsequently abrogated; in any event there was no breach of trust because the two payments made to the accused on which he has been convicted were remitted to Henley's on 1st August under a telegraphic transfer for Rs. 4,500.

Reliance is placed by the appellants on a ruling of the Calcutta High Court in *Balthasar* v. *Emperor* (1), *In the matter of Syed Kazim* (2), *Emperor* v. *Ghanshamdas* (3) and *Nga Po Ywet* v. *Emperor* (4). It is contended that since an entrustment if any was only in respect of

(1) A. I. R. 1915 Cal. 266=41 Cal. 844=15 Cr. L. J. 683=26 I. C. 131.
(2) A. I. R. 1927 Rang. 140=102 I. C. 389=5 Rang. 73.
(3) A. I. R. 1928 Sind 106=108 I. C. 663=29 Cr. L. J. 431=23 S. L. R. 13.
(4) A. I. R. 1914 L. B. 1=24 I. C. 332=15 Cr. L. J. 452=7 L. B. R. 278 (F.B.).

goods the accused could not be convicted of criminal breach of trust in respect of the sale proceeds of the goods, inasmuch as goods and their sale proceeds are entirely distinct articles and inasmuch as it was only the goods which were subject to the trust and the sale proceeds were delivered to the accused by purchasers without any trust of any sort. With great respect I am unable to concur in this view. *Balthasar* v. *Emperor* (1) does not appear to me to support such a contention. The decision in that case very largely turned on the question of the form of the charge. As pointed out in that case the accused who had been entrusted with furniture which he was directed to sell in order that the sale proceeds might be remitted to the prosecutor was not charged in respect of the sale proceeds but was charged with a criminal breach of trust in respect of the articles of furniture. The Calcutta High Court there held that to be guilty of the offence with which the accused was charged it was necessary that at the time the property was sold by the accused he should have the dishonest intention of misappropriating the sale proceeds. It was however pointed out that there was no evidence in the case of an intention to misappropriate the sale proceeds at that early stage; there was no evidence that the sale proceeds at a later date were not forthcoming. The learned Judges themselves pointed out, as Fawcett, J., subsequently pointed out in *Dwarkadas Haridas* v. *Emperor* (5), that it ought to be assumed that the word "property" would include furniture or the value thereof.

As regards *Emperor* v. *Ghanshamdas* (3), there the facts were different to the present case also. The learned Additional Judicial Commissioner who decided that case was of opinion that the facts were such as to make the accused a contractor who had contracted to do certain acts and had received an advance for the purpose. As regards *Nga Po Ywet* v. *Emperor* (4), it seems to me that that was a peculiar case in which the agreement between the parties had apparent inconsistent clauses. Certain of the clauses indicated that the accused in that case was merely a trustee or an agent but in the contract itself there was a clause that he was not an agent. It was pointed out in the judgment in that case that where the transaction in fact was a loan it did not become a trust simply because the parties chose to refer to it as such. In *In the matter of Syed Kazim* (2) the decision turned on the manner in which traders dealt with commission agents. It was there pointed out that when a trader dealt with a commission agent and entrusted him with goods for sale the trader after the goods were sold, looked to the commission agent's credit for the realization of the sale proceeds. It seems to me that the circumstances are entirely different in the present case. The letters which have been put in speak for themselves. It is obvious that the company wished to tighten up the procedure relating to the copper goods as their suspicions had been aroused. They insisted that realizations on bare copper should be paid immediately into a banking account in their own name; they emphasized the fact that they were not prepared to undertake the business with the accused except on these terms. It seems to me that the contracts between traders and commission agents in the ordinary course are clearly distinguishable from the contract in the present case.

I am also of opinion that the suggestion that an entrustment of goods creates no trust on the sale proceeds of the goods and that where goods have been entrusted for sale as soon as they are sold the trust ceases because the purchaser pays the money clothed with no trust are both fallacious. It seems to me in the first place that "property" will include cash into which it is converted, if that is an express or implied term in the agreement or trust. If this were not so a servant who was given a ten rupee note to purchase fruit and who changed the note on the way to the market into rupees and then misappropriated the rupees, might successfully urge in self-defence that he had not misappropriated the identical property with which he was entrusted. The second fallacy in the reasoning seems to me the suggestion that it is the intention or knowledge with which the money is ultimately paid to the agent by a third party which governs the question whether there is a trust or not. In the illustration given above could the servant successfully contend that the merchant who gave him change created no trust. The question whether the goods only were entrusted or whether the sale

(5) A. I. R. 1928 Bom. 521=112 I. C. 861.

proceeds of the goods were governed by the trust depends on the express or implied terms of the agreement or trust. I concur in the view mentioned in *Dwarkadas Haridas* v. *Emperor* (5) and *In re Venkata Gurunatha Sastri* (6) that where property is delivered under a trust the sale proceeds of property entrusted may also be subject to the trust. In the present case the evidence shows there was a specific trust to pay the sale proceeds of the property into a banking account opened in the name of W. T. Henley Telegraph Works Company.

With regard to the contention that even if there was trust the same was abrogated subsequently, we have gone through the correspondence and the evidence of Mr. Pilcher and are unable to find any ground for supposing that Messrs. Henley's Telegraph Works Company agreed to modify the arrangement in such a manner as to entitle the accused to have 30 days grace in which to pay into the bank the proceeds of the bare copper. From the beginning to the end of the correspondence the complainants insisted on payment being immediately made into the bank. (After considering the evidence, his Lordship proceeded.) It is however contended on behalf of the appellant that in any case there was no breach of trust because the telegraphic transfer was made on the same date for Rs. 4,500. The two items on which the accused has been convicted aggregate Rs. 3,283-9-11. It is contended that since Rs. 4,500 was paid on the general account there could be no criminal breach of trust as there was no wrongful loss. In an English case of *Reg.* v. *Hall* (7), where the defendant received payment of a debt from one of his master's customers in the Bank of England notes but accounted to his master £6 less than he had received afterwards delivered those very bank notes to his master upon another account it was ruled by Bell, J. that these notes to the amount of £6 should be deemed to have been embezzled. It was held that the payment of these identical notes of £6 to his master on another account made no difference and this ruling was afterwards upheld by the Judges: Starling's Indian Criminal Law, 9th Edn., p. 748. (After considering the evidence, his Lordship proceeded.) The question whether the act of the accused was dishonest or not did not as a matter of fact depend on the question whether wrongful gain or loss was actually caused. The determining factor as shown in S. 24, I. P. C. and in *Ram Bilas, In re* (8) is the intention with which payment is made.

I have carefully gone through the charge and it appears to me that no exception can be taken to the charge made to the jury in this case. We have gone through the evidence as the accused has a right of appeal both on the facts and on the law and it appears to us that the only conclusion that can be arrived at on the facts and the law is that the verdict of the jury convicting the accused on the two counts was a proper verdict. It has been contended that the learned Additional Judicial Commissioner erred in directing the jury to retire again and reconsider their verdict after the foreman had announced not only the proportion on which they were divided but the verdict itself. On behalf of the appellant affidavits have been put in of two jurors and of Mr. Jamshed N. R. Mehta who was then in Court. It is an invariable practice in cases of this kind to treat the record made by a judicial officer of the circumstances which occurred in the Court over which he was presiding as conclusive and I see no reason to depart from that practice in this case. The note made by the learned Judge was as a matter of fact supported by the foreman of the jury. I am of opinion that the present appeal should be dismissed. The learned Additional Judicial Commissioner has given the charge as though there was one charge containing two counts. A reference to the charges made shows that there were distinct charges in respect of separate items and the accused has only been given one sentence. As there were distinct charges, it is necessary in my opinion that a notice should issue to the accused to show cause why separate sentences should not be inflicted on the two charges on which he was convicted. The notice in my opinion should also call upon the accused to show cause why the sentence should not be enhanced.

Ferrers, J. C.—My learned brother has covered the whole ground. With

(6) A. I. R. 1923 Mad. 597=72 I. C. 612=24 Cr. L. J. 452.
(7) 3 Stra 67.
(8) A. I. R. 1915 Mad. 600=26 I. C. 136=15 Cr. L. J. 688=38 Mad. 639.

what he says I agree and I shall not say it again. It will be enough for me to touch a few salient points which have struck me as significant. (After stating facts, his Lordship proceeded.) The points which must be proved to establish a charge under S. 409, I. P. C. are these: (1) Was appellant Henleys' agent? (2) Was the appellant in any manner entrusted with any dominion over Mir Badsah's money? (3) Did he misappropriate that money? (4) Did he thereby violate any legal contract between Henleys and himself? (5) Did he do these things dishonestly? Mutatis mutandis the same points for decision arise in respect of the second item which is the payment received from the National Electric Trading Company. Now in respect of the first of these points the language used by the appellant himself is this:

"The case is false. The relations between me and the complainants' firm have always been those of a debtor and a creditor."

In these words an attempt to deny or at least not to admit, the position of an agent seems to be latent. The attempt is futile. The contract between the parties was embodied in a formal indenture which is Ex. 4. That indenture witnesseth that

"all goods shall remain the property of the company until actually sold and delivered to a purchaser on the company s behalf by the agents acting as sole agents for the company and the agents shall not in any way represent that such goods are their own property."

The agents referred to are the General Electric Trading Co., that is the appellant, and by Cl. (1) Henleys expressly appointed the appellant as agents and the agents agreed to act as such. There can be no reasonable doubt about the first point for decision. On the second point what the appellant himself says is this: "I never was at any time a trustee of the sale proceeds of the goods." These words point to a distinction on which the appellant has spent a great deal of time. It is not at all denied that as regards the goods themselves there was a trust. The pleader who argued for the appellant in the lower Court contended that the appellant had held Henleys' goods in trust for them, but the moment he sold the goods he was not holding the sale proceeds in trust; he was merely civily liable. The futility of this contention has been fully exposed by my learned brother. It is enough for me to say here that when goods are entrusted to an agent and under the contract between himself and his principal he is to sell the goods and obtain money for them then the agent, when he receives that money, although he did not actually receive it from the complainant, is nevertheless entrusted with it within the meaning of the definition in S. 409, I. P. C. It ought to be assumed that the words "property" occurring in the definition includes any price obtained by a sale thereof. These doctrines were enunciated by the High Court of Calcutta in *Balthasar* v. *Emperor* (1) and the High Court of Bombay in *Dwarkadas Haridas* v. *Emperor* (5). Any other interpretation would reduce the law to an absurdity. The third point is clear from the appellant's own account. The General Electric Trading Co., had an account with the Punjab National Bank Ltd., Karachi. The account was overdrawn and the limit laid down for such an overdraft was Rs. 8,500.

On 1st August 1930 the opening debit balance was Rs. 8,351-11-0. On the same day the appellant drew a cheque for Rs. 368-15-1 and there is another debit entry of Rs. 4,506-6-0. The effect of these transactions was to swell the debit balance to the figure of Rs. 13,227-0-1. It was evidently urgently necessary for the appellant to reduce this adverse balance. He did so by crediting to his own account the sum received from Mir Badshah. That payment was on account of bare copper and by the agreement between the appellant and Henleys it ought to have been paid into Henley's account. This was not done. It was paid into the account of the General Electric Trading Co., Karachi, and it served to reduce the adverse balance of that company to Rs. 8,519-3-3. There was here a clear misappropriation. (After considering the evidence on the fourth point, his Lordship proceeded.) There remains the final question: Did the appellant do these things dishonestly? This is the one point upon which at one time I was myself inclined to think that some doubt might be reasonably possible. A looker-on who strives to put himself into the appellant's place and to see the prospect as he saw it, might state his case in some such words as these: Here is an unhappy man overwhelmed by a tidal wave of adversity. He is struggling to keep his

head above water. His creditors and himself are in the same boat. Such a man may say "Here is the cheque of Mir Badshah. I ought to be sure to pay it direct into Henley's account. But my own account is heavily overdrawn. If I use this cheque to reduce that overdraft I shall put off the evil day. It is a thing I ought not to do. If it should fail, I go to the bottom and my creditors go too. But if all goes well, we may both come safe to shore." By such reasoning a man might come to this conclusion: "What I did, ought not to have been done but I did it with the best intentions. To a civil action I may have laid myself open, but for a criminal conviction I have given no cause."

These I suppose were the considerations which held the jury's verdict in suspense. They are considerations which at the outset I was myself prepared to take into account. But after hearing the case fully argued I am convinced that the jury was right. A man who does what he ought not to do must be supposed to intend the natural consequences of what he does. The actual consequences of the appellant's wrongdoing were disastrous. He has gone bankrupt and his assets have fallen far short of his liabilities. In this Court by his pleader he offered a composition. It was plain that he thought that this offer was much more favourable than the creditors had any reason to expect. He offered two annas in the rupee. This was the actual consequence of what the appellant did. It was also the natural consequence. It is the consequence which the appellant must be supposed to have intended. To comply with the provisions of the Criminal Procedure Code and for convenience of proof the prosecution selected three items out of many. The ultimate loss on these three items may not have been very heavy; but the appellant's own pleader stated that Henleys knew in July that the appellant had sold thousands of rupees worth of copper wire and not paid a pie. It seems quite clear that the creditors have suffered a heavy loss; they lost moneys to which they were legally entitled; and this loss is the direct consequence of a plain violation by the appellant of an express contract.

At the outset I attempted in imagination to stand in the appellant's place and to see the situation with his eyes. Even from this point of view, I cannot disallow the verdict of the jury. But sitting in my own place and seeing with my own eyes, I cannot take so favourable a view. While I have been listening to the discussion, while I have been turning over this record, I have been conscious of an increasing conviction that the appellant has been very fortunate. His letters are a long series of procrastinations and prevarications growing more and more clearly dishonest as they go on. They culminate in a false statement which can be demonstrated and a worthless cheque which has been dishonoured. I am fully persuaded that all the points which it was necessary for the prosecution to establish in order to secure a conviction under this section, have been satisfactorily proved. I agree with the verdict given by the jury and I concur also in the order which my learned brother has proposed.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Sind 175

MEHTA, A. J. C.

Issa Angario—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 23 of 1932, Decided on 17th March 1932, against order of City Magistrate, Karachi.

(a) Borstal Schools Act (1929), S. 6—It is not necessary to pass sentence.

The order directing the accused to be detained in the Borstal School without passing any sentence of imprisonment is valid according to law. All that is necessary is that the accused should be convicted of an offence which is liable to be punished with imprisonment. He need not actually be sentenced to imprisonment : *A. I. R.* 1932 *Bom.* 489, *Foll.*; 1 *Bom. L. R.* 162 and 34 *P. R.* 1910 *Cr., Dist.* [P 176 C 2]

(b) Borstal Schools Act (1929), S. 21—High Court is precluded from interfering with discretion of Magistrates in appeal.

Where a Magistrate exercises his discretion to substitute order of detention for any sentence of imprisonment which could or might have been passed, the High Court sitting in appeal is precluded from interfering with the discretion. [P 177 C 1]

A. P. Fouseea—for Appellant.

Partabrai D. Punwani—for the Crown.

Judgment.—The appellant Issa son of Angario on his own admission of guilt, has been convicted by the City Magistrate of Karachi of an offence punishable under S. 12, Prevention of Gambling Act, Bombay Act 4 of 1887. After the conviction the Magistrate recorded the evidence of a Sub-Medical Officer of the Civil

Hospital and found that the accused was a lad of 16 or 17 years of age. Having regard to the age of the accused and to the fact that there were two previous convictions of 1930 and 1931 for theft the learned Magistrate thought fit, instead of passing sentence on the accused, to order under S. 6, Bombay Borstal Schools Act (1929) directing the accused to be detained in the Borstal School at Dharwar. It is from this order that the accused has preferred the present appeal.

The propriety of the conviction cannot be challenged here, as it was based on the appellant's own plea of guilty. On behalf of the appellant it is urged however that the order of the Magistrate is illegal inasmuch as no sentence of imprisonment has been passed. It is contended that the proper course for the Magistrate was first to sentence the accused to a term of imprisonment and then to direct that instead of serving out that sentence he should be detained in a Borstal School. For this contention reliance is placed on the decisions in *Queen-Empress* v. *Kaidya Hussein* (1) and *Emperor* v. *Bakhtawar* (2) in which it has been held that where no definite sentence of imprisonment is passed, but only an order for detention is made the order is invalid and must be set aside. Both those cases were however decided under the Reformatory Schools Act 8 of 1897, under S. 8 of which it is incumbent on the Magistrate to pass a sentence of imprisonment and then to direct, if it is a fit case, that instead of undergoing that sentence the accused should be sent to a Reformatory School and be detained there for a period of not less than three or more than seven years. In the present case the learned Magistrate has chosen to pass an order under S. 6, Bombay Borstal Schools Act, which provides that when an offender is found guilty of an offence for which he is liable to be sentenced to transportation or imprisonment it shall be lawful for the Court to pass, in lieu of any such sentence of transportation or imprisonment, an order for the detention of the offender in a Borstal School, such term being not less than two years nor more than five years, subject to the rules made under the Act. The wording of this section is so clear that no authority is wanted, as regards its construction. There is however a very recent ruling of the Bombay High Court, *Emperor* v. *Mathurdas Purshottam* (3), in which the learned Chief Justice holds :

"The proper procedure to be followed under S. 6, Bosstal Schools Act, is that if the trying Magistrate convicts the accused, he can in lieu of sentence of imprisonment sentence the accused to be detained for a period of not less than two years and not more than five years in the Borstal School at Dharwar. The Magistrate cannot sentence the accused to rigorous imprisonment and then direct him to undergo it in a Borstal School."

There is therefore no substance in the contention that the order directing the accused to be detained in the Borstal School without passing any sentence of imprisonment is not valid according to law. It is further urged that as the Magistrate did not pass or was not prepared to pass a sentence of imprisonment and as this is a fit case in which only fine should be inflicted, it was not competent to him to make an order for detention. It is also urged that having regard to the triviality of the offence, even this Court in appeal might merely impose a fine, and there will then be no justification for an order of detention in the Borstal School. A case of our own Court is quoted, *Imperator* v. *Rajabali Adamji* (4), in which Pratt, J. C., passed a sentence of whipping and thus did away with the lower Court's order of detention in the Reformatory School. This plea too ignores the difference between the provisions of the Reformatory Schools Act and those of the Borstal School Act. Under the latter, all that is necessary is that the accused should be convicted of an offence which is liable to be punished with imprisonment. He need not actually be sentenced to imprisonment. In the present case the appellant has been convicted under S. 12, Prevention of Gambling Act, (Bombay 4 of 1887) under which imprisonment is one of the punishments prescribed for the offence.

Finally it is argued that in any case having regard to the circumstances set forth in the memo of appeal this Court should set aside the order of detention. S. 21, Borstal Schools Act, provides that nothing contained in the Criminal Procedure Code shall be construed to autho-

(1) [1899] 1 Bom. L. R. 162.
(2) [1910] 34 P. R. 1910 Cr.=12 Cr. L. J. 50=8 I. C. 1166.
(3) A. I. R. 1932 Bom. 489=137 I. C. 132=33 Cr. L. J. 395.
(4) [1911] 5 S. L. R. 173=13 Cr. L. J. 44=13 I. C. 284.

rize any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of an offender or the substitution of an order for detention in a Borstal School for transportation or imprisonment. Thus then the learned Magistrate having exercised his discretion to substitute an order of detention for any sentence of imprisonment which could or might have been passed, this Court sitting in appeal is precluded from interfering with the discretion. Even otherwise it would be difficult to find fault with the course adopted. A lad with thieving propensities takes to gambling. If this new activity is not checked in time he might become a confirmed thief or burglar. There is every chance of reformation in the School at Dharwar. For the foregoing reasons therefore the appeal must be dismissed and I order accordingly.

K.N./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Sind 177

FERRERS, J. C. AND ASTON, A, J. C.

Suganchand—Petitioner.

v.

Seth Naraindas—Opponent.

Criminal Revn. Appln. No. 30 of 1932, Decided on 6th June 1932, against order of Sub Judge and First Class Magistrate, Jacobabad.

*** (a) Penal Code (1860), S. 21—Municipal Councillor whether public servant—Bombay District Municipalities Act (as amended by Act 26 of 1930).**

A Municipal Councillor, prior to the amendment of S. 45, Bombay District Municipalities Act (3 of 1901), by Bombay Act 26 of 1930, was a public servant within the meaning of S. 21, Penal Code: 5 *B. H. C. Cr.* 10 and 8 *B. H. C. Cr.* 39 (*F.B.*), *Ref.*: 3 *Cal.* 758, *Expl.* [P 178 C 2]

(b) Bombay District Municipal Act (3 of 1901), S. 16—Effect of delegation of power by Governor in Council by Commissioner in Sind Act (5 of 1868) is to provide for vicarious exercise of powers.

The delegation of powers by the Governor in Council by virtue of Commissioner in Sind Act (5 of 1868) would not have the effect of repealing or annulling the statutory provision contained in S. 16, Bombay District Municipal Act 3 of 1901; it would merely provide for the vicarious exercise of the powers of the Governor in Council by the Commissioner by virtue of the delegation: *A. I. R.* 1926 *All.* 271, *not Foll.* [P 179 C 1,2]

(c) Bombay District Municipalities Act (3 of 1901), S. 16 as amended by Bombay Decentralization Act (3 of 1915)—Even after amendment Municipal Councillors were public servants, removable without sanction of Governor in Council.

Since the amendment of the Bombay District Municipalities Act by the Bombay Decentralization Act (3 of 1915) the Municipal Councillors are public servants who are removable without the sanction of the Governor in Council. By S. 16 as amended they are removable by the Commissioner and delegated powers are no longer needed by the Commissioner. [P 179 C 2]

(d) Bombay District Municipal Act (3 of 1901) S. 16—Commissioner.

The word "Commissioner" in S. 16 means the Commissioner in Sind and cannot be read as meaning Commissioners other than Commissioner in Sind. [P 179 C 2]

*** (e) Criminal P. C. (1898), S. 197—Status of accused at time of commission of offence and not at time of complaint is material.**

It is the status of the accused at the time of the commission of the alleged offence and not his status at the time of the complaint or of the order issuing process that is material for the purposes of S. 197. [P 179 C 2]

(f) Criminal P. C. (1898), S. 197—Local Government.

The Commissioner in Sind is not a local Government. [P 180 C 1]

Kimatrai Bhojraj—for Petitioner.

C. M. Lobo—for Opponent.

Aston, A. J. C.—This is an application for the revision of an order of the learned Sub-Judge and First Class Magistrate, Jacobabad ordering process to issue against applicant under Ss. 120, 420 and 409, I. P. C. It is contended that as a Municipal Councillor of the Jacobabad Municipality in 1929 when the alleged offence was committed and a fortiori as a Vice-President on 15th January 1932 when the complaint was filed the applicant was a public servant not removable from office save by or with the sanction of a Local Government within the meaning of S. 197, Criminal P. C., and that no Court could take cognizance of an offence alleged to have been committed by him, except with the previous sanction of the Local Government. Before the year 1915, Municipal Councillors were removable by the Governor in Council under S. 16, Bombay District Municipal Act 3 of 1901. Under the powers of delegation conferred by Act 5 of 1868 the Governor-in-Council delegated certain powers, including his powers under S. 16, Bombay Act 3 of 1901, to the Commissioner in Sind: vide G. R. 3736 dated 1st July 1901 G. D. Bombay Government Gazzette, p. 95, Part 1-A dated 4th July 1901. By the Bombay Decentralization Act 3 of 1915 S. 16, Bombay District Municipalities Act 3 of 1901 was amended. Thereafter

the Governor in Council had the power to remove a Councillor of a City Municipality and the Commissioner a Councillor of other Municipalities. The definition of a "City Municipality" in S. 3 (1) of the Act does not include the Municipality of Jacobabad. The Bombay District Municipal Act 3 of 1901 was again amended by Bombay Act 26 of 1930 which by S. 5 enacted that every Councillor should be deemed to be a public servant within the meaning of S. 21, I. P. C.

It follows, that in or about August 1929, the date of the alleged offence, Bombay Act 26 of 1930, declaring every Councillor to be a public servant within the meaning of S. 21, I. P. C., had not come into force. The learned Sub-Judge and First Class Magistrate held that it was doubtful, in view of the old S. 45, Bombay District Municipal Act (3 of 1901), whether a Municipal Councillor prior to Bombay Act 26 of 1930 was a public servant, and whether the amending Act was retrospective. He further held that it was unnecessary to decide this question since a Councillor of the Jacobabad Municipality is not a person who cannot be removed except by or with the sanction of the Local Government, for by the provisions of S. 16, Bombay District Municipal Act 3 of 1901 as amended by the Bombay Decentralization Act 3 of 1915 a Municipal Councillor of a Municipality other a City Municipality (which did not include the Municipality of Jacobabad) was removable by the Commissioner. The Commissioner he held, following *Emperor* v. *Jalaluddin* (1) was not a Local Government observing that by S. 3 (29) General Clauses Act (20 of 1897) a Local Government was defined as

"the person authorized by law to administer executive Government in the part of British India to which the Act relates"

and as including a "Chief Commissioner" whereas a Commissioner was defined in Cl. 13 as

"the Chief Officer in charge of the revenue administration of a division"

Again, following *Emperor* v. *Jalaluddin* (1), and differing from *In re. Abdul Kadir Saheb* (2), he held that a removal by the Commissioner under powers delegated by the Governor in Council under Act 5 of 1868 would not be a removal by the Governor-in-Council and that in any event a removal of a Councillor by the Commissioner after the amendment in 1915 would not be by virtue of delegated powers but by virtue of powers conferred on the Commissioner by statute. Lastly with regard to the applicant's plea that on 15th January 1932 when the complaint was filed and on 5th February 1932 when process issued he was a public servant not removable except by or with the sanction of the Governor in Council because he was the Vice-President of the Jacobabad Municipality, the learned Sub-Judge, and First Class Magistrate held, that under S. 197, Criminal P. C., it is the status of the accused at the time of the alleged offence which is material, and not his status at the time the complaint was filed or the order issuing process was passed. I am inclined to hold that the question whether a Municipal Councillor was a public servant within the meaning of S. 21, I. P. C., prior to the amendment of S 45, Bombay District Municipalities Act 3 of 1901, by Bombay Act 26 of 1930 should be answered in the affirmative. S. 21, Cl. 10, I. P. C, Act 45 of 1860 enacted that the words "public servant" denote, inter alia:

"every officer whose duty it is as such officer to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village town or district"

and the illustration to that clause is as follows: A Municipal Commissioner is a public servant " At the date when the Indian Penal Code was enacted and for some years thereafter the words "Municipal Commissioner" denoted in India persons who are called "Municipal Councillors" at the present time.

Under the Bombay Towns Improvements Act 26 of 1850 provision had been made for the appointment of "Municipal Commissioners " who were empowered inter alia to make rules and bye-laws. In *Reg.* v. *Mavji Dayal* (3) we read of "a Managing Committee of Municipal Commissioners :" see also *Reg.* v. *Yenku Bapuji* (4). Again, after 1860, the Bengal Act 3 of 1864 provided for the ap-

(1) A. I. R. 1926 All. 271=92 I. C. 857=27 Cr. L. J. 345=48 All. 264.
(2) [1916] 17 Cr. L. J. 168=33 I. C. 648.
(3) [1868] 5 B. H. C. Cr. 10.
(4) [1871] 8 B. H. C. Cr. 39 (F. B.).

pointment of "Municipal Commissioners" and Bengal Act 4 of 1876 provided for the election and appointment of no less than 72 "Commissioners of the Corporation of the Town of Calcutta." If we turn from the illustration, and look to the provisions of S. 21, Cl. 10, I. P. C., and consider the duties of Municipal Councillors under the Bombay District Municipalities Act 3 of 1901 we see that the Municipalities of which they form the members are empowered by that Act to acquire land and incur expenditure: see S. 52, and to prescribe taxes to be levied for Municipal purposes: see S. 46. It is true, that White, J., in *Empress* v. *Municipal Corporation of Town of Calcutta*(5) at p. 763, expressed the view, that Municipal Commissioners of the Corporation of the Town of Calcutta were not public servants of the description referred to in S. 39, Presidency Magistrates Act 4 of 1877. But his reasons for coming to this conclusion were, that it could not be said of them, that they were persons, who were not removable without the sanction of Government. It was virtually conceded in that case that the individual Commissioners were public servants within the meaning of S. 21, I. P. C.

It might no doubt be argued that the amendment of S. 45 by Act 26 of 1930 showed that it was doubtful prior to the amendment whether Municipal Councillors were public servants. I am inclined to the opinion however that the amendment was occasioned by the change in the colloquial or legal meaning of "Municipal Commissioner" since the Penal Code was enacted. Turning now to the question of delegation of powers. I am unable to agree with the learned Sub-Judge and First Class Magistrate's opinion as to the effect of the delegation of power by the Governor in Council to the Commissioner in Sind prior to the amendment of the Bombay District Municipalities Act 3 of 1901 in 1915. The learned Magistrate followed *Emperor* v. *Jalaluddin* (1) in preference to the decisions of the Madras and Lahore High Courts in *In re Abdul Kadir Saheb* (2) and *Emperor* v. *Khan Chand* (6). In my humble opinion the delegation of powers by the Governor in Council by virtue of Act 5 of 1868 would not have the effect of repealing or annulling the statutory provision contained in S. 16, Bombay Act 3 of 1901 ; it would merely provide for the vicarious exercise of the powers of the Governor in Council by the Commissioner by virtue of the delegation. The reasoning in *Emperor* v. *Jalaluddin* (1) moreover turned very largely on the interpretation of the United Provinces Act 4 of 1910 and Ss. 96 B (1) and 96-B (2), Government of India Act.

I agree with the learned Magistrate that since the amendment of the Bombay District Municipalities Act by Bombay Act 3 of 1915 it could not be said of Municipal Councillors that they were public servants who were not removable without the sanction of the Governor in Council. By S. 16 as amended they were removable by the Commissioner and delegated powers were no longer needed by the Commissioner. It was argued on behalf of the applicant that in consequence of the prior delegation of powers, S. 16, Bombay Act 3 of 1901, should be read as meaning "Commissioners other than the Commissioner in Sind." This contention it seems to me is not only contrary to the plain meaning of the wording of S. 16 ; it is contrary also to the express wording of the Bombay District Municipalities Act itself for the word "Commissioner" which is to be found in S. 16 is defined in S. (3) as meaning in Sind, the Commissioner in Sind, unless there is something repugnant in the subject or context and there appears to me nothing repugnant in the subject or context. I also agree with the learned Magistrate that it is the status of the accused at the time of the commission of the alleged offence and not his status at the time of the complaint or of the order issuing process which is material for the purposes of S. 197, Criminal P. C.

If it were not so, a public servant, who was not removable without sanction, would lose the protection afforded by the section, if he resigned office between the date of the alleged offence and the date of the complaint, or order ; and an accused who was not public servant, within the meaning of S. 197, when an alleged offence was committed, but became a public servant not removable without sanction prior to the complaint, or order, might claim that his subsequent

(5) [1878] 3 Cal. 758=2 C. L. R. 520.
(6) A I. R. 1922 Lah. 337=72 I. C. 523 = 24 Cr. L. J. 411.

status was a bar to his prosecution without sanction. I also agree with the learned Magistrate's opinion that the Commissioner in Sind is not a Local Government for the reasons which he has given in his able judgment. Taking all the circumstances into consideration I am of opinion that the learned Magistrate had jurisdiction to issue process against the accused. I would dismiss this application.

R.M./R.K. *Appliction dismissed.*

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* A. I. R. 1932 Sind 180

FERRERS, J. C. AND RUPCHAND A. J. C.

Gul Sheru—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 51 of 1932, Decided on 12th July 1932.

(a) Criminal P. C. (1898), S. 367—Magistrate should apply his mind to every question of law or fact.

The intention of S. 367 is that the Magistrate should direct his own attention to every material question of fact or law to which he would be required to apply his mind. [P 180 C 2]

Where the police sent up the accused for trial either under S. 379, S. 411 or S. 414, Penal Code, in respect of stolen property consisting of 19 head of cattle as they were doubtful which of three sections to apply, a question so framed that it would apply equally well to any criminal charge which could ever be preferred does not serve any useful purpose. [P 180 C 2]

*** (b) Evidence Act (1872), S. 114, Ill. (a)—Possession of stolen property by accused, must be definitely established.**

In order to justify a presumption of guilt under S. 114, Ill. (a), the possession of the accused in respect of property proved to have been stolen must be definitely established.

The stolen property consisted of 19 head of cattle and the only evidence for the prosecution was that the cattle were found in an open place not enclosed by hedge or covered by any roof, but it was not definitely proved how far away from the accused's house they were found.

Held: that the possession of the stolen cattle had not been so brought home to the accused as fairly to raise the presumption justified by Illus. (a) to S. 114 and the accused was therefore entitled to the benefit of doubt. [P 181 C 1]

Tuljaram Tillumal—for Applicant.

C. M. Lobo—for the Crown.

Ferrers, J. C.—Gulu or Gulmahomed, the applicant, was sent up by the Ghorabari Police for trial either under S. 379 or S. 411 or S. 414. The stolen property consisted of 19 head of cattle valued at Rs. 865. The learned Magistrate before whom the case first came framed two points for determination which are these:

"First, whether the animals before the Court belong to Alu and Suleman; second, whether the accused is guilty of the offence with which he stands charged."

A point for decision framed in these terms does not fulfil the intention of S. 367. The intention of that section is that the Magistrate should direct his own attention to every material question of fact or law to which he would be required to apply his mind. In this case the police were doubtful which of three sections to apply, and it is obvious that a question so framed, that it would apply equally well to any criminal charge which could ever be preferred, does not serve any useful purpose. The learned Judge before whom this case came on appeal has defined the points for decision with greater exactitude. He perceived that this case must depend upon Illus. (a), S. 114, Evidence Act. That section lays down that the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received goods knowing them to be stolen unless he can account for his possession. Now in this case there is no doubt that the animals belong to Alu and Sulleman, and that they have been stolen. The only point for determination is whether those stolen animals were found in the possession of the accused. On this point the evidence given by Musakhan who is the first of the prosecution witnesses and a zamindar is to this effect:

"Juriokhan came to my village and took me from there. On the way he told me that he had to seize cattle from Gulu Brohi .... Before we went to the accused we had seized the cattle in a dhora in Rahuja Makan about one mile from accused's house. When we seized the cattle we did not see any man there. Then we took the cattle to the accused's house. Accused denied all knowledge about the cattle. Juriokhan prepared a mashirnam and took my signature upon it."

The mashirnama states that the cattle were found in front of Gulu's house. Lakho, a camel Head Constable, has done his best to bring the offence home to Gulu. He says:

"We came to Gulu's village. We called Gulu. He came from his house, and on the Sub-Inspector's inquiry showed animals which were sitting in the open maidan."

Now it is not definitely established how far away from the house of Gulu these cattle were found. But it seems that they were in an open place not en-

closed by any hedge or covered by any roof. There are about 8 or 9 houses in the accused's village.

On this state of the evidence we are not satisfied that the possession of these cattle has been so brought home to the accused as fairly to raise the presumption justified by Illus. (a) S. 114, Evidence Act. There remains a good deal of doubt, and under the ordinary principles upon which criminal jurisdiction is exercised the benefit of that doubt ought to be given to the accused. For these reasons we think that this conviction cannot be sustained. We therefore reverse the conviction and sentence and direct that the accused be discharged.

K.N./R.K. *Accused discharged.*

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* A. I. R. 1932 Sind 181

ASTON, A. J. C.

Radhakishen—Plaintiff.

v.

Secy. of State—Defendant.

Civil Suit No. 127 of 1930, Decided on 13th May 1931.

(a) Minor — Minor's money invested by guardian in his own firm—Insolvency of firm after guardian's death—Both guardian and surety held liable for loss to minor—Trusts Act, S 23.

The guardian of a minor's property deposited the minor's money in his own firm. No proper accounts were rendered by the guardian. Subsequently after the guardian's death the firm was adjudicated insolvent owing to speculation of some other persons.

Held : that in the above case the main cause of the loss caused to the minor was the omission of the guardian to invest the property of the minor in trust securities as directed by S. 20, Trusts Act, and also the omission to file proper accounts. Therefore both the guardian and his surety were liable for the loss sustained by the minor. *Collins* v. *Middle Level Commissioners* (1869), 4 *C P.* 279 and *Burrows* v. *March Gas and Coke, Co.*, (1872), 7 *Ex.* 96, *Rel. on.* [P 183 C 1]

*** (b) Tort — Negligence — Liability of Crown or of Secretary of State, for acts of servants stated.**

So far as torts committed by the servants of the Secretary of State in the conduct of undertakings which might be carried on by private persons are concerned, exemptions from liability cannot be pleaded by the Secretary of State. But the Secretary of State will not be liable for torts committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign : *Case law discussed.* [P 185 C 1]

(c) Tort—Negligence—Court losing security bond—Secretary of State held not liable for damages under circumstances of case.

A security bond was executed by a guardian of the property of a minor and was deposited in the Judicial Commissioner's office. It was lost on account of the negligence of the office. A suit was brought by the minor after attaining majority against the Secretary of State for loss caused owing to the negligence caused by the servants of the defendant.

Held : that in the above case although the plaintiff had sustained loss yet as he was prevented from taking action against the surety the fact relied on only constituted damnum sine injuria. Also that as no appreciable benefit accrued to the revenue of the Government by taking the surety bond and as the transaction was not one out of which profit could be derived the transaction was not such in which the East India Company might have been sued and hence the plaintiff had no cause of action against the Secretary of State : 28 *Bom.* 314 ; 40 *Cal.* 391 (*P. C.*); 5 *S. L. R.* 82 and 27 *Bom.* 189. *Rel. on. Case law referred.* [P 183 C 2 ; P 186 C 1]

Kimatrai Bhojraj—for Plaintiff.

C. M. Lobo—for Defendant.

Judgment.—This is a suit filed by the plaintiff to recover a sum of Rs. 23,600 from the Secretary of State as damages for the negligence of the defendant's servants in losing a security bond executed in this Court for a sum of Rs. 23,600. The facts in the suit are virtually admitted. On 13th March 1915, one Changomal Kushaldas applied to be appointed guardian of the property of the plaintiffs who were both minors. His application was granted on the condition that he mortgaged his immovable property. This order was varied by this Court in an appeal and Changomal was ordered to give ordinary security, the District Judge, Hyderabad fixing the security at Rs. 29,600. Changomal being a resident of Karachi applied for permission to enter into the bond at Karachi in this Court and his application was granted. The security bond was taken and on 8th August 1916 the Registrar of this Court informed the District Judge, Hyderabad, that the security bond had been taken. Changomal thereafter deposited the money in his own firm of Messrs. Kushaldas Mangatram. This firm in those days was in a very flourishing condition ; it had 17 immovable properties and was a firm of good standing. In 1918 Changomal died. Plaintiff 1 on attaining majority applied to the District Judge, Hyderabad, to call on the legal representatives to render accounts and hand over property. In the application it was also mentioned that action would have to be taken against the surety and for this purpose application was made that a search should be made for the bond. On 14th June 1927, an application was made to declare the firm of

Messrs. Kushaldas Mangatram insolvents; On 27th June 1927, the District Judge, Hyderabad, requested the Registrar of this Court to send him the security bond, on 15th July the Registrar replied that it was missing. On 3rd August 1927, the firm of Kushaldas Mangatram was adjudicated insolvents. On 22nd September 1928, the plaintiff's pleader asked the District Judge, Hyderabad, to move the Judicial Commissioner to have a thorough search made. In January 1929 plaintiff 1 asked the Registrar to make a thorough search but the bond was not found. On 27th June 1927, an application had also been made by the plaintiffs to the District Judge, Hyderabad, to assign the bond for proper action being taken against the surety and the order of the learned District Judge was "surety bond to be called for." The Official Assignee investigated the claim of the plaintiffs and found that a sum of Rs. 37,447 was due to them. Interest besides has become due on the amount. The Official Assignee has declared a dividend of one anna and eleven pies in a rupee and he has deposed to the fact that taking the most favourable view another dividend of one anna and six pies may be declared. (The material issues for purposes of this report are :) 5. Has the security bond been lost owing to any negligence of the office of Court of the Judicial Commissioner of Sind? 7. Is the defendant liable to the plaintiffs for the amount of surety bond or any part thereof? 9. Is the suit premature for reasons given in para. 13 of the written statement? 10. Is the suit maintainable for reasons given in para. 14 of written statement? 11. Have the plaintiffs any right to sue for reasons given in paras. 14 and 15 of the written statement? 12. Is the defendant liable for the negligence, if any, of the Court of the Judicial Commissioner of Sind? 13. Can the present suit for damages lie against the defendant? 14. Are the legal representatives of the deceased Changomal liable for any loss occasioned to the plaintiff and not the defendant for reasons given in para. 17 of written statement?

Issue 5 was contested by the defendant. It was contended that no negligence was proved in the office of the Court of the Judicial Commissioner. It seems to me however that there was undoubtedly an omission to exercise ordinary care with regard to the surety bond. Not a trace of the bond is to be found, not a trace of any entry in any record or register relating to the bond. Had the bond been forwarded to the District Judge, Hyderabad, as suggested by the defence a reference to it would have been made in the letter dated 8th August 1916 as being forwarded, but the District Judge was merely informed by the Registrar of this Court that the bond had been taken. The security bond was a valuable document; there was no occasion for its destruction, for the Court rules provide for the destruction of only useless records. With regard to issue 6 it is clear that the loss of the bond has prevented the plaintiffs from taking action against the surety. The evidence shows that the plaintiffs did not know who the surety was. The defendant's pleader does not press issue 8. The decision of their Lordships of the Privy Council in *Jawahir Singh* v. *Udai Parkash* (1) is in plaintiffs' favour.

I will now deal with issues 9, 10, 11 and 14 together. The contention of the defence that the suit is premature because the plaintiff took no steps to ask the District Judge to assign the bond under S. 35, Guardians and Wards Act, appears to be due to a misapprehension, for the application made on 27th June 1927, has been put in. I think it is clear that from the point of view of contract, plaintiff would have no cause of action for the loss of the bond, damnum might have been occasioned to the plaintiffs but the injuria was with the Judge. It is to be remembered in this connexion that the bond prior to assignment enures to the benefit of the Judge: see S. 34, Guardians and Wards Act (8 of 1890). Plaintiffs however contend that they have suffered loss on account of the negligence of the defendant's servants in keeping the bond. On behalf of the defendant it is urged that since the firm of Khushaldas Mangatram became insolvent after the death of the guardian and surety was not liable and hence no damage was caused to the plaintiffs by the loss of the bond. It has been pointed out in Mayne on Damages that even before the case of the "*Bernina*" (*Mills* v. *Armstrong*) (2), it was set-

(1) A. I. R. 1926 P. C. 16=93 I. C. 216=53 I. A. 36=48 All. 152 (P.C.).
(2) [1913] A. C. 1.

tled law that where the defendant's negligence is the primary and substantial cause of the damage sustained by the plaintiff, he will be responsible for the whole damage though it may have been increased by the wrongful conduct of a third person or though there may have been negligence on the part of such third person which jointly with the defendant's negligence so caused the damage: *Collins* v. *Middle Level Commissioners* (3). The same rule applies where the negligence is that of a person for whom the defendant is liable. In a case where the defendant contracted to supply gas fittings in the plaintiff's house and the fittings were so defective that the gas escaped and a servant negligently brought in a lighted candle, on which an explosion took place, it was held that the defendants were liable, whether the person who introduced the candle was plaintiff's servant or not: *Burrows* v. *March Gas and Coke Co.* (4).

Similarly where a District Council employed a contractor to construct a sewer and in the construction the contractor injured a gas main from which the gas escaped into an adjoining house and caused an explosion it was held that the District Council was liable for the result as their primary duty to the public was so to construct the sewer that no injury would ensue: see Mayne on Damages, p. 71. In the present case I am of opinion that the omission of the guardian Changomal to invest the minors' property in trustee securities as directed by S. 20, Trusts Act, 1882, and the omission of the guardian to file proper accounts was the main cause of the loss caused to the minors. No doubt the action of other persons speculating in sugar partly caused the loss but on the strength of the cases to which I have referred I am of opinion that the guardian and his surety would be liable for the whole loss sustained by the minors. The question however arises: Can the defendant be rendered liable for negligence displayed in the Judicial Commissioner's office in losing the surety bond? It has been held that if "*A*" breaks his contract with *B* and *C*, a third party cannot sue him on the contract for any harm resulting to himself, but he may sue him if he has suffered damage for some wrongful or negligent act which amounts to a breach of duty towards himself independently of the contract. A railway company owes a duty to its passengers; whether the passenger who has been injured purchased a ticket or had it purchased for him or was allowed to ride gratuitously. Similarly a gas fitter who did his work negligently was liable for damages suffered by a person who was injured by an explosion but who was a stranger to the contract. Lopes, J., there said:

"I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders: see *Parry* v. *Smith* (5)."

In the case of *Heaven* v. *Pender* (6), Brett, M. R., laid down the general proposition that:

"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did use ordinary care and skill in his conduct with regard to those circumstances the would cause danger of injury to the person or property of the other a duty arises to use ordinary care and skill to avoid such danger."

Cotton and Bowen, L. JJ., however declined to adopt this proposition but rested the defendant's liability on the obligation of the dock-owner to take reasonable care that the appliances provided in the dock were in a fit state to be used. In the present case it cannot be said that the security bonds are highly dangerous objects involving special care, nor can it be reasonably alleged, in my opinion, that there is an invitation to members of the public to come to the Court and deposit security bonds and that care would be taken of such bonds. In the present case the bond was a bond taken by the Court itself. I am of apinion, that the facts relied on by the plaintiffs, as regards the loss of the bond, constitute damnum sine injuria.

With regard to issues 7, 12 and 13 the case seems to me even more clear. The liability of the Secretary of State for acts of his servants was provided for by the Government of India Act, 1858, 21 and 22 Vic. Chap. 106 which enacted that the Secretary of State might sue and

(3) [1869] 4 C. P. 279=20 L. T. 442=38 L. J. C. P. 236=17 W. R. 929.
(4) [1872] 7 Ex. 96=41 L. J. Ex. 46=20 W.R. 493=26 L. T. 318.
(5) [1879] 4 C. P. D. 325=27 W. R. 801.
(6) [1884] 11 Q. B. D. 503=47 J. P. 709=52 L. J. Q. B. 702=49 L. T. 357.

be sued in India and in England by the name of the Secretary of State in Council as a body corporate and that all persons and bodies politic might have and take the same suits, remedies and proceedings, legally and equitably against him as they would have done against the East India Company. In *Peninsular and Oriental Steam Navigation Co.* v. *Secy. of State* (7), where the plaintiff was injured by the negligence of workmen in a Government dock-yard, a broad distinction was drawn between acts done in the conduct of undertakings which might be carried on by persons who enjoy no delegated power of sovereignty and acts done in the exercise of powers usually termed sovereign. It was held that since the plaintiff was injured by workmen employed in an undertaking which might have been carried on by persons who enjoyed no delegated powers of sovereignty, it was a case in which the old East India Company would have been employed and a case threefore in which the Secretary of State could not plead exemption.

The learned Judges who decided this suit did not hold that all acts done in the exercise of powers usually termed sovereign were exempt but in *Nobin Chander Dey* v. *Secy. of State* (8), it was held that exemption could be claimed as regards all acts falling under this clause whether the suit was based on contract or tort. This ruling was strongly criticized in *Secy. of State* v. *Hari Bhanji* (9) where it was pointed out that if *Nobin Chander Dey* v. *Secy. of State* (8), was correct it was unnecessary for the Privy Council in *Forester* v. *Secy. of State* (10) to have inquired into the title of the Begum for the resumption of her jagir was an act which could under no circumstances have been legally done by a private person: *Secy. of State* v. *Hari Bhanji* (9) sub-divided acts done in the exercise of powers usually termed sovereign into two classes, namely, acts which are entirely outside the province of Municipal law and acts which fall within the province of Municipal law. To the former class belong acts such as making of war and peace, the conclusion of treaties: see *Nabab of Carnatic* v. *East India Co.* (11) and acts necessary for public safety not purporting to be justified by any canon of Municipal law, as for instance, seizing the property of a deceased Raja as escheat: see *Secy. of State* v. *Kamachee Boye Sahaba* (12). It has been held that all that is done under a treaty is as much beyond the domain of Municipal law as the treaty itself: *Rustomjee* v. *Reg* (13). With regard to the second class, namely, acts within the province of Municipal law, it was pointed out in *Secy. of State* v. *Hari Bhanji* (9) that where the act which is the ground of the complaint is the act which professes to be done under the sanction of the Municipal law and in the exercise of powers conferred by that law, the circumstances that it is an act done by the sovereign power or by the deputy of that power does not oust the jurisdiction of the civil Courts.

Thus in *Foster* v *Secy of State* (10) where possession was taken not as a seizure by arbitrary power but under colour of a legal title their Lordships of the Privy Council held that the claim of the plaintiff was prima facie cognizable by the Municipal Courts. *Secy. of State* v. *Hari Bhanji* (9) was approved of in *Vijya Raghava* v. *Secy. of State* (14) where a Municipal Councillor sued the Secretary of State for wrongful removal from the office and the Court awarded damages. This case was strongly criticized in *Ross* v. *Secy of State* (15) where the plaintiff sued the Secretary of State for damages for the dismissal of an agent of a labour association and for alleged libel. It was held in *Ross* v. *Secy. of State* (15) that *Vijya Raghava* v *Secy. of State* (14) had omitted to give proper consideration to the question whether acts were done in the exercise of powers usually termed sovereign or whether they were done in the conduct of undertakings which might be carried on by persons who enjoyed no delegated powers of sovereignty. *Ross* v. *Secy. of State* (15) subdivided acts done in the exercise of powers usually termed sovereign into torts committed by Government servants while acting as agents of Government and

(7) 5 B. H. C. R. App. 1.
(8) [1875] 1 Cal. 11=24 W. R. 309.
(9) [1882] 5 Mad. 273.
(10) [1872] 1 P. R. 1872=I. A. Sup. Vol. 10=12 B. L. R. 120=18 W. R. 349=3 Sar. 1 (P.C.).
(11) 4 Brown's Chancery Cases 198.
(12) [1858] 7 M. I. A. 476=4 W. R. 42=1 Suth. 373=13 Moo P. C 22 (P.C.).
(13) [1877] 2 Q. B. D. 69=46 L. J. Q. B. 239=25 W. R. 333=36 L. T. 190.
(14) [1884] 7 Mad. 466 (F.B.).
(15) A. I. R. 1915 Mad. 434=37 Mad. 55.

secondly acts done by Government servants in the exercise of statutory authority, and thirdly acts done by Government servants acting as agents of Government. As regards torts committed by Government servants while acting under colour of Municipal law, Wallis, J., in *Ross* v. *Secy. of State* (15) observed that the question will not be settled conclusively until their Lordships of the Privy Council have had an opportunity of considering the case of *Rogers* v. *Rajendro Dutt* (16) where irresponsibility was assumed and he expressed the opinion that as it was a case in which a petition of rights would not lie against the Crown, and as the East India Company would not have been liable and there had been no ratification, there was no cause of action against the Secretary of State. This was followed in *Secy. of State* v. *Cockroft* (17) in which it was held that there was no cause of action against the Secretary of State for a tort committed by the servants of a Public Works Department, namely, negligence in making a military road; in *McInerny* v. *Secy. of State* (18). Fletcher, J., held that no suit could lie for negligence with reference to a highway: see also *Shivabhajan* v. *Secy. of State* (19).

It is quite clear that so far as torts committed by the servants of the Secretary of State in the conduct of undertakings which might be carried on by private persons are concerned exemption from liability cannot be pleaded by the Secretary of State. This was laid down in *Peninsular & Oriental Steam Navigation Co.* v. *Secy. of State* (?) which was approved of in *Secy. of State* v. *Moment* (20). This Court also in *Mathradas Ramchand* v. *Secy. of State* (21) awarded damages for wrongful ejectment of the plaintiff from a second class carriage by railway servants and in *Jehangir Carsetji* v. *Secy. of State* (22) it was conceded by Government in appeal that such actions of tort as could have been brought against the East India Company, would also lie against the Secretary of State. It is also clear that property has been illegally sold or money has been improperly recovered by a public servant acting ostensibly under a statute and where the money has found its way into the public fund, a suit will lie against the Secretary of State for its recovery: *Kailash Chandra Nag* v. *Secy. of State* (23) and 56 *I. C.* 507 *Secy. of State* v. *Lown Karan Marwari* (24): see also *Pamulapati Ankinudu* v. *Secy. of State* (25). It appears to me however established beyond all reasonable doubt that the Secretary of State will not be liable for torts committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign. The facts in the Bombay case above cited, viz., *Shivabhajan* v. *Secy. of State* (19) seem to me in certain respects very similar to the facts in the present case. The suit was instituted against the Secretary of State in Council to recover damages on account of the negligence of the chief constable with respect to goods seized. It appears that 62,500 bundles of hay were attached by the chief constable of Mahim in the beginning of November 1900 while the hay was in the plaintiff's possession. On 2nd January 1901, the plaintiff gave a notice to the District Superintendent of Police for delivery and possession of the hay but only 14,700 bundles were delivered and the remaining 47,800 bundles of hay were missing.

In other words, certain acts were performed under colour of Municipal law, and subsequently loss was caused to the plaintiff owing to the negligence of a public servant. It was held that the seizure of the goods was not in any sense productive of benefit to the revenues of the Bombay Government, that it was not a transaction out of which profits could be derived and there was no ratification or adoption of the act. In order that a suit could lie against the Secretary of State in Council, it must be one in which the East India Company might have been made liable. It was further held in that suit, where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the

(16) [1859] 8 M. I. A. 103=13 Moo. P. C. 209=2 W.R. 51=1 Suth. 413=1 Sar. 755 (P.C.).
(17) [1915] 39 Mad. 351=27 I. C. 723.
(18) [1912] 38 Cal. 797=13 I. C. 370
(19) [1904] 28 Bom. 314=6 Bom. L. R. 65.
(20) [1913] 40 Cal. 391=18 I. C. 22=40 I. A. 48 (P.C.).
(21) [1911] 5 S. L. R. 82=11 I. C. 58.
(22) [1903] 27 Bom. 189=5 Bom. L. R. 30.
(23) [1913] 40 Cal. 452=18 I. C. 112.
(24) A. I. R. 1920 Pat. 182=5 Pat. L. J. 321=21 Cr. L. J. 475=56 I. C. 507.
(25) [1905] 28 Mad. 312.

agent in such employment. The case for the plaintiff was stronger in *Shivabhajan* v. *Secy. of State* (19) than in the present suit for missing hay in that suit was actually taken from the plaintiffs' possession while the missing bond in the present suit was only to enure eventually for the plaintiff's benefit. In the present case no appreciable benefit accrued to the revenues of Government by the taking of the surety bond. The transaction was not one out of which profit could be derived. The transaction does not appear to me in any sense to be one in which the old East India Company might have been sued. Plaintiffs in my opinion have no cause of action against the Secretary of State. I accordingly dismiss the suit with costs.

B.V./R.K. *Suit dismissed.*

A. I. R. 1932 Sind 186

ASTON, A. J. C.

Jasodabai—Plaintiff.

v.

Dharamdas Thawerdas—Defendant.

Suit No. 168 of 1928, Decided on 17th September 1931.

(a) Evidence Act (1872), S. 34 — Account book containing annual profit and loss account but not yearly balance sheet book—Calculations made in haphazard way for varying periods of time — It is not account book kept in regular course of business and cannot be admissible under S. 34.

An account book though it contained a number of annual profit and loss accounts was not a yearly balance sheet book it contained what purported to be a series of profit and loss accounts but these were not made out at regular intervals or for uniform periods of time. The profit and loss was sometimes calculated over a period of two years taken together, sometimes over a period of three years taken together, occasionally for one year, on one occasion for three years and ten months taken together on another occasion for 13 years taken together.

Held: that calculations made in this haphazard way for varying periods of time did not constitute a book kept in the regular course of business so as to be relevant and admissible under S. 34. [P 188 C 1]

(b) Hindu Law—Maintenance — Widow — widow suing her deceased husband's joint brother for maintenance and showing her right of maintenance as dependant on valid contract and not on her "status" as Hindu widow —Court will give effect to such contract — Contract.

Where a party in a maintenance suit brought by a Hindu widow against her deceased husband's joint brother is able to establish that her right to maintenance rests on a valid and binding contract and not merely on her "status" as a Hindu widow the Courts will give effect to the intentions of the parties in accordance with the terms of the contract. To hold that the principles of free contract are subservient to rules of law real or supposed which are primarily concerned with "status" would be a reversal of the march of progress for among progressive societies the movement has always hitherto been from status to contract; 26 *Bom.* 707; 24 *Bom.* 386; 1 *All.* 594; 2 *Bom.* 624; 8 *Mad.* 94; 9 *W. R.* 152; 5 *C. L. R.* 18 and *A. I. R.* 1924 *Mad.* 687, *Ref.* [P 189 C 1]

(c) Hindu Law — Widow — Maintenance — Widow can get maintenance from her husband's brother whether separated or not, notwithstanding nonreceipt by him of her husband's assets.

A Hindu widow is entitled to maintenance from her husband's brother whether separated or not notwithstanding the nonreceipt by the latter of her husband's assets and there is nothing in the Hindu law to prevent the Court in its discretion awarding a widow separate maintenance. The whole policy of Hindu law is not to let even a distant widow starve: 5 *Bom. H. C. A. C.* 130; 2 *Bom. H. C.* 323 and 1 *Bom. H. C.* 13, *Foll*; *A. I. R.* 1926 *Sind* 135, *Ref.* [P 187 C 1]

Balkishen H. Lulla and *Pahlajsing B. Advani*—for Plaintiff

Tahilram Maniram—for Defendant.

Judgment.—This is a suit filed by the plaintiff Jasodabai the widow of Pamanmal in forma pauperis against Dharamdas Thanwerdas the brother of her deceased husband for maintenance. Pamanmal died in or about the year 1899. He was at the time of his death a member of a joint Hindu family consisting of himself his brother Alumal and the defendant. Alumal died in or about the year 1902. After her husband's death plaintiff resided with defendant and was maintained by defendant on whom the family property had devolved. In or about 1923 the defendant married a Marwari lady and plaintiff left the house. Her case is that she was turned out by the defendant at the instigation of his wife. Plaintiff complained to the committee of the panchayat. A settlement was brought about. According to plaintiff the defendant agreed to pay her Rs. 30 per mensem for her separate maintenance and not vary the amount at any time for any reason. She had a bona fide claim to maintenance and in addition she gave valuable consideration for she gave to the defendant certain ornaments belonging to her. Defendant's case is that he has voluntarily maintained the plaintiff for many years as a moral duty without being under any legal obligation to do so and that the ornaments were his. According to the defendant hardly any family property came into his hands. The Las Bela

property was hardly sufficient to pay the debts.

In addition to this his services with Messrs. Clement Robson & Co., a firm in which he was drawing Rs. 256 per mensem were terminated and he is now unable to pay Rs. 30 per mensem to plaintiff. It is contended on behalf of the defendant that since virtually no property came into his hands he was under no legal obligation to maintain the widow of his deceased brother and the settlement arrived at in 1923 was not binding on defendant. I do not think this plea is available for defendant either in law or in fact. The Bombay High Court in *Timmappa Bhat* v. *Parmesharima* (1) *Chandrabhagabai* v. *Kashinath* (2) and *Bai Lakhmi* v. *Lakhmi Das* (3) held that a Hindu widow is entitled to maintenance from her husband's brother whether separated or not notwithstanding the non-receipt by the latter of her husband's assets and that there is nothing in the Hindu law to prevent the Court in its discretion awarding a widow separate maintenance. Gibbs, J., there remarked that the whole policy of Hindu law is not to let even a distant widow starve. This was not the view taken by a Bench of this Court in *Kewalmal* v. *Isribai* (4) Kincaid, J. C., there held that a widow is not entitled to receive more than the income which her husband would have been entitled to receive had he been alive and had he separated from the co-parcenary. The facts in the present case however are much stronger than in *Timmappa Bhat* v. *Parmesharima* (1).

The evidence shows that plaintiff had valuable gold ornaments in her possession which she claimed as her stridhan. She was claiming maintenance from the defendant as the widow of a deceased co-parcener and she wished orders to be given to the defendant to deliver to her other ornaments which she alleged were in defendant's possession and belonged to her. Defendant was also alleging that plaintiff had some ornaments belonging to him and he contended that a widow had no need of ornaments. He declined to give her maintenance unless she handed over to him all the ornaments in her possession except those which she was actually wearing on her person. He also said he would make her some new bangles. With great difficulty the plaintiff grudging consent these terms were obtained. The evidence shows that plaintiff wept at having to hand over her ornaments. She did so and defendant thereafter gave her maintenance at the agreed rate of Rs. 30, viz., Rs. 27 in cash and vegetables and other things worth Rs. 3 from July 1923 to February 1924. He then fell ill and paid the reduced maintenance at the rate of Rs. 25 promising to pay Rs. 30 when recovered. Rs. 25 was paid to December 1925. Defendant also had some bangles made for plaintiff. I do not believe the defendant's story that the new bangles he had made for plaintiff exceeded in value those ornaments which plaintiff delivered to him. It is impossible to believe that a person who was withholding all maintenance from plaintiff would insist on ornaments being handed over by the widow in order that at his own expense he might replace them with ornaments of greater value; I believe the plaintiff's evidence on this point. The defendant in the words used in *Baldeo Singh* v. *Udal Singh* (5):

"is bound by his own agreement. The plaintiff gave valuable consideration for the promise of maintenance: see *Thornborrough* v. *Whitacre* (6) and defendant performed his part of the contract for a considerable time. Taking into consideration the favour shown by the Courts to these arrangements and the long period which elapsed since the arrangement was made defendant cannot now be allowed to repudiate the agreement.

In case I am wrong in my opinion, it is necessary to consider whether it is proved that owing to the family debts, which defendant had to pay, there was not a sufficient residue of joint family property to impose an obligation on defendant to maintain the plaintiff. I am of opinion that the defendant has failed to establish that sufficient property did not devolve on him to enable him to maintain the plaintiff according to her position in life.

The facts regarding the joint family property and the debts owing were peculiarly within his knowledge and the onus was on defendant to establish his contention. He admits that immovable property at Las Bela and a cap shop came

(1) [1868] 5 Bom. H. C. A. C. 130.
(2) [1866] 2 B H. C. 323.
(3) [1865] 1 B. H. C. 13.
(4) A. I. R. 1926 Sind 135=93 I. C. 353.
(5) A.I.R. 1921 All.248=58 I.C. 732=43 All. 1
(6) [1705] 2 Ld. Raym. 1164=92 E R. 270.

to him; that he sold the immovable property and closed the cap shop. I disbelieve his statement that he sold the greater part of his Las Bela land through Govumal Jethanand for Rs. 686 8-9 and that he sold the remaining piece of land himself for Rs. 85. (After referring to certain entries from a book described as a book kept in the regular course of business, the judgment proceeded.) Defendant when putting in the entry in the book containing Ex. 39 described it as a book kept in the regular course of business. He has also called it the "yearly balance sheet book." The book though it contains a number of annual profit and loss accounts is not a yearly balance sheet book; it contains what purport to be a series of profit and loss accounts, but these are not made out at regular intervals or for uniform periods of time.

The profit and loss is sometimes calculated over a period of two years taken together, sometimes over a period of three years taken together, occasionally for one year, on one occasion for three years and ten months taken together; on another occasion for 13 years taken together. Calculations made in this haphazard way, for varying periods of time, do not appear to me to constitute a book kept in the regular course of business, so as to be relevant and admissible under S. 34, Evidence Act and owing to the absence of other books kept in the regular course it is impossible to check and compare the items in it with entries in books regularly kept. (After referring to a letter Ex. 83, the judgment went on.) But the defence now contend in the alternative that since defendant's circumstances have changed and his income has been reduced he is entitled to pay maintenance at a reduced rate. Plaintiff relying on *Gopikabai* v. *Dattatraya* (7) and *Ruka Bai* v. *Ganda Bai* (8) contends that such a plea can only be heard in a separate suit. These cases however merely held that such a suit would lie and in *Maharana Shri Kanmalsingji* v. *Bai Shri Kundankuwar* (9) it was pointed out that such a plea could not be taken in execution. Sir Dinshaw Mulla in his commentary on the Hindu Law when explaining why Courts will grant relief has expressed the opinion that it is because the right to maintenance does not rest on contract but on the provisions of the Hindu law which expressly govern the rights and duties of the different members of a Hindu family : see Edn. 3, p. 441. If the authority cited in support of this view viz., *Sidlingapa* v. *Sidava* (10) is referred to, it will be seen that the Bombay High Court did not hold that the right to maintenance does not rest on contract but on the provisions of Hindu law. It held that the right of maintenance does not ordinarily rest on contract and it is enforceable in numerous instances in which there is no connexion with contract. And if the grounds on which the relief was granted by the various Courts are examined, it is interesting to notice that the relief was granted not under the provisions of the Hindu law but on the ground of "equity." We have already seen what the early view of the Bombay High Court was with regard to the rights of widows to maintenance. In the early Allahabad case upholding a suit for reduction of maintenance the Court was asked to reduce maintenance not on the principles of Hindu law but on the ground of "equity" : see *Ruka Bai* v. *Ganda Bai* (8) and no mention was made in the judgment of Hindu law. In an early Madras decision viz., *Vijaya* v. *Sripathi* (11) the Court merely mentioned that possibily it would hold as had been held elsewhere, that such a suit would lie.

In *Gopikabai* v. *Dattatraya* (7) no reasons were mentioned for granting the relief, the Court merely referred with approval to *Ruka Bai* v. *Ganda Bai* (8), *Vijaya* v. *Sripathi* (11) and *Sreeram Buttacharjee* v. *Puddomookhee Debia* (12). In *Sidlingapa* v. *Sidava* (10) "equity" was also referred to as the basis of the relief and various circumstances were referred to in which it would be 'equitable" to grant such relief. In *Rajender Nath Roy* v. *Putto Soondery* (13) the Court granted relief on the assumption that maintenance had been fixed with reference to the circumstances of the parties, to the reasonable wants of the widow and to the extent of the property and that since the circumstances

(7) [1900] 24 Bom. 386=2 Bom. L. R. 191.
(8) [1878] 1 All. 594.
(9) [1902] 26 Bom. 707=4 Bom. L. R. 531.
(10) [1878] 2 Bom. 624 (F.B.).
(11) [1884] 8 Mad. 94.
(12) [1868] 9 W. R. 152.
(13) [1879] 5 C. L. R. 18.

had changed it was not reasonable to call upon the holder of the property to pay the maintenance fixed. In *Mohieswara Rao* v. *Durgamba* (14) the Madras High Court held that a widow can by contract cancel her right to an enhanced rate of maintenance if the family circumstances improve.

It seems to me to follow that where a party as in this case is able to establish that her right to maintenance rests on a valid and binding contract and not merely on her "status" as a Hindu widow the Courts will give effect to the intentions of the parties in accordance with the terms of the contract. To hold otherwise, to hold that the principles of free contract are subservient to rules of law, real or supposed, which are primarily concerned with "status" would be a reversal of the march of progress, for among progressive societies, as Sir Henry Maine points out in his Ancient law (p. 170) the movement has always hitherto been from status to contract. In considering the intentions of the parties I am of opinion that the plaintiff would never have given up her ornaments had she been told that the rate of maintenance could be varied at any time if the income of defendant was reduced. I am of opinion that defendant also regarded the agreement in the same light as the plaintiff for he was grumbling after the plaintiff and some of the members of the Jamayet had left. Mr. Kalumal informed him that if he became unable to pay, the matter might be reconsidered by the committee. Such a statement however could not bind the plaintiff. (After going through the defendant's financial position, the judgment concluded). I give judgment for plaintiff for Rs.570 arrears of maintenance to date of suit, maintenance of Rs. 30 from date of suit till this date amounting to Rs. 1,470. Decree for future maintenance at Rs. 30 per month, costs. Court-fees to be recovered from defendant: see O. 33, R. 10, Civil P. C.

B.V./R.K. *Suit decreed.*

(14) A. I. R. 1924 Mad. 687 =47 Mad. 306=78 I. C. 831.

* A. I. R. 1932 Sind 189

RUPCHAND AND MEHTA, A. J. Cs.

Commissioner of Income-tax — Applicant.

v.

Sind Light Ry. Co. Ltd. — Opposite Parties.

Civil Ref. No. 147 of 1930, Decided on 31th May 1932

*** (a) Income-tax Act (1922), Ss. 66 (2), 31 and 32—Assessee can claim reference under S. 66 (2) in respect of question of law arising from order passed under S. 31 or S 32 —Where no such point is raised before Income-tax Commissioner such point cannot be said to arise out of such order and no reference can be claimed regarding it.**

The only right conferred upon an assessee to claim a reference to the High Court under S. 66, Cl. (2) of the Act, is in respect of questions of law arising from an order passed under S. 31 or or S. 32 of the Act or from a decision by a Board of Trade under S. 33 (a) of the Act. Where the Assistant Commissioner of Income-tax bas no occasion to deal with or apply his mind to a point of law, the point not having been raised before him, such point of law cannot be said to arise out of his order and the assessee can claim no reference in respect of that point: *Bray* v. *Justices of Lancashire* (1889), 22 *Q. B.* D. 484, *Ref.*; *Case law discussed.* [P 191 C 1]

(b) Income-tax Act (1922), S. 26 (2)—Significance of S 26 (2) explained.

Section 26 (2) is evidently intended to secure to Government a tax based on the earnings of a business for a full year notwithstanding the transfer of the business from one person to another before the expiry of the year provided of course that the business is continued by the transferee. If the transferor and the transferee are separately taxed for profits earned by them during the period each of them carries on the business, the incident of taxation would be seriously affected; and if the income for the whole year though enjoyed by two different persons is liable to be taxed at the end of the year it is but proper that the person who is in possession of the business at the end of the year should be made responsible for it leaving it to him to settle the equities between him and the transferor with regard to the apportionment of such taxation. [P 192 C 1]

*** (c) Income-tax Act (1922), S. 26 (2)—Provision of Act allowing assessee to escape assessment — Court must give effect to it, though it may seem unreasonable.**

Though it may appear somewhat unreasonable to the Court that a company should escape assessment of tax on a profit which it has admittedly made, yet if the law, as it stands enables the company to avoid payment of the tax, the Court is bound to give effect to it. Therefore where the Government acquires a private concern whom it pays profit for the previous nine months and keeps to itself profit for the last three months of the year S. 26 (2) applies to such a case and the company cannot be assessed for the profits given to it by the Government. [P 191 C 2]

*** (d) Income-tax Act (1922), S. 26 (2)—"Succession" and "succeeded" explained—**

S. 26 (2) in express terms refers to person having been succeeded by another not in respect of every source of income but in respect of any business or vocation.

It is no doubt true that the words "succeeded" and 'succession" in S 26 (2) primarily refer to "succession" by one person of the property of another person on his death. But these words have been used for very many years both in the English and Indian statutes relating to taxation in a much wider sense and as meaning a transfer by one person to another of any business or part of any business or profession or vocation. An asse-see is liable to be taxed not only on the income derived by him from his business but also from other sources. He may carry on business in one or more lines or in one or more places, either alone or in partnership with others. He may at the same time follow a profession or a vocation and de ive income therefrom and he may possess property yielding him an income. S. 26, Cl. (2) in expr ss terms refer to a person having been succeeded by another not in respect of every source of income but in respect of "any business or profession or vocation" and contemplates that such person may be succeeded by another, in the whole of his business or in any one particular line of his business or in any business carried on by him in a particular place and that such person may still continue to earn his income from his remaining sources and in no sense can ne be said to "pass out" in consequence of such succession. When may a person be said to succeed to a part of the business of another must necessarily depend upon the particular facts of each case, and no hard and fast rule can be laid down in that behalf. [P 192 C 2]

*** (e) Income-tax Act (1922), S. 26 (2)—"Person" includes Secretary of State engaged in enterprises of commercial nature.**

"A pe son" includes the Secretary of State when engaged in enterprises of a commercial nature. The acquisition by him of a railway in the exercise of the statutory powers vested in him under the Railways Act would nevertheless make him the successor of the company in respect of such railway: *English case law discussed.* [P 193 C 1]

(f) Income-tax Act (1922), S. 26 (2)—"Person' and "business" explained.

There can be succession to a person without there being succession to that person's business; succession to a person is not the same thing as succession to a business. A person may be succeeded by another in a business in the sense that it is the same sort of business, although not the same business. The difference between the two is the difference between business in the abstract and business in the concrete. Business in the abstract is merely an idea connoting some kind of activity. Business in the concrete is the activity put into practice. *A* may succeed to a particular business of *B* and yet not to the assets or liabilities of *B* in reference to that business. In that case there may be succession to the concrete business of *B* but not to the individual It is conceivable that the management of a concern may be by rotation. Each successor may take over the management of the business with a fresh start of liabilities and assets. These are some of the illustrations of succession to business and not to the individual. When one person is succeeded by another there must be a wiping out of the original individual, i. e., the particular business activity together with all the old liabilities and assets appertaining to it must change hands. When *A* has not only taken over the actual business of *B*, but even the assets and liabilities, i. e., when there is a succession to *B* by *A* then *A* should be liable to pay the income-tax for the year during which the transfer takes place. Under English law the income-tax authorities pursue the business; under Indian law they pursue the individual along with the business; and that is why the words "in such capacity" are to be found incorporated in S. 26(2), Income-tax Act. The succession referred to in S. 26 (2) is in relation to a person's business. "Business" in S. 26 (2) is not business in abstract but is business in concrete. [P 195 C 1, 2]

(g) Income-tax Act (1922), S. 26 (2)—"Capacity' explained.

By capacity is meant a position enabling one to do something. [P 196 C 2]

(h) Interpretation of Statutes — Taxing statute should be interpreted in favour of subject.

It is a well-recognized rule that in a statute imposing pecuniary burdens, if there is a reasonable doubt with regard to the construction of any burdensome provision, the construction most beneficial to the subject is to be adop ed. [P 197 C 1]

C. M. Lobo—for Applicant.

Tolasing K. Advani — for Opposite Party.

Rupchand, A. J. C.—This is a reference under S. 66, Cl. (3), Income-tax Act 11 of 1922.

Prior to 31st December 1928 the assessee company owned two light railways called the Mirpurkhas Jhudo Railway and the Mirpurkhas Khadro Railway. Both these railways were constructed by the company on Government land on certain terms and conditions which inter alia provided (1) that Government will arrange for their working of the railways and appropriate 40 per cent. of the income as working expenses and will pay to the company 60 per cent. of the income as their profit; and (2) that Government will have the right of buying up the railways at the expiry of certain stated periods. Each of these railways was constructed in pursuance of a separate agreement ; the construction of the Mirpurkhas Jhudo Railway having been taken in hand in 1908 and completed in 1911 and that of the Mirpurkhas Khadro Railway, having been taken in hand in 1912 and completed in 1913.

On 31st December 1928, the Government took over the Mirpurkhas Jhudo Railway and paid to the company 60 per cent. profit for working the line for the

preceding nine months and also compensation for the acquisition of the line. The company was taxed for the year 1928-29 on the profits made by it from this railway for a period of nine months and on the other railway for the whole period of 12 months. Under S. 26 (2) of the Act the company claimed exemption from payment of the tax on the profits earned by it on this railway for the broken period of the year. It failed to obtain relief from the Subordinate Income-tax authorities and applied to the Commissioner of Income-tax for review of the order passed by the Assistant Commissioner and in the event of his refusing to afford the company relief to refer the question to this Court.

At a later stage of the proceedings and after the Commissioner of Income-tax had intimated to the company his decision, he was asked to refer a further question also to this Court, namely whether the company is not in any case exempted from payment of the tax under S. 25 (3) of the Act.

The Commissioner has refused to accede to this request and has submitted for cur consideration only the following issue:

"Whether in the circumstances of this case and in view of the provisions of S. 26 (2), the income-tax officer has correctly included the earning by the company from the Mirpurkhas Jhudo line for the period 1st April 1928, to 31st December 1928, in its total income from its "previous year" ending with 31st March 1929, for the purpose of its assessment for the year 1929-30."

Two points have been raised before us on behalf of the company, first that the Commissioner of Income-tax was in error in refusing to refer the alternative case of the company as based on S. 25 (3) of the Act and secondly that he was in error in not affording relief to the company by virtue of S. 26 (2) of the Act.

There is, in our opinion, no substance in the first point.

The only right conferred upon an assessee to claim a reference to the Court under S. 66, Cl. (2) of the Act is in respect of questions of law arising from an order passed under S. 31 or S. 32 of the Act or from a decision by a Board of Trade under S. 33 of the Act.

This reference purports to be made in respect of questions of law arising out of an order passed by the Assistant Commissioner of Income-tax under S. 31 of the Act.

It is common ground that exemption under S. 25 (3) was not claimed by the company before that officer. It is therefore difficult to see how the question of law based on the provisions of S. 25 (3) can be said to arise out of his order when he had no occasion to deal with it or to apply his mind to it.

In this connexion, it will be sufficient to refer to the observations of Lord Esher, M. R. in *Bray* v. *Justices of Lancashire* (1), on the somewhat cognate provisions of the Taxes Management Act 1880 which are as follows :

"On the determination of any appeal under the Income-tax Acts by the special Commissioners the appellant or the surveyor, may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction, and require the Commissioners to state a case for the opinion of the High Court. The case is to set forth the facts and the determination. That means that the case is to raise the question of law which the Commissioners have determined and to which the appellant has objected as wrong in law and by sub-S. 2 the High Court is to hear and determine the question or questions of law arising on the case Now what was the question of law raised by the clerk of the peace. Not that if this part of the lunatic asylum was assessable the justices or the visiting committee were not the people to be assessed but some one else but that no one was asses able or in other words, that these parts of the asylum were not not assessable at all. The determination of the Commissioners was taken upon that point of law and that alone. If that is so, that was the only point with regard to which a case could be stated and if in the case any other point is stated, it is one that should not be in the case and which no Court is bound to answer."

We are not concerned with what transpired at the hearing of the review application made to the Commissioner of Income-tax under S. 33 or what he might have said in that order, as we have no jurisdiction to deal with any new points of law that might have been urged during those proceedings. Under the circumstances, it is not necessary for us to go into the objections raised by the learned Government Pleader that the application to the Commissioner of Income-tax to refer this question to the Court was made after time and that in any case the company having failed to apply to this Court within six months of the date of the refusal by the Commissioner to refer the question; it was not competent for the company to

(1) [1889] 22 Q. B. D. 484=58 L. J. M. C. 54=37 W. R. 392=53 J. P. 499.

raise it now. We therefore propose to deal only with the question submitted to us by the Commissioner of Income-tax. Now, at first sight it does appear somewhat unreasonable that the company should escape assessment of tax on the profit which it has admittedly made. But if the law as it now stands enables the company to avoid payment of the tax, the Court is bound to give effect to it. Cl. 2, S. 26 under which exemption is claimed reads as follows :

" 26 (2) Where at the time of making an assessment undar S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person the assessment shall be made on such person succeeding as if he had been carrying on the business, profession or vocation through the previous year and as if he had received the whole of the profits for that year."

The reason why this clause was enacted may well be surmised. It was evidently intended to secure to Government tax based on the earnings of a business for a full year notwithstanding the transfer of the business from one person to another before the expiry of the year provided of course that the business was continued by the transferee. If the transferor and the transferee were separately taxed for profits earned by them during the period each of them carried on the business, the incident of taxation would be seriously affected; and if the income for the whole year though enjoyed by two different persons was liable to be taxed at the end of the year, it was but proper that the person who was in possession of the business at the end of the year should be made responsible for it leaving it to him to settle the equities between him and the transferor with regard to the apportionment of such taxation. Rare instances like the present, of the Government acquiring a private concern do not appear to have attracted the attention of the legislature when enacting this clause and no exception has been made in that behalf. Cl. (2) therefore applies equally to the Government succeeding the private business of an assesseee during to a year on which assessment is based. The Commissioner has given two reasons for holding that Cl. (2) does not apply to the circumstances of the present case. His first reason may best be given in his own words. He has said :

" In the first place as the company assessee is still in existence no question whatever of succession can arise. A question of succession arises only when the person concerned passes out. As long as that person exists no one can be said to succeed him and it would be meaningless to talk of a successor or succession. The section clearly refers to a person " having been succeeded by another person." Hence all that can be inferred therefrom is that the company in this case should in the first instance get out as such and its place be taken by some other person as successor to it The obvious object of this section is to provide for the levy of an assessment in a case in which the person who earned the income to be taxed in a certain capacity is not in existence as such and is succeeded by another person in that capacity."

With all respect this reasoning does not give due effect to the important expressions " any business, profession or vocation " and " in such capacity " designedly used in this clause by the legislature. It is no doubt true that the words " succeeded " and " succession " primarily refer to " succession " by one person of the property of another person on his death. But these words have been used for very many years both in the English and Indian Statutes relating to taxation in a much wider sense and as meaning a transfer inter vivos by one person to another of any business or part of any business or profession or vocation. An assessee is liable to be taxed not only on the income derived by him from his business but also from other sources, see S. 6 of the Act.

He may carry on business in one or more lines or in one or more places, either alone or in partnership with others. He may at the same time follow a profession or a vocation and derive income therefrom and he may possess property yeilding him an income. Cl. (2) in express terms refers to a person having been succeeded by another not in respect of every source of income but in respect of " any business or profession or vocation " and contemplates that such person may be succeeded by another in the whole of his business or in any one particular line of his business or in any business carried on by him in a particular place and that such person may still continue to earn his income from his remaining sources and in no sense can he be said to " pass out " in consequence of such succession. The Board of Inland Revenue seems to have been fully alive to this meaning attaching to the section. This is abundantly clear from the instructions issued by it for the guidance of the assessing officers. Paras. 75-A

p. 207, Income-tax Manual, reads as follows :

" Where a concern splits up into two or more concerns each of the latter should be assessed on the profits in the previous year of the corresponding part of the original business in the manner appropriate to its status (i. e., whether it is a firm or a company etc) when the assessment is made. Where a person disposes of a part of his business to another there is a succession in respect of that part and the same principles apply. When a business is split up and a portion thereof transferred it is not correct to make a consolidated assessment on the profits of the business as a whole in the previous year and then apportion the tax between the different proprietors of the divided parts."

When a person may be said to succeed to a part of the business of another must necessarily depend upon the particular facts of each case and no hard and fast rule can be laid down in that behalf. But the fact remains that these instructions go counter to the suggestion made by the learned Commissioner that the evident object of this section is that a person who is taxed in a certain capacity should cease to exist as such so as to attract the applicability of this clause. Our attention has not been drawn by the learned Government Pleader to any provision of the Act to warrant this suggestion and in the absence of any declaration of intention by the legislature in that behalf which may only be gathered from the Act and not de hors the Act, I am not prepared to hold that the company should have ceased to exist as a business concern before it can be said to have been succeeded by another. The other reason given by the learned Commissioner is that the Secretary of State had not succeeded to the company " in same capacity." He has based this reason on four grounds (1) that the Secretary of State was not a company doing business (2) that he had taken over the railway in pursuance of his statutory powers (3) that the company was not the owner of the land on which the railway was constructed and could only receive its share of profit out of its working through such agency as the Secretary of State appointed and (4) that the Secretary of State was the full owner of the land and the railway and could work it in any way he liked and that the working of the line by the Secretary of State was therefore now not the same. I am afraid there is no substance in this line of reasoning either. The definition of " a person " in the General Clauses Act, is comprehensive enough to include the Secretary of State when engaged in enterprises of a commercial nature. The acquisition by him of a railway in the exercise of the statutory powers vested in him under the Railways Act would nevertheless make him the successor of the company in respect of such railway.

In *Stockham* v. *Wallasey Urban Council* (2) the District Council had taken over a tramway from the Wallasey United Tramways in pursuance of its statutory powers and was held to be a successor of the company and this notwithstanding the fact that the company did not cease to exist altogether but continued to do its omnibus business. The fact that the company was not the owner of the land on which the railway was constructed or was not the owner of the rolling stock is again hardly material. At most it might be said that the Secretary of State and the company were partners in an enterprise, one partner having contributed land and the other the railway and that this particular concern had now passed into the hands of one partner,but that does not indicate that the partner who originally owned the land and now owns both the land and the railway is not the successor of the company in respect of the railway. The railway has not been scrapped. It worked during the rest of the assessing period in the same way and through the same agency, namely, the Jodhpur railway as before the Secretary of State taking 60 per cent of the profits which used to be paid to the company, the Jodhpur railway retaining the balance of 40 per cent for working expenses.

The point that on acquisition by the Secretary of State the railway could have been worked by an agency other than the Jodhpur railway again hardly arises as that has not been done. Even if it has been so done it would not have mattered so long as the same line continued to be worked. In *Bell* v. *National Provincial Bank of England* (3) the respondents a Bank with a large capital whose head office was in London and having numerous branches in England

(2) [1907] 95 L. T. 834=5 L. G. R. 200=71 J. P. 244.

(3) [1904] 1 K. B. 149=73 L. J. K. B. 142=90 L. T. 2=52 W. R. 406=68 J. P. 107=20 T. L. R. 97=5 T. C. 1.

and Wales purchased the business and premises and other assets of the County of Stafford Bank which had a comparatively small capital and carried on business only at Woolwerhampton. The respondents then for the first time carried on business at Woolwerhampton with the manager and staff previously employed by the County of Stafford Bank and the profits of this Branch went into the general account; still it was held that the respondents had succeeded to the business of the County of Stafford Bank within the meaning of R. 4, Sch. D of the English Act.

There can be no doubt that the part of the business of the company of owning the Mirpurkhas Jhudo line was separate and distinct from that of the Mirpurkhas Khadro line and that each of the lines was intended from the very commencement to be treated as a separate and distinct enterprise and liable to be acquired from the company separately and at different times. It is no doubt true that in 1908 the company was founded not only for the purposes of acquiring from Messrs. Forbes Forbes Campbell & Co., Ltd., their rights of constructing the Mirpurkhas Jhudo line which they had secured from Government, but also for the purpose of acquiring from them the rights of constructing the Mirpurkhas Khadro line, which were then the subject of negotiation if and when such rights were granted to them. But the grant of the rights by Government in respect of each railway were separate and were the subject of separate agreements which inter alia empowered the Secy. of State to acquire each railway line separately at certain stated periods which did not coincide with one another and one compensation to be paid to the company depending on the cost and the working profits of the line under acquisition without any regard whatsoever to the cost and the working profit of the other line; and that for that purpose, if for no other, the company had to maintain separate accounts in respect of each line. For these reasons, I would answer the question propounded by the learned Commissioner in favour of the company and would hold that the income of the company for the Mirpurkhas Jhudo section for nine months ending with 31st December 1928, was wrongly included by the Income-tax Officer in the income of the company for the purpose of the assessment. I would also allow the company costs of this Reference.

Mehta, A. J. C.—This is a reference by the Commissioner of Income-tax, Bombay Presidency, under S. 66 (ii), Indian Income-tax Act, (11 of 1922) at the instance of the Sind Light Railways, Co , Ltd., a company with its registered office at Karachi—a dispute having arisen with regard to the assessment of the company for the financial years 1929-30, that is, the year ending with 31st March 1930. (After stating the facts of the case, the judgment proceeded.) Thus the only question of law referred by the Commissioner to us is:

"Whether in the circumstances of the case and in view of the provisions of S. 26 (ii) of the Act, the Income-tax Officer has correctly included the earnings of the company from the Mirpurkhas Jhudo, line for the period 1st April 1928 to 31st December 1928 in its total income for its previous year ending 31st March 1929, for the purpose of its assessment for the year 1929-30."

The first point to be determined is whether, as the assessee company contends, the Commissioner has erred in not referring to this Court for decision the question of the applicability of S. 25 (iii) of the Act. I have no doubt whatsoever that the learned Commissioner was perfectly justified in refusing to accede to the request of the company. In the first place this question was not one of the issues before the Assistant Commissioner who could not therefore have applied his mind to it and given a decision thereon. That being so, it is clear from the provisions of S. 66 (ii), that this additional question could not be submitted to this Court for decision. If authority is wanted, out of several rulings two may be selected viz., *Radha Kishen & Sons* v. *Commissioner of Income tax, Punjab and N. W. F. P.* (4) and *Raghunath Das Sewlal* v. *Commissioner of Income-tax, Bengal* (5). The only point that has to be decided in this reference then is, whether the company can claim under S. 26 (ii) of the Act, exemption in respect of the earnings of the Jhudo line for the nine months of 1928. S. 26 (ii) is as follows:

"Where at the time of making an assessment under S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding as if he had been carrying on the busi-

(4) [1928] 3 I. T. C. 73.
(5) A. I. R. 1932 Cal. 411 (S.B.)

ness, profession or vocation throughout the previous year and as if he had received the whole of the profits for that year."

The Commissioner of Income-tax is of the opinion that even after 31st March 1929, the company was still carrying on the old business, as it had the Khadro line to work, and that thus there had been only a curtailment of the business, no succession to the company out and out, and at any rate not in the same capacity. On behalf of the assessee Mr. Tolasing contends that the company had two businesses distinct from each other; that it was immaterial they were of the same kind; and that none of them having wholly passed out of the hands of the company into those of the Secy. of State there had been a succession to the company in the sense in which S. 26 (ii), can reasonably be construed. In support of this contention Mr. Tolasing relies principally on an English case, *Stockham* v. *Wallasey Urban Council* (2) in which it was decided that if a company is carrying on two separate businesses and sells one the purchaser can be the successor of the separate business. The case of *Bell* v. *National Provincial Bank of England* (3) is also cited to establish the same proposition. I am however not inclined to follow these authorities, mainly because the law in England at the time was different from that we have in India under S. 26 (ii) of our Income-tax Act. According to the rule under the English Statute which was the subject-matter of interpretation in the above-mentioned English cases there was to be succession to a business, and not as in S. 26 (ii), Indian Income-tax Act, to a person. Moreover the words "in such capacity," which occur in the Indian Act are not to be found in the analogous provisions of the English Income-tax Act. It is argued that there is no difference between the two, that there cannot be any succession to a person without there being succession to that person's business: and that therefore succession to a person is the same thing as succession to a business.

The fallacy of this reasoning can be easily demonstrated. A person may be succeeded by another in a business in the sense that it is the same sort of business, although not the same business. The difference between the two is the difference between business in the abstract and business in the concrete. Business in the abstract is merely an idea connoting some kind of activity, e. g., in the present case constructing railway lines in order to use the same for gain. Business in the concrete is the activity put into practice, e. g., in the present case constructing the Feeder lines Jhudo and Khadro and actually using them for gain. Now suppose Government prohibited this particular kind of business, viz., constructing railways and carried it on themselves, there would be succession to the business in the abstract, but not to the individual. Then again *A* may succeed to a particular business of *B* and yet not to the assets or liabilities of *B* in reference to that business. In that case too there may be succession to the concrete business of *B*, but not to the individual. It is conceivable that the management of a concern may be by rotation. Each successor may take over the management of the business with a fresh start of liabilities and assets.

These are some of the illustrations of succession to business and not to the individual. When one person is succeeded by another I quite agree with the learned Commissioner that there must be a wiping out of the original individual, i. e., the particular business activity together with all the old liabilities and assets appertaining to it must change hands. It also stands to reason that when *A* has not only taken over the actual business of *B*, but even the assets and liabilities, i. e., when there is a succession to *B* by *A* then *A* should be liable to pay the income-tax for the year during which the transfer took place. For the foregoing reasons I do not agree that there is no differentiation possible between the provisions of the English law and the Indian law on this subject. Under English law the Income-tax Authorities pursue the business; under Indian law they pursue the individual along with the business, and that is why the words "in such capacity" are to be found incorporated in S. 26 (ii), Income-tax Act. Applying S. 26 (ii) as interpreted above to the facts of this case, the question for determination here is whether the company can claim the exemption which can only be granted if the company is succeeded by the Government. Now a person cannot succeed to another except in relation to something; and the succession referred to in S. 26 (ii)

is in relation to a person's business. The most important question is: What is meant by the term "business"? The answer to this reference pivots round the correct determination of significance of this word. Unfortunately the definition as given in S. 2 (iv) of the Act, does not help us. It merely says:

"Business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

The first part of it, viz., trade, commerce or manufacture is clearly business in the abstract—merely any kind of activity. The latter part of it has reference to some particular kind of activity put into actual practice. If in S. 26 (ii) business is to be regarded in the abstract then the commissioner's view is correct because by transferring the Jhudo line to the Secretary of State the company has not ceased to do the same kind of business. It has still got the Khadro line. There was merely a curtailment of its activity. If on the other hand by "business" is meant any particular activity in a concrete form, then the assessee's contention that the Jhudo line business has passed absolutely out of the company's hands, and that therefore it is entitled to the exemption claimable under S. 26 (ii), would deserve to be upheld. From the language of S. 26 (ii), as I have stated above, I am inclined to think that it is the individual in relation to any particular business activity is to be pursued, i. e., the individual who has stepped into the shoes of the original person, the latter having ceased to exist as such. Business is meant in the abstract. If the activity is cut down it may affect the assessment to that extent; but the liability to pay for the income actually made prior to the curtailment cannot be transferred. The scope of the activity has reference to the business and not to the person carrying on the business. If stress is laid on this point the Commissioner's view would seem to be correct, in part 3 of the income-tax manual which gives notes and instructions regarding the income-tax law and rules, there is however a note in the nature of an instruction which may be reproduced here:

"Where a concern splits up into two or more concerns each of the latter should be assessed on the profits in the previous year of the corresponding part of the original business in the manner appropriate to its status (i. e., whether it is a firm or a company, etc.) when the assessment is made. Where a person disposes of a part of his business to another, there is a succession in respect of that part, and the same principles apply. Where a business is split up or a portion thereof transferred, it is not correct to make a consolidated assessment on the profits of the business as a whole in the previous year and then apportion the tax between the different proprietors of the divided part."

This would clearly support the contention of the assessee company. The second sentence destroys the theory that "business" in the section is business in the abstract sense. The learned Government Pleader who has appeared before us on behalf of the Income-tax Commissioner maintains that these notes and instructions being contrary to the statute itself cannot be given effect to and should therefore be disregarded for all practical purposes. At the same time I find that the income-tax manual purports to be issued by authority of the Government of India : and in the prefatory note to Edn. 1 it is stated :

"Part 3 contains instructions and notes designed to assist income-tax authorities in the determination of questions which are bound to arise in assessments under the new Act. These instructions and notes have no statutory force, but Income-tax authorities should conduct assessment in accordance with them until they are cancelled or amended, unless in any particular instance the Income-tax Commissioner should desire to suspend action on any particular instruction pending a representation to the Board of Inland Revenue."

The important part of the note has been underlined italicized by me. I may shortly dispose of the contention of the commissioner that even if the succession be held proved, the Secretary of State has not succeeded to the company in the same capacity. By capacity is meant a position enabling one to do something. There is no doubt that the position held by the company in respect of the Jhudo line is now held by the Secretary of State. That the position is merged in some other more comprehensive position of the Secretary of State makes no difference. If all the assets as well as liabilities of the company in respect of the line have been transferred to the Secretary of State then the Secretary of State has taken over this particular business in the same capacity. Ex. B is the agreement between the Secretary of State and the Sind Light Ry. Co. Ltd. Cl. 32 relates to determination of the contract and matters consequent thereon. There is no express provision with regard to the liablities of the company in respect of the line acquired by the Government. It goes with-

out saying however that if the transferee has to meet any liabilities of the company the same must be deducted from the purchase price. As I have observed above, I have my doubts with regard to the construction of the words "succeeded in such capacity by another person" in S. 26 (ii) of the Act. But for the instructions in the income-tax manual referred to above, I should have been inclined more in favour of the view taken by the income-tax authorities ; because in India it is the individual that has to be pursued, and unless and until a person is so succeeded in a business that he ceased to exist as such he cannot refer the Government to the successor for the tax leviable on the income of the business.

It is a well recognized rule that in a statute imposing pecuniary burdens, if there is a reasonable doubt with regard to the construction of any burdensome provision, the construction most beneficial to the subject is to be adopted : see *Stockton and Darlington. Ry* v. *Barrett* (6), *In re Micklethwait* (7), *In re Thorley* (8) and *Pryce* v. *Monmouthshire Ry. and Canal Co.* (9). So that having regard to the notes and instructions contained in the income-tax manual which is a compilation of the Government of India my answer to this reference must be in favour of the assessee company. There is no doubt that income was earned for the 9 months of 1928 from Jhudo line. There is no doubt that the income was earned by the company, and but for the transference of the railways to the Secretary of State in the midst of the financial year 1928-29, the company would have had to pay the income-tax and super tax on that income. There should have been some settlement of the question as to who had to pay the tax when the railway was acquired by the Government. Probably it never occurred to the parties that such a question was likely to arise. Speaking for myself, I feel that the assessee company wins in this reference not on the merits of its own case. Under the circumstances I was inclined to order that the parties should bear their own costs but in deference to the order of costs proposed by my learned brother it does not involve a considerable amount I do not wish to differ.

R.K. *Reference answered.*

(6) [1840-44] 7 M. & G. 870 = 8 Scott. N. R. 641.
(7) [1855] 11 Ex 452=25 L. J. Ex. 19.
(8) [1891] 2 Ch. 613 = 60 L. J. Ch. 537 = 64 L. T. 515=39 W. R. 565.
(9) [1879] 4 A. C. 197=49 L. J. Ex. 130 = 40 L. T. 630=27 W. R. 666.

A. I. R. 1932 Sind 197

ASTON, A. J. C.

McCurley In re
Ex Parte, Jethanand Lalchand.

Misc. Appeal No. 4 of 1931. Decided on 11th December 1931, against order of Official Assignee, Court of Judicial Commissioner of Sind, rejecting appellant's claim.

(a) Insolvency—Claim by creditor—Burden of proof is on creditor.

The law requires a creditor of the insolvent to prove his claim: the burden is therefore on him to prove his claim and not on the Official Assignee. [P 198 C 1]

(b) Insolvency—Official Assignee—Rights of—Official Assignee has power to scrutinise claim.

The rights as between the Official Assignee and the claimant are entirely distinct from those between a debtor and a creditor, for the Official Assignee like the Trustee in Bankruptcy represents the general body of creditors and is entitled to go behind the covenant in mortgage or a stated account and to require satisfactory evidence before admitting proof that the claim represents a genuine debt; *Re Van Laun, Ex parte Pattullo*, (1907) 1 *K. B.* 155; *Re. Vaun Laun Ex parte Chatterton* (1907) 2 *K.B.* 23 and *A. I. R.* 1928 *All.* 280, *Foll.* [P 198 C 1]

(c) Insolvency—Official Assignee—Rights of—Official Assignee can always inquire into consideration of debt due by insolvent.

The Bankruptcy Court can always inquire into the consideration for a judgment debt.

An Official Assignee is therefore entitled to go behind the facts stated in a promissory note alleged to be executed by the insolvent more specially so when there are facts which throw great suspicion on the claim. Existence of suspicious circumstances is not however a condition precedent as to give rise to the exercise of his discretion to use powers which he possesses in the interests of the general body of creditors: *Ex parte Kibble, In re, Onslow*, (1875) 10 *Ch. A.* 373 and *In re. Lennox Ex parte Lennox*, (1885) 16 *Q. B. D.* 315, *Foll.* [P 198 C 2]

Jhamatmal Valiram—for Appellant.
The Official Assignee, in Person.

Aston, A. J. C.—This is an appeal against the order of the learned Official Assignee rejecting the appellant's claim in Insolvency No. 46 of 1930 Re McCurley, except for a sum of Rs. 200 and interest and Rs. 30 and interest in respect of two promissory notes dated 29th November 1929. The appellant contends in the first place, that the learned Offi-

cial Assignee erred in placing the burden of proof as to consideration of the promissory notes on the appellant; he relies on S. 118 (A), Negotiable Instruments Act, and contends that prima facie there was a presumption that consideration was paid. According to the claimant full consideration was paid for the two promissory notes of Rs. 800 and Rs. 100; according to the insolvent he borrowed a sum of Rs. 200 and one Highfield stood surety and both executed the promissory note for Rs. 800. With regard to the second promissory note the insolvent states that Highfield borrowed Rs. 30 and he, the insolvent, was his surety and both executed the promissory note for Rs. 100. The case seems to me very similar to that in Misc. Appeal No. 2 of 1931 decided by my brother Rupchand, A. J. C. There too the first contention was that the burden of proof had been wrongly placed by the Official Assignee. It was pointed out that there was no substance in the first point. The law requires a creditor of the insolvent to prove his claim, the burden is therefore on him to prove his claim and not on the Official Assignee. The rights as between the Official Assignee and the claiment are entirely distinct from those between a debtor and a creditor for the Official Assignee like the Trustee in Bankruptcy represents the general body of creditors and is entitled to go behind the covenant in a mortgage or a stated account and to require satisfactory evidence before admitting proof that the claim represents a genuine debt: see *Re Vaun Kaun, Ex parte Pattullo* (1) confirmed in appeal in *Re Vaun Laun, Ex parte Chatterton* (2) where it was held that the Trustee in Bankruptcy can scrutinise claims and that no judgment recovered against the bankrupt, no covenant for payment given by or account statedby him can bind the Trustee in Bankruptcy or deprive him of his right to investigate the claim. The trustee is entitled to go behind such forms to get at the truth. See also the decision of the Allahabad High Court in *Ram Lal Tandon* v. *Kashi Charan* (3).

Reliance is placed on behalf of the appellant on three cases decided in England viz: *Re Tollemche, Ex parte Revell* (4). *Re Lennox, Ex parte Lennox* (5) and *Re Re Blythe, Ex Parie Bonner* (6). It is contended that before the Official Assignee can go behind the facts stated in a promissory note and before he can go behind the presumption referred to in S. 118 (A) Negotiable Instruments Act, there must at least be suspicious circumstances giving rise to the exercise of his discretion to use thepowers which he possesses in the interest of the general body of creditors, and that in the absence of suspicious circumstances the ordinary rules of evidence apply. In my opinion the cases relied on come far short of establishing the principle above mentioned. In none of them was the rule laid down in *Ex parte Kibble, In re, Onslow* (7) questioned. It was there stated that it is a settled rule of the Court of Bankruptcy, on which the Court has always acted, that the Bankruptcy Court can enquire into the consideration for a judgment debt. All that the Court there held was that as at present advised the Court did not wish to lay down as a rule that the Bankruptcy Court should inquire into the .consideration of judgment debts in every case even when there was nothing to show that grounds for an inquiry existed. Ordinarily a judgment debt ought to be considered as binding.

In *Re Lennox, Ex parte Lennox* (5) Lindley, J., pointed out that where there were facts which threw great suspicion on a claim, an investigation ought to be held. In the present case, apart from the general law, it seems to me clear that there were suspicious circumstances. The claimant is a moneylender who has transactions to the extent of Rs. 10,000, but he keeps no books of account. The learned Official Assignee, in my opinion, correctly emphasised this point. He was satisfied that the actual consideration for the pronotes for Rs 800 and Rupees 100 was that alleged by the insolvent. He believed the insolvent's word that only Rs. 200 and Rs. 30 were received.

(1) [1907] 1 K. B. 155.
(2) [1907] 2 K. B. 23=76 L. J. K. B. 644=97 L. T. 69=14 Manson 91=51 S. J. 344=23 T. L. R. 384.
(3) A. I. R. 1928 All. 380=108 I. C. 147.
(4) [1884] 13 Q. B. D. 720=54 L. J. Q. B. 89=51 L. T. 376.
(5) [1885] 16 Q. B. D. 315=55 L. J. Q. B. 45=54 L. T. 452=34 W. R. 51.
(6) [1881] 17 Ch. D. 480=44 L. T. 908=30 W. R. 24.
(7) [1875] 10 Ch. 373=44 L. J. B. K. 63=32 L. T. 138=23 W. R. 483.

I see no reason to differ from the view taken by the learned Official Assignee and accordingly, dismiss this appeal.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Sind 199

RUPCHAND, A. J. C.

Jetha Devji & Co.—Plaintiffs.

v.

Javhersing Harnamdas and *others*—Defendants.

Civil Suit No. 370 of 1929, Decided on 23rd November 1931.

(a) Civil P. C. (1908), O. 30, Rr. 3 and 8—Suit against Firms—Some partners appearing under protest—Court is not bound to go into question of their liability before passing of decree—Partnership.

Where in a suit against a firm, the names of the partners are disclosed in the plaint, but some of them appear under protest and deny that they are partners in the said firm at the time of the accrual of the cause of action, the Court is not bound to go into the question of their liability as partners before the passing of the decree. The question of their liability can be left to be determined in the execution proceedings: *Weir & Co.* v. *McVicar & Co.* (1925) 2 *K.B.* 127 and *A.I.R.* 1927 *Cal.* 758, *Foll.*; *A.I.R.* 1921 *Bom.* 48 and *A. I. R.* 1926 *Sind* 154, *Diss. from* [P 200 C 1]

(b) Civil P. C. (1908), O. 5—O. 5 is controlled by provisions of special suits.

Order 5 provides for appearance in response to a summons issued in ordinary suit. It is controlled by and is subjected to the provisions applicable to special suits. [P 200 C 2]

(c) Civil P. C. (1908), O. 21, R. 50, Cl (1)(b)—Words "Or who has been adjudged to be partner"—Scope of, indicated.

The words "or who has been adjudged to be a partner" in Cl. (1) (b), R. 50, provide for a case where the only person served on behalf of the firm denies that he is a partner and the plaintiff asks for an issue being raised for the purpose of holding whether the service on him is good service on the firm or not. In such proceedings if a person is adjudicated as a partner and the decree is then passed against the firm no further leave under O. 21, R. 50 to execute the decree against him is necessary.

[P 201 C 1 2]

Manghanmal Bhojraj—for Plaintiffs.

Pahlajsing B. Advani, *Khanchand Gopaldas* and *Fatehchand Assudamal*—for Defendants.

Judgment.—This is a suit against the firm of Javhersing Harnamdas said to be consisting of nine partners. The names of all the alleged partners have been disclosed in the amended plaint and summonses have been issued to all of them under O. 30, R. 3, Civil P. C. Six out of them have appeared under protest as provided by R. 8 and have denied that they are or were partners in the said firm at the date of the accrual of the cause of action. Both parties have applied for commissions to examine witnesses for the purpose of proving or disproving whether the persons who have appeared under protest are or are not liable as partners. The only question with which I am at present concerned is whether the question of their liability as partners should be gone into before or after the decree, if any, passed against the debtor firm.

Rule 8 is silent on this point. All that it contemplates is that where the only person served with a summons under R. 3 appears under protest, the plaintiff may adopt one of two courses. He may ask the Court to decide whether such person is or is not a partner in the debtor firm, or to apply for service of a fresh summons upon any other person who represents the debtor firm; and in default of appearance obtain a decree against the firm. In the latter case, it is open to him to apply under O. 21, R. 50, Civil P. C., for leave to execute the decree against the person who has appeared under protest and to have the question of his liability determined in execution proceedings. In *Vithaldas* v. *Hansraj* (1) Macleod, C. J. expressed the view that in the event of the plaintiff adopting the second alternative, the person who has been served and has appeared under protest has a right, if he so wishes, to have the question of his liability decided before a decree is passed against the debtor firm. In dealing with this third alternative his Lordship has said at p. 1250 (of 23 *Bom. L. R.*):

"It seems to me that it is contrary to the principles of equity that any person should be liable to have a claim of this kind hanging over him without being able to ask the Court to decide one way or the other whether or not he is liable to the claim."

With all respect, I am unable to accept this view. The main object of the legislature in providing a special procedure for suits against firms was to afford a plaintiff a speedy remedy of enforcing in the first instance his claim against the property of the firm and against such persons who do not dispute their liability as partners of the firm. I find it difficult to hold that it was ever intended that in a case where the plaintiff has by mistake or otherwise served a summons under

(1) A. I. R. 1921 Bom. 48=64 I. C. 688=23 Bom. L. R. 1249.

R. 3 on persons who have entered appearance under protest, it should be open to them to delay the passing of the decree against the firm and thereby deprive the plaintiff of the speedy remedy provided by O. 30 by the simple process claiming that the issue of their liability be tried as a condition precedent to the passing of the decree.

I am also unable to see that the equities, if any, in favour of such persons are in any way greater than those in favour of the plaintiff. The onus is always on the plaintiff to prove partnership of persons whom he seeks to hold liable, and if the inquiry is postponed until after the decree, it is the plaintiff who stands to suffer more by the delay than the persons who are sought to be held liable. There is also no good reason why the Court should be compelled to hold an inquiry which might not at all be necessary for purposes of the suit. All that the plaintiff is entitled to is the satisfaction of his claim, and if he can get it otherwise, there is no occasion for such inquiry. Although R. 8 doesnot expressly lay down that where the plaintiff has chosen a second alternative the inquiry into the liability of persons who have appeared under protest should be postponed until after the decree, that seems to be the view adopted by the Court of Appeal in *Weir & Co.* v. *McVicar & Co.* (2). In that case their Lordships had to construe the effect of the corresponding provisions of O. 48-A, Rules of the Supreme Court, and at p. 135, Atkin, L. J., has said :

"The only question in this case is whether a person who has been served as a partner and has entered an appearance under protest denying that he is a partner is entitled to an issue to try the question of his partnership and to have the proceedings in the action stayed until that issue has been finally determined. In my opinion, there is no ground for suggesting that he has such a right. Under ordinary circumstances where a person enters a conditional appearance he does so subject to an implied term that he is to take steps to have it determined whether he has been rightly served or not, and that unless he takes such steps within a reasonable time his appearance is to stand as an unconditional appearance. But the case of appearance under protest of a person served as a partner does not fall within that general principle, for the effect of such an appearance is specially provided for by the rules, which say that a person so appearing is to take no further part in the action with which he is not concerned until after judgment has upon a proper service of some other person, been recovered against the firm, and then, but not till then, he is entitled to have it determined whether he is a partner or not. To my mind, there is no provision in the rules for determining any other issue."

In my opinion these observations equally apply to the provisions of the Civil Procedure Code which, so far as the point now in issue is concerned, are in all essential particulars the same. That seems to be also the view taken by Buckland, J., in *International Continental Caoutchouc Compagnie* v. *Mehta & Co.* (3). It is also worthy of note that in the case of *Charry* v. *Pohumal Bros.* (4), which case was decided after the case of *Weir & Co.* (2), Macleod, C. J., has not referred to the third alternative suggested by him in the earlier Bombay case. The only other decision which requires consideration is that in the case of *Chotumal Bulchand* v. *Alibhoy Mamooji* (5), where Tyabji, A. J. C., sitting as a single Judge on the original side of this Court distinguished the case of *Weir & Co.* (2), on the ground that there was a difference in the terminology of the Indian and the English Rules, that "may appear under protest" in O. 38, R. 8, Civil P. C., was not the same as "entering an appearance under protest" in O. 48-A, R. 7, Rules of the Supreme Court, and that appearance under R. 8 read in the light of O. 5, R. 2, Civil P. C., was different from entering an appearance under the English procedure which provided different kinds of appearance. such as conditional appearance, appearance under protest, and appearance limiting the defence.

With all respect again, I am unable to draw this distinction. O. 5 provides for appearance in response to a summons issued in an ordinary suit ; and it is controlled by and is subjected to the provisions applicable to special suits. O. 30 contemplates service of a summons upon an individual on behalf of and as representing a firm : such individual may be the manager of the firm or a partner. R. 5 requires that the person so served should be informed in writing whether he is served as a partner or as a person having control or management of the partnership business or in both characters. R. 6 requires that the defence filed by the part-

(2) [1925] 2 K. B. 127=94 L. J. K. B. 786=133 L. T. 428.

(3) A.I.R. 1927 Cal. 758=105 I. C. 356=54 Cal. 1057.

(4) A.I.R. 1926 Bom. 585=99 I. C. 495=50 Bom. 665.

(5) A.I.R. 1926 Sind 154=93 I. C. 380.

ner so served shall be in the name and on behalf of the firm and not on behalf of himself. R. 7 exempts from appearance a person who is not a partner but has only the management and control of the business. Lastly, R. 8 enables a person served with a summons as a partner to appear under protest. Prima facie this rule does not require such person to file a defence on behalf of the firm whom he does not wish to represent. Can it then be said that in view of O. 5 a person appearing under protest is also bound to file a defence on the merits, and if it is open to him not to file any defence, does it mean that where he chooses to file a defence on the merits, he can insist upon that defence being gone into or insist that his liability as a partner be gone into so as to enable him to go into that defence ? The learned Additional Judicial Commissioner appears to have been considerably influenced by the fact that unless a person appearing under protest is permitted to litigate his liability as a partner and permitted to defend the suit on the merits in the event of his being held liable, he might in the subsequent inquiry held under O. 21, R. 50, Civil P. C., be shut out from challenging the decree on the merits.

What defences on the merits, if any, are open to a person sought to be held liable as a partner under O. 21, R. 50, Civil P. C., is not a question now before me. I therefore do not propose to go into it. Suffice it to say that if it is not open to a defendant to attack a decree on the merits in execution proceedings, there is no reason why a different rule should apply in a case where a person alleged to be a partner in the debtor firm is not served with the summons under R. 3 and in a case where he is so served and appears under protest. Mr. Manghanmal has drawn my attention to the words "or who has been adjudged to be a partner" appearing in Cl. (i), sub Cl. (b), and has argued that in view of these words it is permissible for the Court to go into the issue of partnership at this stage. Similar words however appear in O. 48-A, R. 8, Rules of the Supreme Court. They evidently provide for a case where the only person served on behalf of the firm denies that he is a partner and the plaintiff asks for an issue being raised for the purpose of holding whether the service on him is good service on the firm or not. In such proceedings if a person is adjudicated as a partner and the decree is then passed against the firm, it would follow that no further leave under O. 21, R. 50, Civil P. C., to execute the decree against him is necessary. At most these words may be said to include a case where the Court has gone into the liability of a person who has appeared under protest although he was not the only person served with a summons under R. 3 and the Court need not have gone into the question of his liability at that stage.

For these reasons, I hold that I am not bound to go into the question of the liability of the persons who have appeared under protest at this stage. In view of this order, the application for commission filed for the purpose of proving whether these persons are partners or not is dismissed as premature. The case should now be set down for hearing on the rest of the issues. With regard to costs, I think that in view of the fact that the plaintiffs might have been misled by the previous decision of Tyabji, A. J. C., it is a fit case in which each party should bear his own costs.

R.M./R.K. *Order accordingly.*

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* A. I. R. 1932 Sind 201

FERRERS, J. C. AND MEHTA, A. J. C.

Pharho Shahwali—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 37 of 1932, and Confirmation Case No. 3 of 1932, Decided on 25th April 1932, against order of Third Addl. Sess. Judge, Hyderabad.

(a) Criminal P. C. (1898), S. 164—Confession duly recorded—Presumption is that it was freely made—Burden of proving that it is inadmissible lies on accused—Evidence Act (1872), Ss. 24 and 102.

In a confession duly recorded under S. 164 the presumption is that the confession was freely made. The burden of showing that a confession recorded under S. 164 is inadmissible lies upon the accused. In itself the mere fact of retraction is not sufficient to make it appear that the confession cannot be received. Nevertheless in ordinary cases and as a general rule corroborative evidence is required to show both that the confession was freely made and that it is true.

[P 203 C 2 ; P 204 C 1]

*** (b) Evidence Act (1872), S. 26—Accused deceived into belief that Magistrate before whom he is making confession is police officer—Confession is not irrelevant.**

Section 26 does not say "in the immediate presence of some one whom the confessor knows or believes to be a Magistrate" and even if an accused had been deceived into the belief that

the Magistrate before whom he made the confession, was a police officer still that deception would not be sufficient to make his confession irrelevant. [P 204 C 1]

(c) Evidence Act (1872), S. 26—Bar of proof of confession under S. 26—Conditions necessary.

In order to bar proof of confession by any person while he is in police custody two things are necessary, first there must be some limitation imposed upon the liberty of the confessor; second the limitation must be imposed either directly or indirectly by the police: *A. I. R.* 1932 *Sind* 149, *Rel. on.* [P 204 C 2]

(d) Criminal P. C. (1898), S. 298—Question whether particular evidence is admissible or not should be decided before it is actually given—Evidence Act (1872), S. 165.

The duty of preventing the production of inadmissible evidence is laid upon the Judge by S. 298, Criminal P. C., and for the discharge of the duty facilities are provided by S. 165, Evidence Act. The question whether particular evidence is admissible or not should be answered before the words are allowed to pass lips of the deponent. It is useless for the Judge after he has received the opinion of assessors to decide that, of the evidence which was led before him an important part ought not to have been admitted. [P 205 C 1]

(e) Evidence Act (1872), S. 167—Conditions necessary.

Under S. 167 it is necessary to decide two questions: namely, was the evidence wrongly admitted? and if so is there, without it, evidence sufficient to justify the conviction?. The improper admission of a single question would be sufficient reason for quashing a conviction under S. 167, Evidence Act. [P 205 C 2]

(f) Penal Code (1860), S. 302—Sentence.

It is necessary that in cases of murder, when the murder, in commission of which the offender has acted with malice aforethought, is clearly brought home to the offender the full penalty allotted by the law to such offence should be imposed. [P 206 C 1]

(g) Evidence Act (1872), S. 24—Extra judicial confession made before person is taken into police custody has high probative value—It must be however proved strictly.

Per *Mehta, A. J. C.*—An extra judicial confession of guilt by a person before he is taken into police custody has a very high probative value. The proof of such confession should however be very convincing particularly when it is not reduced to writing. [P 205 C 2]

*** (h) Evidence Act (1872), S. 26—Extra judicial confession—Crucial test is whether person confessing is a free man or his movements are controlled by police.**

The mere fact that a police officer in order to avoid the effect of provisions of S. 26 studiously refrains from taking the accused into his custody is not a good ground for ruling out a confession if it was actually made before the accused's movements were controlled by the police. The crucial test is whether at the time when a person makes an extra judicial confession, he is a free man or his movements are controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. [P 206 C 1]

Hirdaram Balchand—for Appellant

C. M. Lobo—for the Crown.

Ferrers, J. C.—The Additional Sessions Judge of Hyderabad has convicted Pharho of the murder of Bhambhomal and has sentenced him to death. Against this conviction Pharho has appealed and the sentence also comes before us for confirmation. We deal with both these pieces of business together. The averments which the prosecution has made are these:

Bhambhomal was a zamindar. He had occasion to collect a few rupees from a tenant named Jehan Khan. Early on the morning of the 3rd August Bhambhomal saddled and bridled his horse. Two Hindu zamindars had recently been murdered in the neighbourhood. Bhambhomal therefore took with him a loaded gun. Thus accoutred he mounted his horse and rode away. He never came home again. Later on the same day a witness (Ex. 13) was transplnating paddy in his field. He looked up and saw a horse. Saddle and bridle it had none; but the beast itself was known to this witness. It was Bhambhomal's horse. That evening the witness took the animal to the place where it belonged. Bhambhomal's people were not at first very seriously perturbed. They supposed that the horse might have broken its halter and strayed away. They expected the owner to return on foot. On the following morning Bhambhomal was still missing. His people therefore went in search of him. The news had come to the ear of a neighbouring zamindar who is also a Hindu. This man whose name is Verhomal, met the trackers near Chibhar's village. They went to Jehan's water wheel and there they heard that on the previous day Bhambhomal had been there. They followed the tracks of the horse right up to the hedge of the accused. They heard people talking inside the house but they did not call to them. They observed that attempts had been made to obliterate the hoof-marks of the horse and some suspicion began to dawn in their minds. Verhomal sent Kiritmal to carry word to the police. Kiritmal made his report accordingly. He said:

"Bhambhomal has disappeared. He had no quarrel with anyone. He may have been drowned. He may have gone off somewhere. He may have been murdered. I know nothing further. I bring you the news and I request you to make inquiries."

On this the head constable despatched a Sowar who is Ex. 15. This constable overtook the search party on the banks of Dadwah. At that time they were only looking for a missing man. But they soon received intelligence which gave the known facts an uglier look. A telephone message came in saying that a corpse had floated past a sluice on the canal. The sowar rode off down the stream. On 6th August he spied a dead body floating in a branch which takes off from the Dadwah. This body was discovered to be Bhambhomal's. There was no doubt that Bhambhomal had been murdered. Two slashing blows had almost divided the head from the body. Information was at once sent to the police station at Nawabshah. But the Sub-Inspector was already at the scene of the offence. He had arrived there on the 5th August at 7 p. m. He took note of those facts which had already been discovered and on the morning of the 6th he sent Wadero Haji Amin, Bhugro Khan and Abdul Wahid for inquiries. He gave no names to them but told them

"to inquire from the persons at whose cultivation the prints were found and from others also."

On the same day at 6.30 in the evening the three zamindars returned to the Sub-Inspector. They said that they had discovered who did the murder. Pharho had told them he and two others had murdered Bhambhomal. He told them also why and when and where. The Sub-Inspector thereupon made inquiries from the accused and arrested them. The greater part of the answers which the accused made to these inquiries the police officer has been obliged to pass over in silence. There are however certain facts to which he is allowed to depose. Pharho brought both the Sub-Inspector and the observers to his paddy cultivation from which he produced a gun. It was hidden in mud and water. It was Bhambhomal's gun. Pharho then pointed out the place where the deceased Bhambhomal had been killed. He took the party to the northern bank of Dadwah where he removed a little dust and pointed to blood marks on the ground. The earth was scraped and sent to the Chemical Analyser in a tin box. The Chemical Analyser has reported that he discovered human blood in it. After this Pharho and his fellow prisoners were sent to a Magistrate of the First Class. That Magistrate took the usual precautions and gave the usual cautions. Some time was given to Pharho for reflection. His statement was then recorded. He said:

"About seven days back Bhambhomal went to Chibhar Dhari's village in the morning along the bank of Guriwah. Our houses are situate near the bank of Guriwah. I saw Bhambhomal. I told my brother Karim Baksh. We then consulted among ourselves to murder him when he came back. We both went and sat on the bank of Guriwah. My brother hid himself behind a tree. Shortly after sunrise we saw from a distance that Bhambhomal was coming. When he came near me, I laid one hand on his gun and the other on the rein of his horse. Bhambhomal jumped down and ran away. He dropped his gun. He crossed the Guriwah and plunged into the Dadwah. Both my brother and I followed him. Bhambhomal swam the Dadwah to the other side. We followed. We caught him and we murdered him. My brother held him. He had no hatchet. I had a hatchet and I murdered him."

After this the proceeding followed the usual course. The prisoners were committed to the Sessions Court and there they were tried and Pharho was convicted and sentenced. Against that conviction Pharho has appealed and the sentence has come up for confirmation. The piece of evidence which the Crown has put in the forefront of this case is the statement made by Pharho himself. What that statement was has already been set forth among the averments, made by the Crown. Such a statement raises two questions:

1st. Was this confession freely made?

2nd. Is it true?

Each of these questions entails a separate consequence. If the answer to the first is "Yes" then the evidence may be admitted to the record and taken into consideration. If the answer be "No" the evidence will neither be received nor discussed. Now such confessions are recorded under S. 164, Criminal P. C. That section requires that the Magistrate shall make at foot of his record a memorandum in the form provided by the section itself. These requirements the Magistrate has duly fulfilled. The law laid down by the Evidence Act is to the effect: In the case of a confession duly recorded under S. 164 the presumption is that the confession was freely made. The burden of showing that a confession recorded under this section is inadmissible lies upon the accused In itself the mere fact of retraction is not sufficient

to make it appear that the confession cannot be received. Nevertheless in ordinary cases and as a general rule corroborative evidence is required to show both that the confession was freely made and that it is true. Now in the present case the learned Judge had no doubt that the confession which the Magistrate has recorded was freely made. He says that the conduct of Pharho shows that he was willing from the beginning to own up. Pharho himself says much the same thing. His words are :

"I confessed before the Magistrate because he made enquiries from us in the Doulatpur Thana and we were told that he was Inspector of Police."

Pharho may perhaps have been advised that before a Sub-Inspector of Police a confession could safely be made because evidence of it would be excluded under S. 25. If so his advisers did not fully apprise him of all the relevant sections of the Evidence Act. S. 26 says:

"No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate shall be proved as against such person."

The section does not say 'in the immediate presence of some one whom the confessor knows or believes to be a Magistrate.' On the contrary S. 29 says if the confession is otherwise relevant it does not become irrelevant merely in consequence of a deception practised upon an accused person. There is not the slightest reason to believe that any deception was really practised upon this accused. On the contrary the Magistrate carefully removed the accused from the custody of the police and placed him in the custody of his Revenue Naik. The police constable was directed to leave the premises and the accused was warned, that he was in the presence of a Magistrate; that he was not bound to make a confession; and that any statement he might make would be taken down in writing and may thereafter be used against him. However as the law stands even if Pharho had been deceived into the belief that the Magistrate was a police officer still that deception would not be sufficient to make his confession irrelevant.

There remains the second question:

Is the confession true ?

On this it is permissible to take into consideration part of what Pharho said to the Sub-Inspector. S. 27 provides that when any fact is deposed to as discovered in consequence of information received from an accused person in the custody of a police officer, so much of such information, as relates distinctly to the fact thereby discovered, may be proved. (Judgment then discussed evidence and proceeded as follows.) An additional adminicle of proof is to be found in the confession which Pharho is said to have made to the zamindar Abdul Wahid. By the evidence which Abdul Wahid has given on this point I have not myself been very much influenced. But the Court below has admitted that evidence to its record. I am not saying that in so doing that Court did wrong.

The question turns upon the Evidence Act, S. 26. That section says :

"no confession made by any person whilst he is in custody of a Police Officer shall be proved against him."

The word "custody" has not been defined by the Act. But the ordinary sense is sufficiently clear. Two things there must be. First there must be some limitation imposed upon the liberty of the confessor. Second, this limitation must be imposed either directly or indirectly by the police. It is in this sense that the law has been laid down by this Court in a series of decisions culminating in *Haroon* v. *Emperor* (1). (His Lordship, then, again discussed evidence and proceeded.) I take this occasion to observe that in my opinion the manner in which the learned Judge has dealt with the evidence about this confession is not what the Evidence Act intends. The Court allowed Abdul Wahid to testify to these words : "Pharho said that he had murdered Bhambhomal." This is followed by about a score of lines of type which give the confession in detail. The Assessors were allowed to hear all this. The Judge wrote it down with his own hand. No objection seems to have been raised at the time, and it was not until the Judge was writing his judgment that he came to the alternative conclusion either that no confession whatsoever was made to zamindars or that if at all any was made it is inadmissible in evidence. Here there is evidently something amiss. That which is not admissible should never have been admitted. As soon as the prosecution puts a question which might evoke the answer "he told me that he did it" or words to that effect, the Judge, if he has

(1) A. I. R. 1932 Sind 149=26 S. L. R. 1.

any doubt, should intervene at once. The duty of preventing the production of inadmissible evidence is laid upon the Judge by Criminal P. C., S. 298; and for the discharge of that duty facilities are provided by the Evidence Act, S. 165. The question is, "shall this evidence be admitted ?"

The moment to answer such a question is the moment when the evidence is knocking for admission at the door. It is a question which should be answered before the words are allowed to pass the lips of the deponent. Once the thing has been said the mischief has been done. It is useless for the Judge after he has received the opinion of the assessors to decide in the privacy of his chamber that if the evidence which was led before them an important part ought to have never been admitted. It was admitted. The assessors heard it said and it does not appear that they ever received from the Presiding Officer any suggestion that they should expunge it from their memory. This decision the Judge himself did not make until he was writing his judgment. Even when he had made it he did not act upon it himself. The narrative part of his judgment begins with the words : "The facts of the case are as follows :" Amongst those facts, and without any reservation, it is said : "On inquiry the 3 accused confessed to have committed the murder of Bhambhomal." At a later stage the Judge discussed the circumstances. He decided to direct himself to dismiss this part of his record from his mind. He goes on : "Omitting that part of the evidence from consideration there remain" such and such things. One such thing is the confession recorded by the Magistrate. That this confession was freely made the Judge does not doubt. But in considering whether it was true he says :

"In his confession to the Magistrate Pharho has undoubtedly not given the whole truth because to the zamindars Abdul Wahid and others he had stated that three of them had committed the murder but to the Magistrate he stated that only two of them did it."

That is to say, he not only uses this evidence to contradict the confession recorded by the Magistrate, but he uses it as if it were evidence undoubtedly true. On the strength of it he declares that part of the confession to the Magistrate was undoubtedly incomplete. These proceedings are mistaken. The mistake is grave. Under the practice formerly in force in England the improper admission of a single question would be sufficient reason for quashing a conviction. Under the Evidence Act this consequence is forestalled by S. 167. Under that section it is necessary to decide two questions. They are : Was the evidence wrongly admitted ? And if so, is there without it evidence sufficient to justify the conviction ?

I do not agree with the learned Judge in thinking that he did wrong in admitting this evidence. But even if the confession to Abdul Wahid was wrongly admitted, the other evidence, to my mind, is conclusive. From what has been said it will appear that in my opinion the evidence against Pharho is even stronger than it appears to be from the convicting judgment of the Sessions Court. For these reasons I would dismiss this appeal. No reasons have been shown which would justify us in mitigating the normal penalty for murder. The murderer appears to have acted with malice aforethought. Murders are ripe in this District. It is necessary that in cases of murder when such a murder is clearly brought home to the offender the full penalty allotted by the law to such an offence should be imposed. I would therefore confirm the conviction and sentence.

Mehta, A. J. C.—It goes without saying that we have only dealt with the case as against the appellant Pharho.

The issue for determination here is whether the conviction of the appellant for the offence of murder of Bhambhomal, recorded by the learned Additional Sessions Judge of Hyderabad, is or is not justifiable upon the evidence in the case. In the first place, according to the prosecution, the appellant admitted his guilt before three respectable zamindars. Speaking for myself I should be inclined to ascribe a very high probative value to an extra-judicial confession of guilt by a person before he is taken into police custody. The proof of such confession should however be very convincing particularly when it is not reduced to writing. The trial Judge observes in his judgment that he is of the opinion that

"the accused made no confession whatsoever to the zamindars; and if at all he made any it was made at the time when he was in police custody, and therefore inadmissible in evidence."

Three questions therefore arise for determination: Firstly, whether no confes-

sion was made? Secondly, whether, if any confession was made by the appellant, there is any bar to the proof of it under S. 26, Evidence Act? And thirdly, if the confession is relevant and can be proved against the appellant, what value should be attached to it? (The judgment then discussed evidence and proceeded as follows.) The next question is, whether if the appellant did make a confession, the proof of it should be forbidden on the ground that the appellant was in police custody at the time he confessed. On this point the learned Sessions Judge has merely relied on certain discrepant statements made by the witness Thanwerdas in order to come to the conclusion that the appellant must have been in police custody when with the zamindars. He has not given cogent reasons why he should brush aside the testimony of the zamindar Abdul Wahid (Ex. 25) and the Police Inspector, Pandhi Khan (Ex. 40) according to whom the appellant was produced before the police on the evening of 6th August, that is, after the appellant had cleared his breast in the presence of the zamindars. It may be that Thanwerdas having made initially one misstatement persisted in it till he made a muddle of it all by trying to improve upon the mistake. He however is positive that when he went to the Thul bungalow where the police were encamped on the morning of 6th August he had not seen the appellant there. Even if the police officer, as is not altogether unlikely, knew the view of the law taken by this Court in the case of *Haroon* v. *Emperor* (1), and studiously refrained from taking the accused into his custody, that is not a good ground for ruling out the confession if it was actually made before the accused's movements were so to say controlled by the agency referred to in S. 26, Evidence Act, namely the police.

The crucial test is whether at the time when a person makes an extra-judicial confession he is a free man or his movements are controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. Since I am satisfied that the statement of the zamindar Abdul Wahid that the appellant had confessed before he was made over to police custody is not proved to be untrue, I see no reason why we should not proceed upon the assumption that the appellant did make some kind of incriminating statement before the zamindars. (The judgment then discussed evidence on the third question and proceeded as follows). I have therefore no douht in my mind that the conviction is perfectly justifiable. As there is no extenuating circumstance the extreme penalty of the law inflicted in this case is also perfectly justifiable. I therefore concur that the appeal of the appellant must be dismissed and the sentence of death confirmed.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Sind 206

ASTON, A. J. C.

Jethanand Moorijmal—Applicant.

v.

Kotumal Tarachand—Opponent.

Judicial Misc. No. 233 of 1932, Decided on 11th August 1932.

*** Civil P. C. (1908), S. 24—Daughters of Judge married to plaintiff's son and his brother's sons respectively—Relationship is close—It is fit case for transfer under S. 24.**

Where a daughter of the Judge of the Court in which a suit is instituted is married to the plaintiffs' son and his another daughter is married to the plaintiff's brother's son the relationship of the Judge with the plaintiff is somewhat close relationship and might be a source of embarrassment to the Judge trying the case. It is therefore a fit case for transfer of suit under S. 24: *A.I.R.* 1923 *Lah.* 564, *Rel. on.* [P 207 C 1]

Hatim B. Tyebji and *Khanchand Gopaldas*—for Applicant.

Kodumal Lekhraj—for Opponent.

Order.—This is an application under S. 24, Civil P. C. to transfer a Suit No. 1532 from the Small Cause Court to this Court.

The suit is for the recovery of Rupees 2,000 and the grounds inter alia upon which the application is made are that the plaintiff's son is married to the daughter of the learned Small Cause Court Judge Mr. Kalumal and the son of plaintiff's cousin is married to another daughter of the learned Judge and besides this the learned Judge has inherited interest in the firm of Lunidaram Pahlumal & Co., a firm which has monetary dealings with the opponent.

The applicant has not been diligent in making his application. The suit was filed on 13th May 1932 and the summons was served on the following day. 16th June 1932 was a date fixed for

appearance; the suit was adjourned by consent to the 28th June; on the 27th June a written statement was filed; on 28th June the learned Small Cause Court Judge ordered the defendant to file a proper defence; an adjournment was made till the 14th July. On 14th July the parties obtained a postponement for settlement to 21st July. On 20th July the present application was made. The applicant did not avail himself of Bombay Act 4 of 1929 S. 30, and he only made this present application two months after the Small Cause Court suit was filed. The opponent relied on the fact that the defendant's son is betrothed to a grand-daughter of the learned Small Cause Court Judge's brother. It appears to me that the relationship, namely, a daughter married to the plaintiff's son and another daughter married to the plaintiff's brother's son, makes the relationship of the learned Judge to the plaintiff a somewhat close relationship and I do not think the fact that the defendant's son has been betrothed to a grand-daughter of the learned Judge's brother in any way puts the parties on a par as regards relationship.

No one in his senses would suggest that the learned Judge would not dispose of this suit to the best of his ability in an impartial manner, but there can be no doubt, I think that the relationship to which I have referred might be a source of some embarassment to a Judge trying a case. In *Ahmad Shah* v. *Mt. Aushan Begam* (1) there was also a kind of double relationship the nature of which was not disclosed and the Lahore High Court there transferred the suit.

In my opinion although the applicant has not been diligent, he has established reasonable grounds for a transfer. The effect of such order would probably be that the trial of the matter will be considerably delayed and if the applicant's motive is to gain time it is likely that the manoeuvre will be successful. With considerable reluctance I grant the present application but I make no order as to costs. The applicant however says that his application is bona fide. He must give security for the plaintiff's claim costs and interest within a fortnight.

R.M./R K. *Application allowed.*

(1) A.I.R. 1923 Lah. 564=77 I.C. 762.

A. I. R. 1932 Sind 207

MILNE, A. J. C.

Moolji Khimji and Co.—Applicants.

v.

K. S. Pardanani and Co. and *another*—Opponents.

Insolvency No. 28 of 1930 and Judicial Misc. No. 407 of 1930, Decided on 17th March 1931.

(a) Presidency Towns Insolvency Act (1909), S. 7—Scope.

An application by a stranger claiming a lien on certain property of the insolvent on the ground that the applicant was given a lien on the property by the insolvent does not lie under S. 7. [P 208 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 7—Question of Official Assignee's title by reputed ownership falls to be decided under S. 7.

The question of the Official Assignee's title by reputed ownership is a question arising in the insolvency proceedings and would fall to be decided under S. 7. [P 208 C 1]

Kimatrai Bhojraj—for Applicant.

Srikishendas H. Lulla—for Opponent No. 1.

Fatehchand Asudamal—for Official Assignee.

Judgment.—The applicant claims a lien on certain property lying in 2 godowns, a shop and a packing room, he having been given a lien on the same by the insolvent. Opponent 1 also claims a lien on the property. Opponent 2 the Official Assignee does not claim the property in the godowns: this he alleged with other property was given to applicant in full satisfaction of his claim. He denies that opponent 1 has any claim against the estate. He claims the property in the shop and packing room on the doctrine of reputed ownership. This property has been sold: the proceeds are in the hands of the Official Assignee. A preliminary question has been raised: whether the application lies under S. 7. It clearly does not lie in respect of the property in the godowns. The Official Assignee does not claim the property as part of the insolvent's estate: no question arises in connexion therewith in the insolvency proceeding: there is no advantage in or necessity for deciding the dispute in these proceedings. It is a question between applicant and opponent 1 which they must settle between themselves. As regards the property in the shop and the packing room applicant claims a lien on this: so does opponent 1. Opponent 2: The Official Assignee claims the property on the ground of reputed

ownership and denies that applicant and opponent 1 have any lien on the property. The question of the Official Assignee's title by reputed ownership would in any view of the provisions of S. 7 fall to be decided under the provisions of that section. It would be a question arising in the insolvency proceedings, a claim of the Official Assignee based on higher rights than the insolvent could claim. The claim however is put forward only as a defence: if applicant's claim does not fall within the purview of S. 7, it is not necessary to consider the Official Assignee's defence.

The next question is, whether the applicant has put forward any claim which can properly be decided under S. 7. The terms of S. 7 are wide but exactly similar provisions in the English Act have been restricted in their scope by a series of rulings. Questions arising in bankruptcy where the trustees claims by a higher title than the bankrupt are generally decided by the Court exerising jurisdiction in bankruptcy. Where the trustee claims the same right as the bankrupt, the Court generally will not exercise its jurisdiction as against a stranger to the bankruptcy unless he submits to its jurisdiction: vide Mulla's Law of Insolvency, para. 59 and the cases quoted therein. There does not appear to be any reason why this latter principle should not apply to claims against the Official Assignee as representing the estate of the insolvent even if such claims were held to be covered by the provisions of S. 7. The disagreement between various High Courts in India on the interpretation of S. 7 has been noted in the passage quoted from the learned author. But it would appear to be the sounder view that the legislature enacting S. 7 in the very words of the English Act intended to and did enact these provisions as already interpreted by a course of judicial decisions in England. Further the manner in which a secured creditor should realise his claim is laid down in the schedule to the Act, para 9 and note (a). That is the normal procedure. The debt in respect of which the liens are claimed are disputed and if the applicant desires to take advantage of the Insolvency Act he should do so in the ordinary way.

The proceeds of the property contained in the shop and the godown are in the hands of the Official Assignee apparently by consent of the parties, to abide the decision of the Court. If applicant or opponent 1 claims a lien on the property, he should establish his right by suit. The claim put forward by the applicant does not lie under S. 7. The application is therefore dismissed.

P.N./R.K. *Application dismissed.*

A. I. R. 1932 Sind 208

RUPCHAND, A. J. C.

Official Assignee—Applicant.

v.

Ramchand Doulatram—Opponent

Judicial Misc. No. 299 of 1929, Decided on 28th June 1932.

(a) Presidency Towns Insolvency Act (1909), S. 7, Proviso (added in 1927)—Application under S. 7—Official Assignee not claiming higher or better title— Still Insolvency Court has jurisdiction to entertain application.

The Insolvency Court has jurisdiction under S. 7 of the Act to decide disputes falling within the purview of the section between the Official Assignee and third parties even though the Official Assignee does not claim a higher and better title: *A. I. R.* 1931 *Mad.* 317; *A. I. R.* 1921 *Mad.* 167 and *A.I.R.* 1929 *Mad.* 705 (*F.B.*), *Foll.*; *A. I. R.* 1921 *Mad.* 204; 40 *Mad.* 810; 46 *I. C.* 196; *A. I.R.* 1921 *Cal.* 95 and *A. I. R.* 1927 *Cal.* 474, *Rel. on.*; *A. I. R.* 1932 *Sind* 50, *Expl.* [P 209 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 7—Proviso (added in 1927) — Application under S. 7—Official Assignee not claiming higher or better title — Whether Court should exercise jurisdiction under S. 7 depends on facts of each case—Proceedings under S. 7 already three years old—Property situated and parties residing within jurisdiction of same Court—No harm to party if he was required to defend his title in such proceedings instead of in regular suit — Court should exercise jurisdiction under S. 7.

Where, in an application under S. 7 the Official Assignee does not claim a higher or a better title than the insolvent the question whether the Insolvency Court should exercise its jurisdiction under the section or should refuse to do so and refer the Official Assignee to a regular suit must depend upon the facts of each case and no hard and fast rule can be laid down in that behalf.

The proceedings started on an application under S. 7 were already three years old and property in dispute was situate and parties resided within the jurisdiction of the Court to which the application was made under S. 7. No prejudice was going to be caused to the party against whom the action was taken if he was required to defend his title to the property in such proceedings instead of in a regular suit.

Held: that the Insolvency Court should not decline to exercise its jurisdiction under S. 7: *A. I. R.* 1932 *Sind* 50, *not Appr.*; [P 210 C 1]

W. Lobo—for Applicant.

Pahlajsing B. Advani—for Opponent.

Judgment.—This is an application by the Official Assignee under S. 7, Presidency Towns Insolvency Act, praying for a declaration that a certain immovable property which stands in the joint names of the minor son and minor nephew of the insolvent is joint family property of the insolvent and his minor son and nephew and that a moiety thereof is liable for the debts of the insolvent. He has also prayed for an injunction restraining the minor son of the insolvent from alienating the said property. It is contended on behalf of the minor that S. 7 is limited in its application to cases where the Official Assignee claims a higher right in the property than that claimed by the insolvent and that therefore the application is incompetent. It is further urged that under any circumstances this is not a fit case for exercise of the discretionary powers vested in the Insolvency Court under S. 7 of the Act, and that the Official Assignee should be referred to a regular suit. In support of these contentions reliance has been placed upon the proviso to S. 7 of the Act which was added by the amending Act of 1927 and also on the rulings of Milne, J. C. in Judicial Misc. 292 of 1930, *Moolji Khimji & Co.* v. *K. S. Pardanani & Co.* (1) and *Official Assignee* v. *Mt. Parmeshwaribai* (2). On the merits it is said that the property in dispute was purchased by the mothers of the two minors out of moneys bequeathed to them under the will of the insolvent's father and does not therefore form part of the joint family property of the insolvent.

The legal issues have been tried as preliminary issues. It is not necessary for me to refer to the two unreported rulings of the learned Judicial Commissioner as it appears that the view expressed by him in *Official Assignee* v. *Mt. Parmeshwaribai* (2) is much more circumscribed than that taken by him in the previous rulings. In this case the learned Judicial Commissioner has definitely held that the Insolvency Court has jurisdiction under S. 7 of the Act to decide disputes falling within the purview of the section between the Official Assignee and third parties even though the Official Assignee does not claim a higher and better title. So far as this part of the judgment goes it is in accordance with the view which has prior to the amending Act of 1927 prevailed in different High Courts of India: see *Official Receiver Tinnevelly* v. *Sankaralinga Mudaliar* (3), *Abdul Kadir Sahib* v. *Official Assignee of Madras* (4), *In re Seehase* (5), *Rash Behari Ghosh* v. *Official Assignee of Calcutta* A. I. R. 1921 *Cal.* 95 and *Fool Kumari* v. *Khirodchand* A. I. R. 1927 *Cal.* 474.

The effect of the proviso to S. 7, which was added by the amending Act of 1927 came up for consideration before a Full Bench of the Madras High Court in *Official Assignee of Madras* v. *Narsinha Mudaliar* (6) and it was pointed out by Beasley, J., that the proviso was not intended to limit the scope of the section to matters in which the Official Assignee claimed a higher title than the insolvent would himself have had but was intended only to prevent a stranger to the insolvency from being first examined under S. 36 of the Act and then to have his deposition taken under that section used against him on an application made under S. 7 of the Act. This view has been followed in *Ramchandra Aiyar* v. *Official Assignee of Madras* (7) and in *Chinnappa Mudaly* v. *Official Assignee of Madras* (8). With this view I entirely agree. The jurisdiction of the Insolvency Court to deal with an application of this nature is therefore beyond dispute. In the case of *Official Assignee* v. *Mt. Parmeshwaribai* (2) the learned Judicial Commissioner has however said that as a rule the Insolvency Court should not exercise its powers under S. 7 and should refer the parties to a regular suit in all such cases where an English Bankruptcy Court would not deal with them in the exercise of its bankruptcy jurisdiction indicating thereby that the Court should in every case refer the Official Assignee to a regular suit where he does not claim a higher title to that of the insolvent.

(1) A. I. R. 1932 Sind 207.
(2) A. I. R. 1932 Sind 50=25 S. L. R. 521=135 I. C. 269.
(3) A. I. R. 1921 Mad. 204=44 Mad. 524=62 I. C. 495.
(4) [1917] 40 Mad. 810=36 I. C. 524.
(5) [1917] 46 I. C. 196.
(6) A. I. R. 1929 Mad. 705=52 Mad. 717=118 I. C. 506 (F. B.).
(7) A. I. R. 1931 Mad. 317=54 Mad. 739=131 I. C. 481.
(8) A. I. R. 1932 Mad. 167=55 Mad. 385=135 I. C. 535.

With all respect I am afraid this dictum is too broadly stated. Whether in any particular case an Insolvency Court in India should refuse to exercise its jurisdiction must necessarily depend upon the facts of each case and no hard and fast rule can be laid down in that behalf. The procedure applicable in England to cases of this nature is different in several particulars to that prevailing here and that all that can at most be said is that the English decisions may be referred to as a useful guide in determining whether in any particular case the Court should exercise its discretion under S. 7 or not. So far as the facts of the present case go I can see no reason why the Official Assignee should be referred to a regular suit. The property is situate within the jurisdiction of this Court and the parties reside here. A regular suit if filed will be filed in this very Court and perhaps be dealt with by the same Judge. All that will be required of the Official Assignee would be to pay heavy court-fee. The chief opponent is a minor and in the event of the suit succeeding against him the court-fee paid by the Official Assignee would be practically irrecoverable. The procedure to be followed in dealing with the present application would in no way be different from that of a suit and there will be no prejudice whatsoever to the minor if he is required to defend his title to the property in the present proceedings instead of in a regular suit. He will have the same right of appeal as in a regular suit and perhaps he will have an additional advantage in so far that in the event of an appeal being filed by him he will not be required to pay an ad valorem court-fee on the claim in appeal.

The only party who suffers by the present procedure being adopted is the Crown. These proceedings are already three years old and to a certain extent this delay is partly due to the minor not pressing for the trial of his legal objections at an early stage of the proceedings. For all these reasons I think this is a fit case in which the Court should not decline to exercise its powers under S. 7 and I order accordingly. The application should now be set down for hearing on the merits.

S.N./R.K. *Case remanded.*

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* A. I. R. 1932 Sind 210

FERRERS, J. C. AND ASTON, A. J. C.

William J. W. Ross—Applicant.

v.

Eleanor Agnes Ross—Opponent.

Criminal Revn. Appln. No. 143 of 1932, Decided on 16th September 1932.

*** Criminal P. C. (1898), Ss. 488 and 489—Divorce proceedings pending — Application under S. 488 should be adjourned till end of divorce petition—High Court stayed proceedings—Criminal Trial, Stay.**

On receiving an application under S. 488, against a husband who has already instituted proceedings in the Divorce Court the Magistrate should refer the applicant for her remedy to the civil Court. S. 489 is not meant to encourage applicants to resort to criminal Courts up to the very time when an order is passed by a competent civil Court. Where the civil Court is seised of the matter, it is better that the civil Court should dispose of it. High Court stayed proceedings in criminal Court until the conclusion of the divorce petition : *Craxton* v. *Craxton*, (1907) 23 *T. L. R.* 527, *Ref.* [P 211 C 1]

Hakumatrai M. Advani — for Applicant.

C. M. Lobo—for the Crown.

Judgment.—This is an application under Ss. 435 and 439, Criminal P. C., for the quashing of an application under S. 488, Criminal P. C., made by the opponent Mrs. Eleanor Agnes Ross, in the Court of the learned District Magistrate, Thar Parkar, on 30th June 1932. It appears that on 23rd May 1932 the applicant had filed a petition for divorce in the District Court of Hyderabad (Sind) under the Divorce Act against the opponent alleging that she had committed adultery with one Mr. G.M. Carter. The first hearing of the proceedings under S. 488 was fixed for 20th July 1932. On 19th July 1932 the applicant applied to the District Magistrate for stay of the proceedings on the ground that his petition for divorce having been previously filed in the District Court, Hyderabad, (Sind), and the questions of fact and law in the proceedings under S. 488, Criminal P. C., and the divorce proceedings being common, all proceedings for alimony would more properly be dealt with by the District Court, Hyderabad. This application for stay was rejected, the learned District Magistrate observing that the divorce petition had nothing to do with the maintenance proceedings.

Reliance is placed by the applicant on the judgment of Bucknill and Bargrave Deane, JJ., in the case of *Craxton* v.

Craxton (1). That was under the English law, and the Court held that there could be no question of desertion of the wife by the husband when there was a lis pendens in the divorce Court, and the order of the Justices was referred to as very extraordinary. Our attention has been drawn by the learned Public Prosecutor to the provisions of S. 489, Cl. (2), Criminal P. C., which enacts that where it appears to the Magistrate that, in consequence of any decision of a competent civil Court any order made under S. 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly. It is argued that since there is at present no decision of a competent civil Court the Magistrate has a free hand in proceeding with this application under S. 488.

I am of opinion that the learned Magistrate would have exercised a better discretion on receiving an application under S. 488 against a husband who had already instituted proceedings in the divorce Court, if he had referred the applicant for her remedy to the civil Court. I do not think that it was the intention of the legislature in S. 489 to encourage applicants to resort to criminal Courts up to the very time when an order was passed by a competent civil Court. As the civil Court was seised of the matter, it seems to me clear, it is better that the civil Court should dispose of it, and in the circumstances which have arisen in the present case, I am of opinion that a High Court would stay proceedings in a criminal Court until the conclusion of the divorce petition. We accordingly direct the learned Magistrate to stay the hearing of the application under S. 488, Criminal P. C., by adjournment from time to time until the conclusion of the divorce petition.

R.K. *Order accordingly.*

(1) [1907] 23 T. L. R. 527=71 J. P. 399=51 S. J. 484.

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* A. I. R. 1932 Sind 211

FERRERS, J. C. AND ASTON, A. J. C.

Tejumal Hassomal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 53 of 1932, Decided on 14th May 1932.

(a) Criminal Law Amendment Act (1908), S. 17—Members of unlawful assembly are not guilty under S. 17.

Persons who commit offence of being members of an unlawful assembly even though they commit the offence of rioting, are not guiity of being members of an unlawful association. [P 212 C 1]

*** (b) Criminal Law Amendment Act (1908), S. 17—Scope—Criminal P. C. (1898), S. 243.**

Disobedience of a command to disperse is not an ingredient of an offence under S. 17. An admission of not having dispersed in spite of the orders of the police is therefore not an admission for the purposes of S. 17. [P 212 C 1]

(c) Criminal P. C. (1898), S. 243—One admission for several accused is bad.

Where a Magistrate records one admission for a number of accused persons the admission is bad. [P 212 C 2]

*** (d) Criminal P. C. (1898), S. 439 (5)—Accused deliberately not appealing—Revision by third person—High Court is slow to interfere.**

Where a party aggrieved has a right of appeal which he has deliberately elected to leave unused High Court as a rule is slow to interfere in revision either of its own motion or at the instance of any unauthorized third person: *A.I.R.* 1931 *Bom.* 195 (*F.B.*), *Dist.*; *A. I. R.* 1930 *Oudh* 497 and *other cases referred*. [P 214 C 1]

Motiram Idanmal—for Applicant.

C. M. Lobo—for the Crown.

Aston, A. J. C.—This is an application for the revision of the conviction and sentences of the learned City Magistrate, Hyderabad, who convicted seven accused persons under S. 17, Criminal Law Amendment Act, and sentenced them to various terms of imprisonment. The application has been filed by the father of one Chandumal who was sentenced to four months rigorous imprisonment and a fine of Rs. 500 or in default to six weeks rigorous imprisonment. The order of the learned Magistrate was as follows:

"Accused 1, Chandumal, accused 2, etc., have admitted not having dispersed in spite of the orders of the police and have no cause to show against their conviction. I accordinqly convict and sentence them under S. 17 (1), Criminal Law Amendment Act 14 of 1908.

1. Accused Chandumal s/o Tejumal to four months rigorous imprisonment and fine of Rs. 500 or in default six weeks rigorous imprisonment."

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The offence under S. 17, Criminal Law Amendment Act, consists of being a member of, or taking part in meetings of, or contributing to, or assisting an unlawful association and the Act defines an unlawful association as: (a) an association which encourages or aids persons to commit acts of violence or intimidation, or the members of which habitually com-

mit such acts or (b) which has been declared to be unlawful by the Governor-General in Council under the powers hereby conferred. It is obvious that the offence is distinguishable in important respects from the comparatively simple offence of being a member of an unlawful assembly. It is necessary in the first place that there must be a combination or a body of persons either known by a distinctive name or not.

The combination or body must either have been declared by a Government notification to be an unlawful association or it must be a combination or body which encourages or aids persons to commit act of violence or intimidation or else its members must habitually commit such acts. Lastly the accused in order to be guilty under S. 17, Criminal Law Amendment Act, must be a member of the association or take part in its meetings or contribute or receive or solicit a contribution for its purposes or assist in its operation. It follows that if five or more persons meet for the purpose of holding a meeting of an unlawful association, they constitute an unlawful assembly within the meaning of S. 141, I. P. C, for their common object is to commit an offence, but it does not follow that persons who commit the offence of being members of an unlawful assembly, even though they commit the offence of rioting, are gullty of being members of an unlawful association.

Disobedience of a command to disperse is not an ingredient of an offence under S. 17, Criminal Law Amendment Act, 1908. In the present case the complaint against the accused was that they

" were members of an unlawful association within the meaning of S. 17 and that they did not disperse when ordered to do so by the police."

Under S. 242, Criminal P. C., it is the duty of the Magistrate to state to the accused the particulars of the offence and to ask them if they have any cause to show why they should not be convicted. A formal charge need not be framed. If the accused admit having committed the offence their admission under the provisions of S. 213 must be recorded as nearly as possible in the words used by them and if they fail to show sufficient cause, the Magistrate can convict them. The learned Magistrate's order in this case shows that the accused "admitted not having dispersed in spite of the orders of the police." The order proceeds that the accused had no cause to show against the conviction. The admission recorded by the learned Magistrate is open to the objection that he recorded one admission for a number of accused persons whereas the section requires the words of each as nearly as possible to be recorded. The admissions recorded appear to indicate a misapprehension in the mind of the accused as to the nature of the offence with which they were accused.

They admitted not having dispersed in spite of the orders of the police. For the purposes of S. 17 this is no admission of guilt whatever. The order states that the accused had no cause to show against their conviction. But if the accused were ignorant of the real nature of the accusation it would be difficult for them to show cause against the offence under S. 17. The circumstances therefore show that had we been dealing with this matter, by way of appeal, there would have been considerable force in the contentions made on behalf of the accused.

The learned Public Prosecutor has however drawn our attention to a number of rulings of this Court. The rulings are based on S. 439, sub-S. 5, Criminal P.C. This lays down that where an appeal lies and no appeal is brought, no proceedings in revision will lie at the instance of the person who could have appealed. It was laid down in *Jumo* v. *Emperor* (1), that sub-Cl. (5) precludes a High Court from exercising the discretion vested in it by S. 439, sub-Cl. (1). This case has been regarded as the leading case in Sind on the subject and it has been followed in *Harbhagwandas Metharam* v. *Emperor* (2); *Emperor* v. *Janu Fakir* (3) and in *Nuran* v. *Emperor* (4), a Bench of this Court held that *Jumo* v. *Emperor* (1) was binding on it until a Full Bench altered the law. In *Hiranand* v. *Emperor* (5), Madgavkar, A.J.C., observed that he was precluded by the rule and practice of this Court from entertaining an application in revision where a party had not appealed. In

(1) A. I. R. 1914 Sind 139=28 I. C. 108=16 Cr. L. J. 252=8 S. L. R. 229.
(2) A. I. R. 1920 Sind 75=60 I. C. 1001=14 S. L. R. 173.
(3) A. I. R. 1922 Sind 22=66 I. C. 999=23 Cr. L. J. 343=15 S. L. R. 171.
(4) A. I. R. 1925 Sind 206=82 I. C. 754=25 Cr. L. J. 1362=18 S. L. R. 262.
(5) A. I. R. 1924 Sind 129=76 I. C. 230=25 Cr. L. J. 131=17 S. L. R. 245.

that case also the application was made by the father of the accused. It is however to be noticed that the Court reduced the fine which had been inflicted from Ra. 500 to Rs. 200.

On behalf of the applicant it is pointed out that the present application has not been made at the instance of the person who could have appealed. It is an application made by the father of the accused. As against this the learned Public Prosecutor has cited the case of *Narain Parsad* v. *Emperor* (6) where the High Court of Allahabad stated that they were loath to take action on an application made by a third person on behalf of an accused who was an adult and of mental capacity and who had not authorized the application. Reliance has been placed on behalf of the applicant on *Emperor* v. *Janardhan* (7). That case however turns on a different question, namely, whether it was necessary for the Court to record the words of the accused admitting his guilt under S. 342. It appears to me that the matter of revision is purely discretionary with the Court. There are no doubt instances in which District Magistrates have referred to this Court questions arising out of the conviction of persons who have not appealed and this Court in the exercise of its powers of revision has sent for the record and passed such orders as were considered necessary. Such action by the District Magistrates seems to me necessary in many cases owing to the fact that the accused themselves are very often illiterate and do not understand their rights and are not in a position to make the necessary applications for themselves.

In the present case there is absolutely no explanation why the accused Chandumal has persistently refrained from making any application himself. He had a right of appeal to the Sessions Court but he made no appeal. The appeal was made by the father and when it was pointed out that the father could not appeal the appeal was withdrawn. The father has now come to this Court. There was nothing to prevent the son himself making his application even if he was below the age of 18: but that has not been established in this case. Since the accused has not thought fit to approach either the Sessions Judge or this Court we do not think that this is a case in which we should interfere in exercise of our powers by way of revision. I would therefore dismiss the present application.

Ferrers, J. C.—After what has been so admirably said by my learned brother there remains no more for me to add than this. The case was argued before us on the basis that the prisoner did not plead guilty they had therefore a right of appeal. That right they elected not to use. Now the Code of Criminal Procedure in S. 439 (5) says :

> " Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

The point that is made on behalf of the applicant is that the applicant is not barred by this section because he is not a party who could have appealed. It is true that the applicant who has brought these proceedings to our notice is not himself one of the convicts nor does he hold a power of attorney from all or any one of them. Now there are still some in this country who affect to ignore the established order of things. In the proceedings before the Courts of justice they decline to take part. They ostentatiously refuse to invoke the aid of law for themselves; but if a friend will volunteer to act on their behalf they do not disdain to profit by his intervention. Such a friend has intervened in this case. He is a pleader. But it is not as a pleader that he is acting. He is without any estensible instructions. He holds no power of attorney. He does not purport to be acting as a pleader on behalf of any client. He has in fact put himself into the position of client. The application is in his own name and it has been argued for him by another pleader. That pleader we have been glad to hear at full length.

We sit here to see that nothing is done under colour of law which is not in conformity with justice. If any such thing should happen we desire that it should be brought to our notice no matter by whom: cf. *Mohanlal Saksena* v. *Emperor* : *A. I. R.* 1930 *Oudh* 497. But the things which we should correct in this way are not mere technical imperfections

(6) A. I. R. 1923 All. 85=71 I. C. 243=24 Cr. L. J. 115=45 All. 128.
(7) A. I. R. 1931 Bom. 195=1931 Cr. C. 339 =131 I. C. 473=32 Cr. L. J. 719 (F.B.).

of procedure, they are substantial failures of justice. Of any such failure in this case I see no signs. Authority has acted with moderation. From the application itself we find that it was necessary to make 100 arrests. But of these 100, 89 were discharged; 11 only were put before the Magistrate and of these 11, 4 apologized and withdrew. They were accordingly acquitted. There is not here any indication of high-handedness or of arbitrary violence. The allegation rather is that the procedure in Court was not exactly in accordance with the Procedure Code.

Now every prisoner is entitled to claim that all forms of law shall be exactly observed. Any such claim which any prisoner may make we shall hear with patience and determine with the best abilities we have. But we shall not ordinarily interfere with technicalities of procedure except at the instance of the person aggrieved. Most of the points which have been argued before us are of this nature. They might have afforded matter for interesting argument if the prisoners had availed themselves of their right to appeal. They are not however points to which I should be disposed to attach much importance in an application for revision, even if that application were made by the convicted person himself. I do not attach any more importance to them when they are made by a person who has admittedly no authority to speak on behalf of the person upon whom the sentence has been inflicted. We have here a competent Court which has inflicted a sentence within its jurisdiction. We presume that all judicial acts were regularly performed. We presume in particular that when the accused appeared before the Magistrate the particulars of the offence with which he was accused were stated to him. The convicts themselves have not alleged the contrary If they are content with the proceedings, so are we.

Where, as in the present case a party aggrieved has a right of appeal which he has deliberately elected to leave unused we shall as a rule be slow to interfere in revision either on our own motion or at the instance of any unauthorized third person. For these reasons I concur in the order proposed by my learned brother, dismissing this application.

R.K. *Application dismissed.*

* A. I. R. 1932 Sind 214

FERRERS, J. C. AND ASTON, A. J. C.

Tarachand Gehimal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 82 of 1932, Decided on 8th September 1932.

*** Criminal P. C. (1898), S. 344—Court may adjourn case "from time to time," but not "sine die."**

There is no doubt that on reasonable grounds being established the Court can postpone the hearing of a case until after the disposal of another case which is pending or of a civil suit. The correct method is for the Court to postpone the case, not sine die, but for fixed and definite periods, pending the disposal of the connected case. But the Court should not adjourn a case sine die: 4 *I. C.* 537, *Expl.*; *Case law referred.*

[P 215 C 1]

Partabrai D. Punwani—for Applicant.

C. M. Lobo—for the Crown.

Motiram Idanmal—for Opponent.

Aston, A. J. C.——This is an application under Ss. 435 and 439, Criminal P. C., for the revision of an order of the learned City Magistrate, Sukkur, postponing a case under S. 420, I. P. C., sine die, pending the disposal of a case of an alleged cheating which had previously been instituted in Aligarh against the proprietor of the complainant's firm. The application was admitted only on the point whether a case can lawfully be kept in abeyance sine die. Our attention has been drawn to S. 344, Criminal P. C., and to *Ramchand* v. *Emperor* (1); *Murugan* v. *Gutha Rami Naidu*, *A. I R.* 1927 *Mad.* 851; *Bholanath Das* v. *Emperor* (2) and *Kewalram* v. *Emperor* (3). It has been contended that the words "from time to time" imply that the adjournment must be to a stated time and cannot be for an indefinite period. For the respondent reliance has been placed on *Guru Das Hazra* v. *G. L. Weatherall* (4), and the decision of this Court in Criminal Revision Application No. 28 of 1925. The Crown supports the applicant. We are of opinion that a postponement sine die is not in accordance with the provisions of S. 344. In *Guru Das Hazra* v. *G. L. Weatherall* (4), the principal case relied on, the Court did not particularly

(1) A. I. R. 1929 Sind 115=1929 Cr. C. 106=30 Cr. L. J. 399=115 I. C. 313=23 S. L. R. 225.

(2) A. I. R. 1924 Cal. 614=83 I. C. 628=26 Cr. L. J. 68.

(3) A. I. R. 1926 All. 421=93 I. C. 1055=27 Cr. L. J. 560.

(4) [1909] 11 Cr. L. J. 7=4 I. C. 537.

ccnsider the question of the validity of the order sine die. It concerned itself more with the question whether the grounds for the postponement were reasonable or sufficient. There is no doubt that on reasonable grounds being established the Court can postpone the hearing of a case until after the disposal of another case which is pending or of a civil suit.

But the question arises: What is the correct method of so doing? I am of opinion the correct method is for the Court to postpone the case, not sine die, but for fixed and definite periods, pending the disposal of the connected case. The effect will be the same: the hearing of the case will be postponed until after the conclusion of the other case. But where the Court adjourns a case sine die, there is a danger that the matter may be overlooked. The Court loses control over the proceedings. It is no longer in touch with the matter. The Court is not likely to ascertain from time to time whether diligent steps are being taken in the other case which is being first tried and whether the application for postponement is bona fide. The wording of S. 344 "from time to time" appears to me to indicate that it is necessary that a fixed term, even though such term may be of considerable length, should be given. In the circumstances we set aside the order of the learned Magistrate and direct him to adjourn the trial, if reasonable cause is made out, in future from time to time in accordance with the provisions of S. 344.

R.K. *Order accordingly.*

A. I. R. 1932 Sind 215

FERRERS, J. C.

Gangumal Shewaram and *others*—Applicants.

v.

Nanikram Khubchand and *another*—Opponents.

Transfer Appln. No. 89 of 1931, Decided on 4th March 1932.

(a) Civil P. C. (1908), S. 24—Jurisdiction challenged—Defendant cannot apply for transfer under S. 24.

A superior Court cannot make an order of transfer of a case under the appropriate section of the Civil Procedure Code unless the Court from which the transfer is sought to be made has jurisdiction to try it. A defendant cannot therefore raise an issue as to the jurisdiction of a Court in which the suit is pending and at the same time apply for transfer of the case under S. 24: *A.I.R.* 1920 *Pat.* 133, *Foll.* [P 215 C 2]

(b) Civil P. C. (1908), S. 24—Jurisdiction is not restricted to place of suing.

The word "jurisdiction" cannot be restricted to the sense of the place of suing only, as there are other limits upon the authority of a Court to pass a decree besides the limit of locality. [P 215 C 2]

Fatehchand Asudomal—for Applicants.

Pahlajsing B. Advani—for Opponents.

Order.—This is an application by the defendants for the transfer of Suit No. 319 of 1931 now pending before the Subordinate Civil Court of Hyderabad to be tried on the District Court side jurisdiction of the Judicial Commissioner's Court. To this application a preliminary objection has been taken. That preliminary objection rests upon the decision recorded by the High Court of Patna in the case of *Firm Ram Kumar-Sheo Chand* v. *Tula Ram-Nathu Ram* (1). It was there decided that a defendant cannot raise an issue as to the jurisdiction of a Court in which the suit is pending and at the same time apply for transfer of the case under S. 24, Civil P. C.

Now in the present case the defendants have filed a written statement of which the first para runs as follows:

"This Court has no power to annul a deeree of the Court of the Judicial Commissioner."

The written statement makes this point for this reason. The relief prayed for in the suit is:

"The Subordinate Court at Hyderabad will be pleased to declare that a judgment and decree passed by the Court of Judicial Commissioner in Sind is null and void and not liable to be executed in any manner."

Now it is settled law that a superior Court cannot make an order of transfer of a case under the appropriate section of the Civil Procedure Code unless the Court from which the transfer is sought to be made has jurisdiction to try it. This position is admitted by the defendants who are making this application. They try to evade the effect of it by restricting the word "jurisdiction" to the sense of the place of suing only. The word "jurisdiction" cannot be construed in so narrow a sense as this. There are other limits upon the authority of a Subordinate Court to pass a decree besides the limit of locality. The defendants having raised the issue as to jurisdiction should now proceed to obtain a decision upon that issue. Until such a

(1) A. I. R. 1920 Pat. 138=56 I. C. 920.

decision has been obtained this application would be premature. The applicants have already been given the opportunity of dropping the contention regarding jurisdiction if they should be so advised. Of this opportunity they have not elected to take advantage.

This application for transfer must therefore be refused with costs.

R.K. *Application refused.*

A. I. R. 1932 Sind 216

RUPCHAND, A. J. C.

Bhagwandas Lekhraj Ahuja, In re.

Misc. Appeal No. 7 of 1931, and Case No. 36 of 1930, Decided on 2nd March 1932, against order of Official Assignee of Judicial Commissioner's Court, Sind.

Presidency Towns Insolvency Act (1909), S. 28—Voting letter can be revoked before proposal is considered and votes taken.

The voting letter does not come into operation immediately it is filed before the Official Assignee but it is only an authority to act at the meeting, and may therefore be revoked at or before the meeting, but before the proposal or the amended proposal, if any, is considered, and the votes counted, e. g., at an adjourned meeting.

[P 217 C 2]

Kimatrai Bhojraj—for Insolvent.

Nadirshah Naoroji and *Dipchand Chandumal*—for Creditors.

Judgment.—The short question raised in this appeal is with regard to the right, if any, of a creditor to withdraw the letter sent by him to the Official Assignee assenting to a composition proposed by the insolvent before the proposal comes up for consideration at a meeting of the creditors convened for that purpose. The form of the letter is given as an Appendix to Form 82 of the Karachi Towns Insolvency Rules of 1927. It is headed "Voting Letter," and reads inter alia as under:

"I/We ..... of .....one/some of the creditors of the insolvent abovenamed for the sum of Rs ..... hereby request the Official Assignee of the said Court to record my/our vote (a) the acceptance of the proposal as set forth in the Official Assignee's report hereto annexed and/or (b) any amendment thereof which shall, in the opinion of the said Official Assignee, be calculated to benefit the general body of the creditors."

(a) Insert here the word "for" for the word "against" as the case may be.

(b) Creditors may, if they think fit, authorize the Official Assignee to vote "against" the proposal now submitted but "for" such amendment thereof, as may be satisfactory to the Official Assignee."

On the very face of it, it is a letter of request addressed to the Official Assignee as an agent to record his vote in pursuance of the power given to him under the letter, and it would appear that the mere filing of the Voting Letter with the Official Assignee would not prevent the creditor to withdraw his assent or rather cancel the power delegated by him to the Official Assignee of recording a vote before it is actually recorded by him : see Ss. 200 and 203, Contract Act. But it is argued on behalf of the insolvent that in so far as the Voting Letter requires the Official Assignee to record his vote it is ultra vires of Cl. (iv), S. 28, Insolvency Act, as that clause provides that if a letter of assent or dissent, as the case may be, is lodged with the Official Assignee not later than one day prior to the date of the meeting fixed for the consideration of the proposal :

"such assent or dissent shall have effect as if the creditor has been present and had voted at the meeting."

It is contended on behalf of the insolvent that the moment the Voting Letter is received by the Official Assignee, it is in all respects tantamount to the creditor having recorded his vote, and that having once recorded his vote, it is not competent for him to resile from it. The procedure laid down by the Presidency Towns Insolvency Act for consideration of a proposed composition and the form prescribed thereunder are more or less similar to those prescribed under the English Bankruptcy Act. The Voting Letter in question is identical with that given as Appendix to Form 82 of the rules framed under the English Act of 1883; and the same form appears to have been repeated in the rules of most of the High Courts in India. My attention has not been invited to any decided case either in England or in India in which the form of a letter now in question has been held to be ultra vires of the Act or in which the specific point now in issue has been dealt with. The only authority relied upon by the learned pleader for the insolvent in support of his contention is para. 628 of Vol. 12, Halsbury's Laws of England, which refers to the mode of recording votes by proxy at a University Election. But that paragraph has no application whatsoever.

The provisions of the University Election Act (1861) 24 & 25 Vict. c. 53, referred to in that paragraph, contemplate the signing of the Voting Paper by an elector in the prescribed form, and a

nomination by him of another elector empowered to file the Voting Paper before the polling officer. The proviso to S. 2 expressly lays down that every elector is entitled to vote in person notwithstanding that he has duly signed and transmitted a Voting Paper, if such Voting Paper has not been already tendered at the Poll. It is only when the Voting Paper handed over by the elector to his proxy has been produced by the proxy with his own declaration and has been duly read and recorded by the polling officer, that the right of the elector to revoke it is irretrievably gone. If at all therefore the provisions of this Act are against the view pressed on behalf of the insolvent. The provisions of S. 28, Insolvency Act are quite different. Cl. (ii) provides that a proposal shall be deemed to be duly accepted when on a consideration of the proposal at a meeting convened for that purpose the majority in number and three-fourths in value of all the creditors whose debts are proved resolve to accept it. Cl. (iii) enables an insolvent to amend his proposal at such meeting provided the amended proposal is in the opinion of the Official Assignee calculated to benefit the general body of his creditors.

These two clauses presuppose the presence of creditors who have proved their claims at the meeting. They are required to decide after a due consideration of the proposal or the amended proposal, as the case may be whether they are prepared to accept the same. The creditors may take part at the meeting either in person or by proxy, vide Cl. 16, Sch. 1, to the Act, or, if they so wish, they might do so by filing a letter of authority called the "Voting Letter" in favour of the Official Assignee referred to in Cl. (iv), S. 28. Now, it is not only the original proposal but any amendment thereof made at the meeting in terms of Cl. (iii) which may be considered at the meeting and either accepted or rejected. That being so, the Voting Letter expressly mentions the fact that it is open to a creditor to do one of the three things : (a) to empower the Official Assignee to accept the original proposal as also any modification thereof which he considers beneficial to the creditors; (b) to reject the proposal or any amendment thereof altogether and (c) not to accept the proposal which has been made but to accept the proposal if amended in a manner which the Official Assignee considers beneficial to the creditors. Reading the section as a whole, it is abundantly clear that the Voting Letter does not come into operation immediately it is filed before the Official Assignee and that it is only an authority to act at the meeting, and may therefore be revoked at or before the meeting, but before the proposal or the amended proposal, if any, is considered and the votes counted.

There is also nothing in the Act to suggest that a creditor may not cancel the Voting Letter before it is acted upon at the meeting, or that the letter purports to be anything more than a power delegated to the Official Assignee as agent to represent the creditor in the meeting for the purpose of conveying his wishes to the creditors. That being so, the form is not ultra vires of the Act and the creditor may revoke the authority given by him to the Official Assignee of representing him at the meeting and expressing his views before it is acted upon. (The judgment then considered case on merits and concluded.) I agree with the view taken by the Official Assignee that it was competent for the creditors to withdraw their Voting Letters at the adjourned meeting as until then the proposal, or rather the amended proposal for a composition, had not been considered at the meeting of the creditors, and the stage of counting votes had not been reached. I accordingly dismiss this appeal with costs.

R.K. *Appeal dismissed.*

A. I. R. 1932 Sind 217

FERRERS, J. C. AND RUPCHAND, A. J. C.

Devidas Zowkiram—Appellant.

v.

Aluwalla Brothers — Respondents.

First Appeal No. 8 of 1930, Decided on 18th March 1932.

(a) Deed—Construction — General principles stated.

The sense and meaning of the parties on any particular point of an instrument may be collected *ex antecedentebus et consequentibus*, every part of it may be brought into action in order to collect for the whole one uniform and consistent sense if that may be done. But where a clause is ambiguous, construction which will make it valid is to be preferred to one which will make it void : *Barton* v. *Fitzgerald*, (1812) 15 *East* 530; *Mills* v. *Dunbam*, (1891), 1 *Ch.* 576, *Foll.* [P 219 C 1]

(b) Registration Act (1908) S. 17 (d)—Lease—Deed held to be only agreement to lease and not lease—Document held amoun-

ted to lease for six months and hence did not require registration.

Prior to the amending Act 20 of 1929 which expressly enacts that a lease should be executed both by the lessor and the lessee, documents drawn up in the form of an indenture and purporting to be leases were executed by the lessees only. But such a document can only be treated as a mere record of an agreement on which the lessee has agreed to lease the property to the lessor, and not a lease properly so called. [P 219 C 1]

An indenture of lease signed by the lessee contained the following clause "that this lease will run for at least six months from date, and hence if the lessees happen to vacate the premises earlier, they will still be liable to pay rent for the full period of six months. After the expiration of six months the lessees may continue to occupy the premises at the aforesaid rent and on the terms noted in this indenture, as long as they may desire, provided they continue to pay their monthly rent strictly in advance . . . . In case of the lessor happening to sell the building to anyone at any time after expiry of six months from this day, the lessees will be bound to vacate the premises on receipt of a month's clear notice for the same from the lessor."

Held : that the document provided for two agreements, one of them being a lease for a period of six months binding on both parties, and the other an agreement permitting the tenant to continue in occupation so long as he wished but subject to his tenancy being terminated at the wish of the lessor in the event of the lessor selling the property ; that it was not a lease for an indefinite period and did not require registration. It was a lease for a period of 6 months and as such was admissible in evidence though not registered : *Hand* v. *Hall*, (1877) 2 *Ex. Div.* 355, *Foll.* [P 218 C 2; P 219 C 1]

A lease for a period not exceeding one year need not be in writing, and if in writing, according to the law prevailing in the Bombay Presidency and in Sind, such writing need not be registered. [P 219 C 2]

Tolasing K. Advani—for Appellant.

Ichanchand Gopaldas—for Respondent.

Rupchand, A. J. C.—This appeal arises out of a suit instituted by the plaintiff-appellant for recovery of rent due to him for a period of six months less the amount realized by him by re-letting the premisses on account and risk of the defendants. His case was that the defendants had executed a document in his favour which is referred to as a lease, agreeing to occupy his premises for a period of six months but they had subsequently declined to enter into possession of the premises. The learned Additional Judicial Commissioner nonsuited the plaintiff on the ground that the document which formed the foundation of his suit created a lease for an indefinite period and as cuch was inadmissible in evidence for want of registration. The plaintiff has some to us in appeal, and the only question before us is as to the true interpretation of this document. Now this document is no doubt very badly drafted. It purports to be in the form of an indenture, but it is signed by the defendants only. Inter alia it contains the following terms :

"Now the lessor doth hereby let and the lessees do hereby take the upper three floors in their entirety (not the ground floor of the aforesaid building at the monthly rental of Rs. 320 (three hundred and twenty) only, for a period of which shall be at least six months as computed from this day on the following terms :

* * * *

(9) "That this lease will run for at least six months from date, and hence if the lessees happen to vacate the premises earlier, they will still be liable to pay rent for the full period of six months. After the expiration of six months, the lessees may continue to occupy the premises at the aforesaid rent and on the terms noted in this indenture, as long as they may desire, provided they continue to pay their monthly rent strictly in advance . . . In case of the lessor happening to sell the building to anyone at any time after expiry of six months from this day, the lessees will be bound to vacate the premises on receipt of a month's clear notice for the same from the lessor."

The learned Judge has treated the document as one entire lease for an indefinite period, liable to be terminated earlier, and has on that ground distinguished this case from the leading case of *Hand* v. *Hall* (1), and the Indian decisions which are based upon it. The learned Judge has said :

"And that as the term of this lease was at least six months, and as long thereafter as the tenant might like to continue in occupation of the premises demised, there was nothing further for the tenant to do, if he wished to continue as a tenant after six months. He had to send no notice. He had to get no fresh lease executed. All he had to do was to continue to exercise the privilege of a tenant and observe the conditions of the lease. In *Hand* v. *Hall* the tenant, if he wished to continue for the further term had to serve a notice on the lessor. In the present case, the had to be served if the tenant wished to terminate the tenancy after six months. In the circumstances, the necessity of dividing the contract into two parts in *Hand* v. *Hall* does not arise."

With all respect we are not able to accept this view as correct. In our opinion, the document in suit does provide for two agreements, one of them being a lease for a period of six months binding on both parties, and the other an agreement permitting the tenant to continue in occupation so long as he wished but subject to his tenancy being terminated at the wish of the lessor in the

(1) [1877] 2 Ex. D. 355=46 L. J. Ch. 603.

event of the lessor selling the property. The document is not a lease properly so called. It does not fall within the meaning of S. 105, T. P. Act. It is not signed by the lessor and it does not therefore purport to be a transfer by him of the rights of the lessor in his property in favour of the lessee. It is no doubt true that prior to the amending Act, 20 of 1929 which expressly enacts that a lease should be executed both by the lessor and the lessee, documents drawn up in the form of an indenture and purporting to be leases were executed by the lessees only. But such a document can only be treated as a mere record of an agreement on which the lessee has agreed to lease the property to the lessor, and not a lease properly so called. The record of the terms of the agreement between the parties as contained in the document in suit is to say the least couched in ambiguous language; and it is a question whether it is a record of an agreement intended to create one single and entire lease for an indefinite period exceeding one year but terminate earlier or as a record of an agreemeent of lease for six months and a further agreement enabling the tenant to continue in occupation if he so wished, but at the same time enabling the lessor to terminate the tenancy in the event of his selling the property. The latter interpretation would bring the document within the decision of *Hand* v. *Hall* and is in our opinion the one which should prevail.

To interpret it otherwise would mean a violation of two well-recognized rules of construction applicable to all kinds of written instruments. R. 1 was stated by Ellenborough, L. C. J., in *Barton* v. *Fitzgerald* (2) at p. 541, as follows :

> " It is a true rule of construction that the sense and meaning of the parties on any particular point of an instrument may be collected *ex antecedentebus et consequentibus* every part of it may be brought into action in order to collect for the whole one uniform and consistent sense, if that may be done. "

Rule 2 has been stated by Kay, L. J., in *Mills* v. *Dunham* (3), p. 590, thus :

> " It is also a settled canon of construction that where a clause is ambiguous construction which will make it valid is to be preferred to one which will make it void. "

By dividing the contract into two parts, we will not only be giving due effect to the provisions contained in the preamble " for a period which shall be at least six months " and in Cl. 9, of the document referred to above, the lease will run for at least six months from date, but will make the document valid and enforceable.

In our opinion the expression " after the expiration of six months the lessee may continue to occupy the premises " confers nothing more and nothing less than an option to the lessee to continue to occupy the premises after that period if he so wishes ; and the mere fact that the document contemplates that he may exercise that option impliedly by continuing to occupy the premises, or that it does not require him to exercise that option by expressly giving in that behalf as in the case of *Hand* v. *Hall* is hardly a ground for holding that the contract in the present case may not be split into two as was done in that case. In *Yousaf* v. *Poleologo* (4) the lease was as follows :

> " I the undersigned . . . . . agree to rent a one storey house . . . . on Rs. 90 per month for a period of one year to John Poleologo Esq. . . . . and also do agree not to increase the abovesaid rent nor to have the premises vacated for a further period of two years if the said tenant wish to occupy it for that period. "

There was no provision requiring the tenant to express his option of continuing to occupy as a tenant in any particular manner. A Bench consisting of Sir Lawrence Jenkins, C. J., and Beaman. J., gave effect to the document as a lease for a period not exceeding one year and as such not falling within the purview of S. 17 (d), Registration Act. Treating the document in suit as evidence of lease for a period of six months, it is clearly admissible in evidence. A lease for period not exceeding one year need not be in writing, and if in writing, according to the law prevailing in the Bombay Presidency and in this Province such writing need not be registered : see Government Notification No. 12501, dated 8th December 1908, issued under the proviso to S. 107, T. P. Act, and published in the Bombay Government Gazette (1903) part 1, p. 2116. In this view it is not necessary for us to consider further the alleged conflict between the observations of Brett, L. J., in *Ex parte Voisey, In re Knight* (5) at p. 127 that

(2) [1812] 15 East 530=134 R. R. 519.
(3) [1891] 1 Ch. 576=60 L. J. Ch. 362=64 L. T. 712=39 W. R. 289.
(4) [1906] 8 Bom. L. R. 580.
(5) [1882] 52 L. J. Ch. 121=21 Ch. D. 442=47 L. T. 362=31 W. R. 19.

"the Statute of Frauds applies only to those cases where the tenancy if good must of necessity last for more than three years and not if at the time of the arrangement, the tenancy may last for less than three years although it may last for more and those of Ryves and Piggot JJ., in *Munshilal* v. *The Notified Area of Barani* (6) that for the purposes of registration the terms of a lease must be 'understood to mean the period for which the lessee is protected against dispossession at the will and pleasure of his lessor or in other words, the length of time for which the lessee is entitled to continue in possession provided he himself fulfils all the stipulated conditions."

We hold that the learned Additional Judicial Commissioner was in error in refusing to admit the document for want of registration. We accordingly set aside his decision and direct him to take the case back on his file and to deal with it according to law. Costs to be costs in the cause.

K.N./R.K. *Appeal allowed.*

(6) A. I. R. 1914 All. 120=22 I. C. 933=36 All. 176.

A. I. R. 1932 Sind 220

RUICHAND AND MEHTA, A. J. Cs.

Pitamberdas and *others*—Appellants.

v.

Bhawanilal and *others*—Respondents.

Second Appeal No. of 1931, Decided on 15th February 1932.

(a) Civil P. C. (1908), O. 22—Applicability—Suit or appeal must be pending.

Order 22 applies to joinder of legal reprentatives of a person who is properly on the record, and dies pending the suit or appeal as the case may be, but not to the case where person is dead long before suit or appeal: *A. I. R.* 1920 *Sind* 82 and *A. I. R.* 1921 *Mad.* 56, *Rel. on.* [P 220 C 2]

(b) Civil P. C. (1908), O. 41, R. 20—Discretionary power should be refused if party is deprived of his valuable right.

The Court would always decline to exercise its discretionary powers under R. 20 where the exercise of such powers would have the effect of depriving a party of the valuable right which accrues to him in consequence of ths failure of an appellant to bring on record legal representatives of a deceased person within the time allowed by O. 22: *A. I. R.* 1920 *Cal.* 261; *A. I. R.* 1926 *Cal.* 335; *A. I. R.* 1927 *Pat.* 23 and *A. I. R.* 1927 *P. C.* 252, *Ref.* [P 220 C 2; P 221 C 1]

(c) Cosharer—Suit by one for ejectment of another, without impleading others is competent—Suit by some cosharers against another—Appeal by plaintiffs—One appellant dying—Representatitves not on record—Appeal dismissed on merits—Second appeal by living plaintiffs is competent—Civil P. C. (1908), O. 22, Rr. 3 and 4.

A single cosharer or tenant-in-common may institute a suit for ejectment against a trespasser or other cosharer or tenant-in-common without impleading the other cosharers or tenants-in-common as parties to the suit. [P 221 C 1]

Where therefore some tenants-in-common file a suit against another tenant-in common regarding trespass committed by him and pending appeal in the District Court filed by the plaintiffs one of them dies and his legal representatives are not brought on record and the appeal is dismissed on merits, they can carry on, on their own behalf the second appeal filed by them although if they had succeeded in the trial Court the result would have been different. [P 221 C 2]

Srikishendas H. Lulla — for Appellants.

Gordhandas A. Kikla — for Respondents.

Rupchand, A. J. C.—These are two connected applications. One of them is by the plaintiffs-appellants for joinder of the legal representatives of respondent 3 and the other is by defendant respondent 1 for an order that in consequence of the failure by the appellants to join the legal representatives of respondent 3, the whole appeal has abated. Both these applications are misconceived. It is common ground that respondent 3 was dead long before the appeal was filed. O. 22, Civil P. C., applies to joinder of legal representatives of a person who is properly on the record, and dies pending the suit or appeal as the case may be: see the *Manager, Encumbered Estates in Sind* v. *Tharumal* (1) and *Govind Kaviraj* v. *Gauranga Saw* (2).

The learned pleader for the appellants has asked that relief be afforded to the appellants under O. 41, R. 20, Civil P.C., but there are no grounds for the exercise of such powers. The appellants are themselves to blame for not joining the legal representatives of the deceased at the time of the filing of the appeal. He was one of the original plaintiffs and an appellant in the Court of first appeal. The present appellants knew or at any rate could easily have known of his death if they so wished. It is said that respondent 3 was dead long before the appeal was decided by the first appellate Court. If that be so, it is still worse. If the appeal had abated in the lower appellate Court either as a whole or so far as the rights of the deceased were concerned, it was not open to the appellants to circumvent by making the deceased as one of the respondents to this appeal and then applying for the joinder of his legal representatives. The Court would always decline to exercise its discretion-

(1) A. I. R. 1920 Sind 82=78 I. C. 569.
(2) A. I. R. 1924 Mad. 56=75 I. C. 739.

ary powers under this rule where the exercise of such powers would have the effect of depriving a party of the valuable right which accrues to him in consequences of the failure of an appellant to bring on record legal representatives of a deceased person within the time allowed by O. 22, Civil P. C. : *Kali Dayal* v. *Nagendra Nath* (3); *Manindra Chandra* v. *Bhagabati Devi*, *A. I. R.* 1926 *Cal.* 335; *Badri Narain* v. *E. I. Ry., Co.*, *A. I. R.* 1927 *Pat.* 23 and *Chockalingam* v. *Seethai Ache*, *A. I. R*, 1927 *P. C.* 252.

The application for joinder of the legal representatives whether it be treated as an application under O. 22 or under O. 41, R. 20, Civil P. C., is therefore incompetent. If O. 22. Civil P. C. has no application to the circumstances of the present case, it follows that the application by defendant 2 for abatement of the appeal under the provisions of that order is also incompetent. The point however remains whether an appeal filed by some of the original plaintiffs is properly constituted or not. This point in its turn depends upon the question whether the deceased plaintiff was a necessary party to the present appeal or not. The suit of the plaintiffs was in effect one for trespass committed by the defendant, by depriving them of their rights over a strip of land covered by the diki and the projections constructed by him in the haveli reserved for the use of all the tenants-in-common. Each of the plaintiffs had an independent cause of action to have this encroachment, which interfered with his right of enjoyment, removed.

Now it is well settled that a single cosharer or tenant-in-common may institute a suit for ejectment against a trespasser without impleading the other cosharers or tenants-in-common as parties to the suit: *Mohomed Farug* v. *Sidik*, *A. I. R.* 1925 *Sind* 36; *Ahmad Sahib Shutari* v. *The Magnesite Syndicate, Ltd.*, (4); *Seetarama* v. *Sivaramayya*, *A. I. R.* 1926 *Mad.* 809; *Harendra Narian Singh* v. *Moran* (5); *Sri Thakurji* v. *Hira Lal* (6); *Sheotahal Dube* v. *Lal Narain Prasad Chand*, *A. I. R.* 1931 *All.* 695 and *Maula Dad* v. *Mt. Fateh Bibi*, *A. I. R.* 1926 *Lah.* 545.

The same principle has been applied in England to a suit for trespass filed by one cosharer or tenant-in-common against another: see Bullen and Leak on Pleadings, 8th Edn., p. 59, and Halsbury's Laws of England, Vol. 27, para. 1503, p. 854. Although our attention has not been invited to any Indian decision on the point, there is no reason why a suit of a like nature by one cosharer against another cosharer should not be competent. Such a suit is no doubt open to the objection that it exposes a successful defendant to similar suits being filed against him by other cosharers. But this objection equally applies to a like suit filed by one cosharer against a stranger, and this objection seems not to have prevailed in the cases referred to above.

If therefore it was competent for the remaining plaintiffs to institute the present suit in the first instance, there is no reason why they should not be allowed to carry on, on their own behalf, the appeal filed by them. Had the plaintiffs succeeded wholly in the trial Court and were respondents in this appeal, it would perhaps have been another matter. A decree passed by this Court against the living plaintiffs without bringing on record the legal representatives of the deceased plaintiff might have resulted in bringing into existence two decrees of competent jurisdiction contrary to each other; and this would not have been permissible in law: see *Sheo Chand* v *Sita Ram*, *A. I. R.* 1927 *All.* 331 and *Srinivasulu Chetti* v. *Guraviah*, *A. I. R.* 1927 *Mad.* 505. But the plaintiffs other than the dead man are the appellants. The decree granted by the trial Court in respect of a part of the relief claimed by them is not now in dispute. Either the appellants will succeed in obtaining additional relief or not. In either case the decree passed by this Court will not be in conflict with the decree already passed by the trial Court. The non-joinder of the legal representatives of respondent 3 who was one of the original plaintiffs is therefore not fatal to the appeal. We accordingly hold that the appeal as presented by the the rest of the plaintiffs is competent and should be set down for hearing on the merits.

R.K. *Order accordingly*

(3) A. I. R. 1920 Cal. 264=54 I. C. 822.
(4) [1916] 39 Mad. 501=29 I. C. 60.
(5) [1888] 15 Cal. 40.
(6) A. I. R. 1922 All. 408=75 I. C. 335=44 All. 634.

A. I. R. 1932 Sind 222

RUPCHAND, A. J. C.

Dwarkadas Fatehchand—Plaintiffs.

v.

Lalchand Hirachand and *others* — Defendants.

Civil Suit No. 249 of 1931, Decided on 21st January 1932.

Trade-mark—Infringement of—*P* having monopoly of selling certain grey shirting—*D* purchasing them from *P* and after cutting off face laps containing *P's* trade-mark putting his own mark similar to that of *P*—Object of *D* in doing so was to deceive unwary customers into belief that *D* was direct buyer and their goods were superior to those of *P*—Injunction can be issued to restrain *D* from using trade-mark similar to that of *P*.

Attempts to decive unwary purchasers by false representations by the use of devices may be made in different forms and it is a question of fact in each case whether there is false representation or not. The degree of readiness with which the Court will infer the probability of deception also depends upon the circumstances of each case. [P 224 C 2]

P had secured a monopoly of selling grey shirtings of certain mills. *D* purchased the shirtings from *P* and after removing the face laps containing the trade-mark of *P*, put his own mark similar to that of *P*. The object of *D* in substituting a device similar to that of *P* and affixing it after cutting the face laps of grey shirtings was to deceive the intending purchasers into a belief that *D* was direct purchaser from the manufacturers and his goods were superior to those supplied to *P*.

Held: that the mode in which *D* was using the device on cloth purchased from *P* was likely to deceive unwary purchasers that they were buying goods superior to those supplied to *P* and that *P* had made a prima facie case for restraining *D* from using device similar to that of *P*: *Wheeler and Wilson Manfg. Co.* v. *Shakespear*, 39 *L. J. Ch.* 36; *Burgess* v. *Burgess*, 3 *De G. M. and G.* 896 and *Burberrys* v. *Cording*, 26 *R. P. C.* 693, *Appl.* [P 224 C 2]

Pahlajsing B. Advani—for Plaintiffs.

Dingomal Narainsing — for Defendants.

Order.—This is a Rule calling upon the defendants to show cause why the temporary injunction issued against them restraining them from selling grey shirtings with the trade-mark or device similar to that used by the plaintiffs on grey shirtings sold by them should not be confirmed pending the trial. The case of the plaintiffs no doubt bristles with certain difficulties, and is probably the first of its kind. My attention has not been invited to any decided case which has a direct bearing upon the points in dispute. The parties are both residents of Shikarpur and carry on a rival trade in piece goods at Karachi. The dispute between them is over the use of a certain device which has as its main feature rays emanating from a central disk, which device is said to be the sun and its rays. The defendants' case is that for a number of years prior to 1928 certain grey shirtings manufactured in Japan were imported here for sale with a device similar to the devices used by the parties. This device was known as the "Asahi" or the "Rising Sun." It appears that some time prior to 1928 certain dealers imitated this device on Indian made grey shirtings, and in the year 1928 the Japanese importing firms objected to the use of devices similar to their device which they claimed was their trade mark. What happened then is a matter of controversy in other connected suits and I do not wish to say anything which might prejudice either the plaintiffs or the defendants in this suit who are defendants in those suits. But it would appear that the defendants' contention is that in consequence of a notice served upon them by the Japanese firms in that year, they made certain alterations in the device used by them with the consent of the Japanese firms and adopted a device which they have continued to use up to now. They call this device of theirs as the "Baloon Chapp."

The only material difference in this and the "Asahi" trade-mark is that the rays of the sun do not form a complete circle and that at the bottom of this circle there are certain other marks which may mean anything but do not look like rays. The defendants say that they have been using this device ever since 1928 on goods selected by them for sale and that grey shirtings bearing their device have acquired reputation in the market and that they have a right to continue it being prior in time to the plaintiff's. They further say that in any case this device is now public property and that they cannot be restrained from its use. On the other hand the case of the plaintiffs is that they have been using their device which also consists of a disk and rays emanating from it but which has two stars on the top over and above

the rays. They say that they have been using it prior to the year 1926, and that in that year they actually registered their trade-mark in Bombay. That trade-mark they call "Chand Tara" (Moon and Stars) trade-mark.

They also sa that they have since 1926 affixed similar devices though slightly different on greyshirtings of different qualities which they call the "Moon Tara" the "Chand Suraj" and the "Chand Ganesh" and that the grey shirtings sold by them are known by these trade-marks or trade names. They deny that the defendants have been using their device for any length of time, or, at any rate, to the knowledge of the plaintiffs, and that, in any case, it has not acquired any reputation in the market. On these facts, at first I was disinclined to confirm the injunction pending the trial of the issues between the parties. But my attention has been invited to a very damaging admission made by the defendants in one of their affidavits which throws a flood of light upon the real disputes between the parties and shows that there is a good deal more to be said in favour of the plaintiffs than might appear at first sight. It is clear from the affidavits filed by the plaintiffs that they have secured the monopoly of selling grey shirtings manufactured by the Manchester Mills, Bombay, Pearl Mills, Bombay, and the Toyo Podar Mills, Bombay. Any wholesale dealer who wants to buy grey shirtings manufactured by these mills must buy them from the plaintiffs. For the purpose of this application it will be sufficient to refer to the grey shirtings of the Manchester Mills as the dispute between the parties relates chiefly to the trade-mark used upon grey shirtings of this mill, called the "Chand Tara" trade-mark. The defendants now buy these shirtings from the plaintiffs, and after removing the face laps containing the trade-mark of the plaintiffs they put their own marks upon them and then dispatch them to their upcountry constituents.

In view of this admission it would appear that the present case is not a case of an infringement of trade-mark property so called or a trade-mark which comes within the definition of the English Trade-Marks Act. But it is akin to it and falls within the category of actions known as "passing off" actions. The evident object of the defendants in substituting a device similar to that of the plaintiffs and affixing it after cutting the face laps of grey shirtings is to deceive the intending purchasers into a belief that the defendants are direct buyers from the manufacturers, and that their goods are superior to those supplied by the plaintiffs. It is the case of the defendants that by affixing their device an the same goods they obtain better prices than what they would otherwise get. They contend that this is due solely to the guarantee which the intending purchasers have that the selection made by the defendants must be a superior selectien and contend that they have every right to have a selection mark of their own upon their goods. But it is difficult to see how the defendants can get a better price for the same goods and that also after they have shortened the length of the cloth by cutting off the face laps, unless they represent to the intending buyers that their goods are of a different and a superior manufacture to those supplied to the plaintiffs and are supplied to them direct by the manufacturers and not through the mediation of the plaintiffs. They admit that their immediate buyers are dealers in piece goods and it is hardly likely that dealers in piece goods would not place their orders with the plaintiffs who are immediate buyers from the manufacturers and who have a monopoly of these goods at lower prices than those charged by defendants, unless it is presumed that the defendants obtain higher prices by holding out that the goods supplied by them are not those purchased by them from the plaintiffs.

Although there is no direct authority upon this point, there are certain passages in Sebestian on the "Law of Trade marks" Edn. 5, in the Chapter relating to "Passing off and analogous cases" which have a certain bearing upon this point. At p. 274 it is said:

> "Where however there has been a representation that an article made by *A* is made by *B*, by means of which one person has secured custom intended for another, so that both the purchaser and the genuine trader have been defrauded, there the injury is the same, and the Court will interfere and protect the right of both parties to trade freely without fraudulent deceptions although the fraud has taken another-form than that of imitating a trade-mark."

And at p. 317 it is said:

"A dealer may not present contrary to the fact that he is agent for a manufacturer."

One of the cases relied upon in support of this last passage is the case of *Wheeler & Wilson Manufacturing Co.* v. *Shakespear* (1). In that case, the defendant acted for a number of years as agent of the plaintiffs for sale of certain machines. After he had ceased to be their agent, he commenced selling machines made according to the principle patented by the plaintiffs, and to such sale there could be no objection as the patent had expired. But he effected his sales in a manner so as to hold himself out as an agent of the plaintiffs, and he was restrained by an injunction from doing so. In this case in the course of his judgment, James V. C., said at p. 41:

"That is in my opinion a gross fraud in fact upon the plaintiffs, and an unjustifiable falsehood which this Court will restrain. I presume it is impossible for them to say whether they are injured or not. How can any manufacturer say what injury he sustains, or may sustain, by some person holding himself out to the world as his agent when he is not his agent, when that person, as appears here, is using the name for the purpose of saying he has got something better than this article to sell? Therefore it seems to me the plaintiffs have made out a case of fraudulent representation on the part of the defendant, calculated in the judgment of this Court to do them an injury; at all events, one which they are entitled to prevent, as any body, is, with respect to a person who, having once been their agent, represents himself wrongfully still to be their agent, after having in fact ceased to be so."

The present case is a converse case and to a certain extent these observations apply to it. It may be that the defendants got their supplies direct from the Manchester Mills before the plaintiffs secured their monopoly and now they are afraid of losing their old customers who are likely to place their orders with the plaintiffs direct, and buy from them these goods at the same price at which the plaintiffs sell them to the defendants, the defendants have adopted this means of representing to their customers that there is no intermediary between them and the manufacturers and that the grey shirtings supplied to the defendants are superior to those supplied to the plaintiffs to the great prejudice of the plaintiffs and the intending buyer. Attempts to deceive unwary purchasers by false representations by the use of devices may be made in different forms, and

"it is a question of fact in each case whether there is a false representation or not: per Turner L. J., in *Burgess* v *Burgess* (2). Likewise the degree of readiness with which the Court will infer the probability of deception must depend upon the circumstances of each case: per Parker, B in *Burberrys* v. *Cording* (3), 701."

For the purposes of the present application, I am satisfied that the mode in which the defendants are using the device on cloth purchased from the plaintiffs is likely to deceive unwary purchasers that they are buying goods superior to those supplied by the plaintiffs and not those which have been bought by the defendants from the plaintiffs but those purchased by the defendants directly from the manufacturers.

As at present I am not deciding the case I do not wish to go into the question whether the defendants have been using their device from 1928, or into the question whethre their device has acquired a reputation in the market or into the further questions whether the plaintiffs themselves are entitled to use their device upon the goods to the prejudice of the rights of the Japanese firms, or whether the plaintiffs have lost their right or whether the device which has, as its chief features, a disc and rays similar to those in question, has become public property or not. Some of these questions will come up again before me in the connected suits where applications for interlocutory injunctions are pending, and will certainly come up again in this case for final disposal after the evidence is recorded. At present, I think, all that I need hold is that the plaintiffs have made out a prima facie case for the injunction continuing against the defendants in so far that the defendants should be restrained from using a device similar to that of the plaintiffs on grey shirtings manufactured by the Manchester Mills and of which the plaintiffs have a monopoly, and which can only be purchased from the plaintiffs. I therefore limit the injunction issued to the defendants to that extent. I reserve liberty to the plaintiffs to apply for an injunction in respect of grey shirtings manufactured by other mills if occasion arises.

(1) [1869] 39 L. J. Ch. 36.

(2) [1853] 3 D. E. G. M. & G. 896.
(3) [1909] 26 R. P. C. 693=100 L. T. 985.

The plaintiffs seemed to have been unaware of the means employed by the defendants to prevent their sales to outside dealers and have not put their case in their plaint so clearly as they might have done, but the case is at its initial stage, and in order to prevent any difficulty hereafter arising on that score, they should make their plaint more definite in the light of the facts admitted by the defendants in their affidavits. Costs of this application to be costs in the cause.

P.N./R.K. *Order accordingly.*

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132	"	"	378	321	1931	"	33	435	1932	"	145								

I. L. R. 7 Lucknow (1 to 10 Parts)=All India Reporter.

(*Parts* 11 *and* 12 *are not received till* 1st *March* 1933. *For Comparative Tables of these parts, see Comparative Tables for the next year.*)

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
1	1932	*PC*	76	128	1931	*O*	345	250	1932	*O*	46	397	1932	*O*	69	511	1932	*O*	317
16	1931	*O*	288	131	"	"	333	257	"	*PC*	158	403	"	"	77	526	"	"	143
26	1932	"	314	171	"	"	318	270	"	*O*	1	405	"	"	88	528	"	"	249
32	1931	"	296	175	"	"	364	292	"	"	82	411	"	"	40	530	"	"	274
38	"	"	356	179	"	"	369	300	"	"	71	421	"	"	77	543	"	"	103
41	"	"	285	194	1932	*PC*	137	313	"	"	49	425	"	"	79	552	"	"	99
49	"	"	351	198	1931	*O*	293	320	1933	"	92	430	"	"	34	564	"	"	172
51	"	"	281	203	"	"	307	324	1932	*PC*	172	442	"	*PC*	207	573	"	"	33
64	1932	*PC*	89	208	"	"	388	341	"	*O*	18	454	"	*O*	123	578	"	"	180
73	1931	*O*	263	219	"	"	387	350	"	"	63	493	"	"	44	583	"	"	118
94	"	"	378	222	"	"	417	360	"	"	90	498	"	"	98	588	1933	"	170
102	"	"	274	226	"	"	426	382	"	*PC*	191	501	"	"	27	590	1932	"	148
111	"	"	352	237	1932	"	54	390	"	*O*	23	505	"	"	66	601	"	"	210
116	1932	"	283																

9 Oudh Weekly Notes=All India Reporter

OWN	A. I. R.			OWN	A. I. R.			OWN	A. I. R.			OWN	A. I. R.			OWN	A. I. R.		
1	1932	*O*	249	152	1932	*O*	103	315	1932	*Notes* 9*b*		444	1932	*O*	253	638	1932	*PC*	207
3	"	"	317	159	"	"	274	319	"	*O*	251	447	"	"	231	647	"	"	161
17	"	"	140	170	"	"	324	321	"	*Notes* 16*c*		451	"	*Notes* 17*b*		655	"	*O*	279
21	"	"	144	180	"	*PC*	76	327	"	*O*	321	461	"	*O*	193	660	"	"	327
24	"	"	143	191	"	*O*	156	334	"	"	242	474	"	*PC*	137	677	"	"	281
25	"	*PC*	25	196	"	*PC*	89	339	"	"	271	478	"	"	142	681	"	*PC*	165
32	"	*O*	99	201	"	"	92	343	"	"	233	488	"	*O*	199	687	"	*O*	288
43	"	*PC*	55	209	"	*O*	148	350	"	*Notes* 11*b*		513	"	"	246	691	"	*PC*	216
49	"	*O*	142	216	"	"	145	355	"	*O*	190	515	"	*PC*	138	725	1933	*O*	153
53	"	*PC*	51	221	"	"	158	362	"	"	182	523	"	*O*	244	728	1932	*PC*	199
60	"	*O*	123	227	"	"	167	376	"	"	219	529	"	"	267	737	"	"	178
91	"	*PC*	74	229	"	"	152	379	"	"	227	532	"	"	225	745	"	*O*	290
96	"	*O*	115	234	"	"	180	387	1933	"	9	538	"	"	210	750	1933	"	107
102	"	"	107	239	"	"	165	396	1932	"	224	557	"	"	268	766	1932	"	287
103	"	"	134	243	"	*Notes* 12*c*		399	"	*PC*	81	563	"	"	265	771	"	*PC*	202
105	"	"	108	250	"	*O*	176	414	"	*O*	222	568	"	"	264	782	"	*O*	298
115	"	"	120	253	"	"	255	418	"	*PC*	32	571	"	*PC*	191	800	"	"	282
116	"	"	113	275	1933	"	6	423	"	"	102	577	"	"	158	803	"	"	293
119	"	*PC*	28	280	1932	"	178	430	"	*O*	220	585	"	*O*	235	813	"	"	342
127	"	"	57	285	"	"	186	434	"	"	218	599	"	*PC*	182	817	"	*PC*	231
134	"	*O*	114	291	"	"	168	436	"	"	230	610	"	*O*	273	824	"	*O*	311
137	"	*PC*	34	301	"	*Notes* 7*b*		437	"	"	247	614	"	*PC*	172				
141	"	*O*	118	304	"	*O*	172	440	"	*Notes* 6*b*		628	"	"	196	829	"	*PC*	235
145	"	*Notes* 20*d*		313	"	"	249	442	"	"	10*b*	633	"	*O*	291	835	1933	*O*	38

9 Oudh Weekly Notes=All India Reporter—(*Concld.*)

OWN	A. I. R.			OWN	A. I. R.			OWN	A. I. R.			OWN	A. I. R.			OWN	A. I. R.		
839	1932	*PC*	240	923	1933	*O*	28	986	1933	*O*	69	1052	1933	*O*	104	1136	1933	*O*	86
847	"	*O*	313	929	1932	*PC*	251	990	1932	*PC*	252	1059	"	"	40	1144	"	"	79
852	1933	"	51	930	"	"	118	997	1933	*O*	41	1063	"	"	102	1146	"	"	59
855	1932	"	343	943	1933	*O*	37	1005	"	"	67	1067	"	"	94	1161	"	"	52
857	"	*PC*	244	945	"	"	31	1008	"	"	70	1078	"	"	84	1165	"	"	83
866	1933	*O*	13	948	"	"	38	1012	"	"	58	1079	"	"	75	1169	1932	*Notes*	15*d*
870	1932	"	306	950	"	"	27	1015	1932	*Notes*	8*c*	1081	"	"	81	1171	"	"	15*f*
875	"	"	308	954	"	"	49	1019	1933	*O*	63	1085	"	"	99	1176	1933	*O*	100
882	"	*FC*	228	958	"	"	72	1024	"	"	80	1089	"	"	15	1181	"	"	45
892	"	"	279	961	"	"	18	1027	"	"	35	1100	"	"	97	1189	"	"	122
896	"	*O*	326	962	1932	*Notes*	14*d*	1032	"	"	33	1104	"	"	4	1191	1932	*Notes*	13*c*
900	"	"	336	963	1933	*O*	21	1037	"	"	76	1109	"	"	19	1196	1933	*O*	50
912	"	"	286	966	"	"	22	1043	"	"	73	1113	1932	*PC*	269	1198	"	"	85
914	"	*PC*	234	977	"	"	53	1049	"	"	62	1128	1933	*O*	1	1202	"	"	66
915	"	"	134																

16 Revenue Decisions=All India Reporter

RD	A. I. R.			RD	A. I. R.			RD	A. I. R.			RD	A. I. R.			RD	A. I. R.		
1	1932	*O*	121	102	1932	*A*	35	369	1932	*A*	241	463	1932	*A*	437	547	1933	*O*	28
9	1931	*Notes*	13*b*	106	"	"	37	373	"	"	358	466	"	"	434	560	1932	*A*	693
12	"	"	10*c*	110	"	"	178	380	"	"	256	472	"	*O*	273	561	1933	"	44
18	1932	*A*	163	120	"	"	134	400	"	"	483	476	"	*A*	666	564	1932	"	701
20	"	"	82	130	"	*O*	76	403	"	"	416	481	"	"	589	567	1933	*O*	38
22	"	"	152	132	"	*A*	98	406	"	"	481	487	"	*O*	281	569	"	"	67
26	"	"	169	186	"	"	52	409	"	"	457	490	"	"	288	572	"	"	70
56	1930	"	217	188	"	"	81	413	"	"	415	494	1933	"	153	580	"	*A*	110
58	1932	*O*	140	190	"	"	272	428	"	"	539	497	1932	*A*	663	583	"	"	91
62	"	"	144	222	"	"	252	429	"	"	473	499	"	*O*	290	589	"	*O*	79
66	"	*A*	149	246	"	*O*	199	434	"	"	460	506	"	*A*	499	591	"	*A*	60
76	1931	"	695	293	"	*A*	273	436	"	"	465	522	"	*PC*	235	595	"	"	55
78	1932	"	196	320	"	*O*	180	438	"	"	502	531	"	*A*	509	597	1932	"	480
87	1931	"	656	325	"	*A*	436	448	"	"	372	535	"	*PC*	264	599	"	"	508
95	1932	*PC*	28	327	"	"	293	450	"	"	643	539	"	"	279				

(Board of Revenue cases are not included.)

17 & 18 All India Criminal Reports=All India Reporter.

Please refer to COMPARATIVE TABLE *No. I in A. I. R.* 1932 *Allahabad.*

33 Cr. L. J. & 135 to 140 I. C.=All India Reporter.

Please refer to COMPARATIVE TABLE *No. I in A. I. R.* 1932 *Lahore.*

1932 Cr. C.=All India Reporter.

Please refer to COMPARATIVE TABLE *No. I in A. I. R.* 1932 *Nagpur.*

TABLE No. II.

Showing seriatim the pages of the ALL INDIA REPORTER, 1932 OUDH with corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

N.B.—Column No. 1 denotes pages of ALL INDIA REPORTER 1932 OUDH.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS and PERIODICALS

A. I. R. 1932 Oudh=Other Journals

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	8	*O W N*	1160	11	136	*I C*	321	23	1932	*Cr C*	55	27	33	*Cr L J*	278
	138	*I C*	800	18	8	*O W N*	1221		33	*Cr L J*	167		136	*I C*	248
	7	*Luck*	270		1932	*Cr C*	50		135	*I C*	392		17	*A I CrR*	461
8	8	*O W N*	1023		33	*Cr L J*	163		17	*A I CrR*	302		7	*Luck*	501
	15	*R D*	637		135	*I C*	384		7	*Luck*	390	28	8	*O W N*	1325
	135	*I C*	698		17	*A I CrR*	307	25	8	*O W N*	1249		1932	*Cr C*	60
10	8	*O W N*	1366		7	*Luck*	341		1932	*Cr C*	57		33	*Cr L J*	275
	136	*I C*	331	21	8	*O W N*	1182		135	*I C*	382		136	*I C*	248
11	8	*O W N*	1240		134	*I C*	1020		33	*Cr L J*	162		17	*A I CrR*	466
	16	*A I CrR*	441		1932	*Cr C*	53		17	*A I CrR*	298	31	8	*O W N*	1333
	1932	*Cr C*	43		33	*Cr L J*	46	27	8	*O W N*	1373		1932	*Cr C*	63
	33	*Cr L J*	287	23	8	*O W N*	1215		1932	*Cr C*	59				

A. I. R. 1932 Oudh=Other Journals—(*Contd.*)

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
31	33	*Cr L J*	280	81	15	*R D*	704	134	138	*I C*	630	190	137	*I C*	800
	18	*A I CrR*	38		12	*LRARev*	368	135	8	*O W N*	1275		33	*Cr L J*	542
	136	*I C*	249		135	*I C*	399		15	*R D*	745		18	*A I CrR*	319
33	8	*O W N*	1286	82	8	*O W N*	1191		135	*I C*	689	193	9	*O W N*	461
	1932	*Cr C*	65		134	*I C*	1011		12	*LRARev*	409	**FB**	137	*I C*	574
	135	*I C*	691		7	*Luck*	292	137	8	*O W N*	1228	199	9	*O W N*	488
	33	*Cr L J*	193	85	8	*O W N*	1198		135	*I C*	387	**FB**	137	*I C*	606
	17	*A I CrR*	380		134	*I C*	872	140	9	*O W N*	17		16	*R D*	246
	7	*Luck*	573	88	8	*O W N*	1313		16	*R D*	58		13	*LRARev*	246
34	8	*O W N*	1343		136	*I C*	222		13	*LRARev*	39	210	9	*O W N*	538
	136	*I C*	209		7	*Luck*	405		136	*I C*	700	**FB**	138	*I C*	725
	7	*Luck*	430	90	8	*O W N*	1400	142	9	*O W N*	49		7	*Luck*	601
39	8	*O W N*	1341		135	*I C*	881		137	*I C*	737	218	9	*O W N*	434
	135	*I C*	890		7	*Luck*	360	143	9	*O W N*	24		1932	*Cr C*	521
40	8	*O W N*	1291	98	8	*O W N*	1376		136	*I C*	701		138	*I C*	156
	135	*I C*	369		1932	*Cr C*	161		7	*Luck*	526		33	*Cr L J*	569
	7	*Luck*	411		136	*I C*	641	144	9	*O W N*	21	219	9	*O W N*	376
44	8	*O W N*	1355		33	*Cr L J*	342		16	*R D*	62		138	*I C*	490
	15	*R D*	781		7	*Luck*	498		13	*LRARev*	42	220	9	*O W N*	430
	136	*I C*	254	99	9	*O W N*	32		136	*I C*	702		138	*I C*	149
	13	*LRARev*	16		1932	*Cr C*	162	145	6	*Luck*	435	222	9	*O W N*	414
	7	*Luck*	493		33	*Cr L J*	381		9	*O W N*	216		138	*I C*	137
46	8	*O W N*	1153		137	*I C*	79		1932	*Cr C*	222	224	9	*O W N*	396
	137	*I C*	678		18	*A I CrR*	114		33	*Cr L J*	343		138	*I C*	199
	7	*Luck*	250		7	*Luck*	552		136	*I C*	810	225	9	*O W N*	532
49	8	*O W N*	1210	103	9	*O W N*	152	148	9	*O W N*	209		138	*I C*	716
	135	*I C*	390		1932	*Cr C*	166	**FB**	137	*I C*	768	227	9	*O W N*	379
	7	*Luck*	313		139	*I C*	742		7	*Luck*	590		138	*I C*	513
51	8	*O W N*	1281		33	*Cr L J*	926	151	7	*O W N*	1043	230	9	*O W N*	436
	15	*R D*	751		7	*Luck*	543		129	*I C*	162		138	*I C*	160
	135	*I C*	693	106	8	*O W N*	1179		6	*Luck*	393	231	9	*O W N*	447
54	8	*O W N*	1105		138	*I C*	796	152	9	*O W N*	229		139	*I C*	618
	134	*I C*	1093	107	9	*O W N*	102	**FB**	137	*I C*	42	233	9	*O W N*	343
	7	*Luck*	237		138	*I C*	627	154	8	*O W N*	1117		137	*I C*	804
57	8	*O W N*	1322	108	9	*O W N*	105		134	*I C*	1022	235	9	*O W N*	585
	135	*I C*	892		139	*I C*	292	156	9	*O W N*	191	**FB**	139	*I C*	298
59	8	*O W N*	1103	113	9	*O W N*	116		137	*I C*	151	242	1932	*Cr C*	405
	15	*R D*	675		1932	*Cr C*	186	158	9	*O W N*	221		9	*O W N*	334
	134	*I C*	1104		139	*I C*	636		137	*I C*	814		137	*I C*	684
	12	*LRARev*	377		18	*A I CrR*	136	161	8	*O W N*	1138		33	*Cr L J*	506
60	8	*O W N*	1263		33	*Cr L J*	811		125	*I C*	395		18	*A I CrR*	259
	137	*I C*	495	114	9	*O W N*	134	163	8	*O W N*	1207	244	9	*O W N*	523
61	8	*O W N*	1318		1932	*Cr C*	187		134	*I C*	1017		138	*I C*	808
	135	*I C*	893		33	*Cr L J*	383	164	137	*I C*	732	246	9	*O W N*	513
63	8	*O W N*	1267		137	*I C*	71	165	9	*O W N*	239		137	*I C*	603
	135	*I C*	695		18	*A I CrR*	62		137	*I C*	217	247	9	*O W N*	437
	7	*Luck*	350	115	9	*O W N*	96	167	9	*O W N*	227		1932	*Cr C*	526
66	8	*O W N*	1090		1932	*Cr C*	188		136	*I C*	838		138	*I C*	159
	135	*I C*	379		33	*Cr L J*	812	168	9	*O W N*	291		33	*Cr L J*	566
	7	*Luck*	505		139	*I C*	736		138	*I C*	128	249 (1)	9	*O W N*	1
69	8	*O W N*	1186	118	9	*O W N*	141	172	9	*O W N*	304		136	*I C*	336
	134	*I C*	878		1932	*Cr C*	191		137	*I C*	349		7	*Luck*	528
	7	*Luck*	397		33	*Cr L J*	809		7	*Luck*	564	249 (2)	137	*I C*	621
71	8	*O W N*	1302		139	*I C*	737	176	9	*O W N*	250		9	*O W N*	313
	135	*I C*	372		7	*Luck*	583		137	*I C*	223		33	*Cr L J*	492
	7	*Luck*	300	120	9	*O W N*	115	178	9	*O W N*	280		1932	*Cr C*	590
76	8	*O W N*	1353		1932	*Cr C*	193		139	*I C*	61		18	*A I CrR*	213
	16	*R D*	130		33	*Cr L J*	384	180	9	*O W N*	234	251 (1)	9	*O W N*	319
	136	*I C*	335		136	*I C*	839		13	*LRARev*	148		137	*I C*	625
77 (1)	8	*O W N*	1371		18	*A I CrR*	150		16	*R D*	320		33	*Cr L J*	511
	135	*I C*	383	121	8	*O W N*	1397		137	*I C*	68		1932	*Cr C*	592
	7	*Luck*	403		16	*R D*	1		7	*Luck*	578		18	*A I CrR*	249
77 (2)	8	*O W N*	1337		13	*LRARev*	103	182	9	*O W N*	362	251 (2)	8	*O W N*	517
	136	*I C*	252		136	*I C*	703		137	*I C*	793		134	*I C*	401
	7	*Luck*	421	122	8	*O W N*	1364	186	9	*O W N*	285		32	*Cr L J*	1184
79	8	*O W N*	1359		15	*R D*	808		1932	*Cr C*	443		6	*Luck*	658
	15	*R D*	785		136	*I C*	256		138	*I C*	123		1932	*Cr C*	592
	13	*LRARev*	20	123	9	*O W N*	60		33	*Cr L J*	561	253	9	*O W N*	444
	7	*Luck*	425		137	*I C*	102		18	*A I CrR*	343		138	*I C*	145
	136	*I C*	333		7	*Luck*	454	190	1932	*Cr C*	373	255	9	*O W N*	253
81	8	*O W N*	1135	134	9	*O W N*	103		9	*O W N*	355				

A. I. R. 1932 Oudh=Other Journals—(*Concld.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
255	139	*I C*	64	281	13	*LRARev*	312	293	140	*I C*	412	317	18	*A I CrR*	124
264	9	*O W N*	568		140	*I C*	700	298	9	*O W N*	782		33	*Cr L J*	920
	139	*I C*	365	282	6	*Luck*	703		19	*A I CrR*	77		7	*Luck*	511
265	9	*O W N*	563		9	*O W N*	800		34	*Cr L J*	58		1932	*Cr C*	872
	139	*I C*	362		139	*I C*	622		140	*I C*	689	321	9	*O W N*	327
267	9	*O W N*	529	283	8	*O W N*	800		1932	*Cr C*	838		137	*I C*	665
	138	*I C*	711		134	*I C*	411	305	6	*Luck*	693		33	*Cr L J*	502
268	9	*O W N*	557		7	*Luck*	116	306	9	*O W N*	870		18	*A I CrR*	233
	139	*I C*	358	286	9	*O W N*	912		33	*Cr L J*	933		1932	*Cr C*	876
271	9	*O W N*	339		140	*I C*	460		140	*I C*	185	324	9	*O W N*	170
	138	*I C*	30	287	9	*O W N*	766		1932	*Cr C*	846		137	*I C*	63
273	9	*O W N*	610		1932	*Cr C*	791	308	9	*O W N*	875		33	*Cr L J*	379
	16	*R D*	472		141	*I C*	511		1932	*Cr C*	848		17	*A I CrR*	456
	13	*LRARev*	303	288	9	*O W N*	687	311	6	*Luck*	663		1932	*Cr C*	879
	139	*I C*	498		16	*R D*	490		9	*O W N*	824	326	9	*O W N*	896
274	9	*O W N*	159		13	*LRARev*	319		139	*I C*	723		141	*I C*	759
	137	*I C*	170		140	*I C*	483	313	6	*Luck*	697	327	9	*O W N*	660
	7	*Luck*	530	290	9	*O W N*	745		9	*O W N*	847		141	*I C*	199
279	9	*O W N*	655		16	*R D*	499		139	*I C*	633	336	9	*O W N*	900
	1932	*Cr C*	697		13	*LRARev*	328	314	7	*Luck*	26	342	6	*Luck*	710
	140	*I C*	706		141	*I C*	706		8	*O W N*	522		9	*O W N*	813
	34	*Cr L J*	99	291	9	*O W N*	633		139	*I C*	626		139	*I C*	631
281	9	*O W N*	677		139	*I C*	367	317	9	*O W N*	3	343	9	*O W N*	855
	16	*R D*	487	293	9	*O W N*	803		139	*I C*	751		140	*I C*	190

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Jai Indar Bahadur Singh v. Mt. Brij Indar Kuar, (1929) 6 O. W. N. 334 =A. I. R. 1929 Oudh 231=117 I. C. 748, (F.B.).	Reversed in A.I.R. 1932 P.C. 191.
Lasa Din v. Mt. Gulab Kunwar, (1929) 125 I. C. 390=A. I. R. 1929 Oudh 536=6 O. W. N. 925.	,, in A.I.R. 1932 P.C. 207.
Phuljhari, Mt. v. Har Prasad, (1926) 1 Luck. 318=3 O. W. N. 181=13 O.L.J. 548=A. I. R. 1926 Oudh 338 =93 I. C. 378.	Overruled in A.I.R. 1932 Oudh 199 (FB).

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ALL INDIA REPORTER
1932
OUDH CHIEF COURT

* A. I. R. 1932 Oudh 1

WAZIR HASAN, C. J. AND
SRIVASTAVA, J.

Amir Mirza Beg and *others*—Appellants.

v.

Lachhmi Narain and *others*—Respondents.

First Appeal No. 44 of 1930, Decided on 9th September 1931, against decree of Sub-Judge, Sitapur, D/- 18th December 1929.

(a) Limitation Act (1908), S. 19—English authorities are not helpful to decide questions regarding acknowledgment in Limitation Act.

There is a fundamental difference in the theory of acknowledgment according to the law in India as compared with the law of England. In England the acknowledgments or part payments in order to be effective must be such as to amount to a fresh promise to pay. Under the Indian law no promise to pay either express or implied is required. Therefore the English authorities cannot afford any guidance in determining the question regarding acknowledgment, which must be decided on the proper construction of the provisions of the Limitation Act: *Bolding* v. *Lane*, (1863) 32 *L. J. Ch.* 219; *Chinnery* v. *Evans*, (1864) 11 *H. L.* 115; *Lewin* v. *Wilson*, (1886) 11 *A. C.* 639 and *Newbould* v. *Smith* (1889), 14 *A. C.* 423, *Ref.* [P 4 C 2]

(b) Limitation Act (1908), S. 20—Part payment—Fresh Limitation starts against payee as well as all other persons.

Part payment by any person liable to pay the debt gives a fresh period of the limitation not only against the person making the payment but against all other persons. [P 5 C 1]

***(c) Limitation Act (1908), S. 19—Acknowledgment by mortgagor gives a fresh start of limitation even as against subsequent mortgagee whether subsequent mortgage is effected either before or after such acknowledgment.**

An acknowledgment by a mortgagor can be used against a subsequent mortgagee as giving a fresh period of limitation in favour of the prior mortgagee and as against the subsequent mortgagee whether the subsequent mortgage is made before or after the acknowledgment has been made because whether the mortgage is made before or after the acknowledgment, in either case the subsequent mortgagee derives his title from the mortgagor: 1 *C. L. J.* 337; *A. I. R.* 1925 *Mad.* 1108, *not Foll.*; 32 *Cal.* 1077; 62 *I. C.* 833; 51 *I. C.* 829; *A. I. R.* 1930 *Oudh* 56 and 8 *O. W. N.* 522, *Rel. on.* [P 5 C 1]

(d) Limitation Act (1908), S. 19—Acknowledgment must be made by person possessing some interest in right or liability.

An acknowledgment of liability or right presupposes an acknowledgment by a person possessed of some interest which can be bound by the acknowledgment. If the person making the acknowledgment has no interest whatsoever, then such acknowledgment would not have the "legal quality" of an acknowledgment and can therefore be of no consequence: *Chinnery* v. *Evans*, (1864) 11 *H. L.* 115, *Ref.* [P 5 C 2]

(e) Mortgage—Where consideration amount is denied by defendant, plaintiff has to prove its genuineness.

In a suit on a mortgage bond where the consideration of the mortgage deed is denied by the defendants it is the duty of the plaintiff to prove that the consideration was real and genuine. [P 7 C 2]

P. L. Banerji and *Makund Behari Lal*—for Appellants.

M. Wasim, *Ali Zaheer*, *Ch. Narain Harkauli* and *R. B. Ram Prasad Varma*—for Respondents.

Judgment.—This appeal arises out of a suit based on a mortgage deed. It was executed on 16th November 1912 by Hamid Mirza Beg and Amir Mirza Beg, defendants 1 and 2, in favour of L. Lachhmi Narain alias Babbaji, plaintiff 1, for a sum of one lakh of rupees in respect of the mortgagor's six annas share in 34 villages forming part of Taluka Aurangabad in the Sitapur District. The mortgage is a simple one and carries interest at the rate of 1 per cent per mensem compoundable with six-monthly rests. The term fixed in the mortgage was ten years and the mortgagee was also authorized to sue for the mortgage money in case of the mort-

gagors' failure to pay the full interest for four half-yearly periods. Plaintiffs 2 to 4 are members of a joint and undivided Hindu family along with plaintiff 1 and the remaining plaintiffs 5 to 8 are assignees in respect of a half-share in the mortgage deed in suit. The plaintiffs released two villages Bakchhirwa and Raghunathpur with their hamlets from their security and confined their claim to the mortgagors' share in the remaining 32 villages.

Defendants 3 to 90 were impleaded as subsequent transferees of the mortgaged property. Defendants 92, 94 and 95 are submortgagees of plaintiffs 1 to 3 in respect of the mortgage deed in suit. Defendants 91 and 93 are transferees of the two subsequent mortgages held by plaintiff 1 in respect of the mortgaged property in suit. Lastly defendants 96 to 99 were made party defendants because of their having attached the property in suit in execution of their money decree against the mortgagors.

In order to save limitation the plaintiffs set up certain acknowledgments of the mortgage deed in suit made by defendants 1 and 2 in 1917 and 1918. The relief claimed was a decree for Rs. 4,95,000-11-3 in default of the payment of which the property was to be sold.

The defendants pleaded that the mortgage deed in suit was without consideration and that the earlier pro-notes and debts mentioned in the deed in suit were fictitious and without consideration. They alleged that defendants 1 and 2 were of extravagant habits living beyond their income. They further averred that defendants 1 and 2 executed pro-notes and mortgage deeds in favour of the plaintiff in anticipation of their estate being placed under the management of the Court of Wards, so that the money due in respect of them could be realized from the Court of Wards, the plaintiff having represented that on his realizing the money from the Court of Wards he would give it to the defendants after deducting 10 per cent of it for his remuneration. They also pleaded that the suit was barred by limitation. Some other defences were also raised, but they are no longer important and need not be taken notice of.

The learned Subordinate Judge framed eight issues and came to the conclusion that the mortgage deed in suit was for consideration only to the extent of Rs. 22,048-7-0, the rest of the consideration being fictitious. He also found that the acknowledgments of liability in respect of the mortgage deed in suit made by defendants 1 and 2 had the effect of extending limitation against the mortgagors as well as their transferees, whether prior or subsequent to the date of acknowledgment, and the claim was therefore within limitation. He accordingly gave the plaintiffs a decree for sale in respect of the mortgaged property with the exception of the two villages released by them for recovery of the aforesaid amount of Rs. 22,048-7-0 together with interest thereon at the contractual rate till the date fixed for payment with future interest at 6 per cent. He further directed that the amount due to submortgagees, defendants 92, 94 and 95, should be paid first out of the sale proceeds and the balance paid to the plaintiffs. Only three of the defendants, namely, Amir Mirza Beg, defendant 2, and two of the subsequent mortgagees, Mt. Krishna Bibi, defendant 43, and Ganesh Prasad, defendant 90, have appealed to this Court. The plaintiffs-respondents have filed cross-objections. In the first place it has been contended on behalf of the two appellants who are the subsequent mortgagees that the acknowledgments of liability made by the mortgagors cannot extend limitation against them as the transfers in their favour were made before the making of the acknowledgments by the mortgagors. The acknowledgments relied upon by the plaintiffs are to be found in two mortgage deeds executed by Hamid Mirza, namely, Ex. 21, dated 31st January 1917 and Ex. 4 dated 12th July 1918 and in a deposition of Amir Mirza, Ex. 7, dated 29th July 1917. It may be noted that defendant 43 Krishna Bibi, who is appellant 2, is a mortgagee under a mortgage deed, Ex. 27, dated 27th October 1915 and defendant 90, Ganesh Prasad, appellant 3, is a mortgagee under the deed Ex. 17 dated 12th January 1916.

Mr. Pyare Lal Banerji, the learned counsel for the appellants has not questioned the sufficiency of these acknowledgments made by Hamid Mirza and Amir Mirza in 1917 and 1918. He has however strenuously argued that the mortgages in favour of Krishna Bibi and Ganesh Prasad having been executed before the said acknowledgments were made, they cannot be said to have been made

by a person through whom the appellants derived title or liability within the meaning of S. 19, Lim. Act. Reliance has been placed upon several English and Indian decisions in support of the argument. Before we refer to the English decisions it will be convenient to quote so much of the provisions of the statutes of limitation, which were the subject of construction in these cases, as is necessary for the present purpose. 3 and 4 Wm. IV C. 27, S. 40 provides:

"that no action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 20 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto, or his agent."

Section 42 of this statute deals with actions for recovery of arrears of rent or interest and provides that no such arrears shall be recovered,

"but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

I Vict. C. 28 makes provision for actions by a mortgagee to recover the land

"at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage."

Bolding v. *Lane* (1) was a case the decision of which turned on the true construction of S. 42, 3 and 4 Wm. 4 C. 27. In this case it was held by Lord Westbury that an acknowledgment by a mortgagor of more than six years' arrears of interest being due upon first mortgage does not preclude a puisne mortgagee from relying on the statute of limitations.

In *Chinnery* v. *Evans* (2) the facts were that a mortgage was made of estates in Ireland, the estates being situate in three counties, Cork, Kerry, and Limerick. After that mortgage had been made the mortgagee presented a petition for the appointment of a receiver. Accordingly a receiver was appointed. The receiver entered into possession of the Limerick estate alone and from the rents received by him the interest was paid on the mortgage. Subsequently the equity of redemption of the estates situate in the counties Cork and Kerry was sold and conveyed by the mortgagors to different persons. The interest continued to be paid on the mortgage out of the Limerick estate exclusively. The question arose whether the mortgage still continued to attach to the Cork and Kerry estates. It was held that the payment by the receiver out of the rents of the Limerick estate was a payment which in law must be considered as made by the mortgagor in respect of the mortgage debt, and therefore prevented the statute of limitations operating as a bar to the demand as to any of the estates comprised in the mortgage. Lord Westbury in the course of his judgment observed that the words "by the person by whom the same shall be payable, or his agent" in S 40, 3 and 4 Wm. 4, C. 27 applied to both the cases, that is to say, to the case of payment of interest as well as to the case of acknowledgment. In dealing with an argument raised before him that the view of the statute adopted by him in this case interfered with the view taken by S. 42 of the statutes in the case of *Bolding* v. *Lane* (1), which was decided by him in the Court of Chancery, he observed as follows:

"But, my Lords, that arises upon a different section, and in reference to a different matter. The case of *Bolding* v. *Lane* (1) decided this: that if there were several incumbrances upon the same land, ranking in a series one after the other, payment made by the mortgagor would not keep alive the right of the first mortgagee to arrears of interest as against the second mortgagee. I think that that does not at all interfere with but, is in perfect harmony with the view which I now suggest to your Lordships to adopt. What was decided in *Bolding* v. *Lane* (1) was this: that the words, 'the person by whom the same is payable, or his agent' were words of such large import and meaning that they would not only comprehend the mortgagor and his personal representatives, upon whom the contract would be personally binding, but would also include the second or third mortgagee, by whom the principal and interest due to the first mortgagee might with propriety be said to be payable, inasmuch as the estate and right of the second mortgagee was subject and posterior to that of the first mortgagee, and he would be entitled to redeem the first mortgage upon the payment of the principal and interest. Accordingly, the effect of that acknowledgment in writing given under S. 42 was confined by that judgment, and I think correctly, to the interest of the individual giving that acknow-

(1) [1863] 32 L. J. Ch. 219=1 Deg. J. & S. 122=1 N. R. 248=9. Jur. (n. s.) 506=7 L. T. 812=11 W. R. 386.
(2) [1864] 11 H. L. C. 115.

ledgment. That however refers totally to different matter from the matter which is now before your Lordships, and which arises upon S. 40 of the 3 and 4 Will. 4, and on the other statute to which I have already called your attention."

A similar question came before their Lordships of the Privy Council on appeal from the Supreme Court of Canada in *Lewin* v. *Wilson* (3). The case was governed by the provisions of Cl. 84 of the Consolidated Statutes of New Brunswick. S. 29 of this statute deals with actions to recover money secured on land and legacies and provides a limit of 20 years after the right accrued

"unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent."

Section 30 of the same statute runs as follows:

"It shall and may be lawful for any person entitled to or claiming under any mortgage of land to make an entry, or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, such payment being made within tweaty years after the right of entry first accrued, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in this chapter to the contrary notwithstanding."

In this case two persons Howe and White executed a joint and several bond.

As between Howe and White the latter was a surety but they were both principal debtors to the obligee. On the same day each of them mortgaged some property to the obligee to secure the bond debt. White's mortgage expressly provided that if he and Howe or either of them paid the principal and interest according to the conditions of the bond, the mortgage deed was void, otherwise it would remain in full force. Interest on the debt was paid regularly by Howe up to a certain date. When the mortgagee brought a suit for foreclosure and sale of the property comprised in the mortgages the question arose whether the payments of interest made by Howe prevented time from running in favour of White. It was held by their Lordships of the Privy Council that the rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor, or his privy in estate, or the agent of either of them must be qualified so as to include any person who by the terms of the mortgage contract is entitled to make payments. Their Lordships emphasized the effect of the legislature having used the word "payment" in S. 30 without any qualification such as is clearly attached to the word "acknowledgment" in S. 29. They observed:

"If therefore we find that the legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it."

The same question came again before the House of Lords in *Newbould* v. *Smith* (4), but their Lordships did not consider it necessary to express any opinion upon the construction of the statute. Lord Herschell described it as "a serious question and one of general importance." Lord Macnaghten observed at p. 428:

"With regard to the important point on which the Court of appeal principally founded their judgment I desire to say that I express no opinion on it."

Thus it seems to us that there is no complete harmony in the English decisions on the subject. The decisions are based upon the construction of statutes the language of which is not identical with the language of S. 19, Limitation Act. They do not embody any general principle which can be regarded as of universal application. It has also to be borne in mind that there is a fundamental difference in the theory of acknowledgment according to the law in India as compared with the law of England. In England the acknowledgments or part payments in order to be effective must be such as to amount to a fresh promise to pay. Under the Indian Law no promise to pay either express or implied is required. We are therefore of opinion that the English authorities cannot afford any guidance in determining the question, which must be decided on the proper construction of the provisions of the Indian Limitation Act.

The Indian legislature has dealt with the question of acknowledgment and payment in two separate sections. S. 19 which deals with acknowledgment provides that it must be

"made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability."

(3) [1886] 11 A. C. 639=55 L. J. P. C. 75=55 L. T. 110.

(4) [1889] 14 A. C. 423.

Section 20 which deals with payment provides that the payment should be made

"by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf."

So it will be found that the legislature has used different language about the two cases and to use the words of their Lordships of the Privy Council quoted above

"we must not readily conclude that it has done so by accident or without meaning, it."

The learned counsel for the appellants conceded and all the authorities in this country are agreed that part payment by any person liable to pay the debt gives a fresh period of the limitation not only against the person making the payment but against all other persons. S. 19 allows acknowledgments to be made either by the party against whom such property or right is claimed or by some person through whom he derives title or liability. If the section had confined the acknowledgment to the person against whom the right is claimed then there should be no doubt that an acknowledgment by a mortgagor could not be used against a subsequent mortgagee but the section does not stop there. It allows acknowledgments to be made also by "some person through whom he derives title or liability." The question therefore arises whether a subsequent mortgagee does or does not derive title or liability from the mortgagor. This derivation of title is a matter quite intedependent on the making of an acknowledgment. Whether the mortgage was made before or after the acknowledgment in either case the mortgagee derives his title from the mortgagor. It is argued that when the section makes an acknowledgment by one person effective against another on the ground that the latter derives title or liability from the former the section must be deemed to contemplate that the derivation of the title or liability takes place after the making of that acknowledgment. The argument is attractive but seems to us hardly warranted by the precise language used by the legislature in the section. We cannot adopt this construction without reading in it words which are not there. It was sought to support the argument by using the analogy of S. 11, Civil P. C. It was argued that the words "between parties under whom they or any of them claim" used in S. 11 have always been construed to apply only to transferees in whose favour the transfer was made subsequent to the commencement of the first suit. It will be sufficient to say that S. 11 embodies the doctrine of res judicata and privity in estate between the parties is one of the essential elements of that doctrine. We are not aware of any such general principle forming an essential element of the rule regarding acknowledgments.

Great stress was also laid upon the consideration that if S. 19 is construed strictly according to the words used the mortgagor could extend limitation against a puisne mortgagee by making an acknowledgment of a prior mortgage even after he has parted with the equity of redemption. The argument does not appeal to us. An acknowledgment of liability or right presupposes an acknowledgment by a person possessed of some interest which can be bound by the acknowledgment. If the person making the acknowledgment has no interest whatsoever then such acknowledgment would not have the "legal quality" of an acknowledgment and can therefore be of no consequence. The following observations of Lord Westbury in *Chinnery* v. *Evans* (2) which were made with reference to a question of payment might be usefully quoted in this connexion:

"It was said in argument that if such an interpretation be given to the statute, it would be possible for a stranger to pay the interest to the mortgagee, and thereby to keep alive the mortgage. It is hardly necessary to deal with such an improbable case as that but the answer to it, I think would be this: that money paid, that is money handed over, by a stranger to the contract under which it was paid, to the individual entitled to receive it, would not have the characteristics and the legal quality of payment. It would be a voluntary render; a gift or donation, being made by a party not in any respect subject to liability to the individual who would not be entitled to receive from the person so rendering it any part of the money which it is supposed would be so paid."

Turning now to the decided cases in this country it must be admitted that the decisions are not uniform. The construction contended for by the appellants is supported by the opinion of Mookerjee, J., one of the Judges constituting the Bench that decided the case *Surjiram Marwari* v. *Barhamdeo Per-*

shad (5). This opinion was followed by a Bench of the Madras High Court in *Yagnanarayana* v. *Venkata Krishna Rao* (6). A contrary view was taken by Sir Francis W. Maclean, C. J., and Mitra, J., in *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (7), by a Bench of the Madras High Court in *Lakshman* v. *Muthaya Chetty* (8) and by the Allahabad High Court in *Arbindakab Rai* v. *Jageshar Rai* (9). The same view has been followed in two decisions of this Court, namely, *Nigah Ali Khan* v. *Aqilullah Khan* (10) and *Ram Sahai* v *Kunwar Sah* (11). In the latter of these cases to which one of us is a party it was observed that the question is not altogether free from difficulty and unless the legislature intervenes the interpretation put upon the section in *Nigah Ali Khan* v. *Aqilullah Khan* (10) should be adhered to. The appellant has failed to make out any compelling reasons to justify our making a departure from the view which has hitherto prevailed in this Court. We accordingly overrule the appellants' contention.

Next, it was contended for the appellants that the learned Subordinate Judge ought to have excluded from his decree villages Kheota and Hahlra, items 20 and 26 of the mortgaged property, as they were excepted from the deed. Para. 11 of the deed provides as follows :

"Let it be noted that the villages reserved for pocket expenses a detail of which is given below, are excepted from this deed.

Village Kheota with hamlet Rampur.

Village Dahlra with hamlet of Brahimpur and hamlet of Gatha appertaining to Shamshapur and Ludhaura appertaining to village Ashrafnagar and Chharia, hamlet Phoolpur and Bhitauli inclusive of hamlets and hamlet Mankapur."

The reply made on behalf of the plaintiffs-respondents was that the two villages Kheota and Dahlra with certain specific hamlets were exempted from the deed but other hamlets pertaining to these two villages were not exempted and for this reason the two villages named were included in the list of the mortgaged property appended to the deed. The list of the mortgaged property attached to the decree is exactly the same as that which forms part of the mortgage deed. We take it that the intention of the decree is to confine it to such hamlets of these two villages as are not exempted. After this expression of opinion by us we trust that there will be no room for doubt on the point.

It was also faintly argued by the learned counsel for the appellants that the rate of interest in the mortgage deed namely 1 per cent per mensem compoundable with six monthly rests is exorbitant and in case the defendants are held liable for only a part of the consideration of the mortgage deed the rate of interest should be reduced. Reference was made to Exs. 2, 3 and 76 deeds of agreements executed by the mortgagors in favour of the plaintiffs in relation to certain pro-notes executed by them in favour of the Allahabad Bank in which it was provided that in case the plaintiff who had joined in executing the pro-notes as a surety had to pay to the bank they will execute a deed in plaintiff's favour carrying an interest of 1 per cent per mensem. These deeds of agreement are silent on the question whether the interest was to be simple or compoundable. It is not the defendants' case that the rate of interest entered in the mortgage deed in suit was so entered by reason of any undue influence. It is also admitted that the Usurious Loans Act does not apply to the case. If the mortgage deed is upheld either in whole or part the mortgagors are bound to pay the contractual rate of interest in respect of the amount for which they are held liable. We must therefore reject the contention.

Lastly the appellant impugned the finding of the learned Subordinate Judge about the deed being for consideration to the extent of Rs. 22,048-7-0. The plaintiffs-respondents on the other hand in support of their cross-objections contended that they had succeeded in establishing the whole of the consideration. The result of the contentions of the parties on this point is to open up the whole of the finding of the learned Subordinate Judge on issue 2, which deals with the genuineness of the items forming the consideration of the mortgage deed. Therefore it will be convenient to dispose of the contentions of both the parties together. The mortgage deed Ex. 3 states that the mortgagors were indebted

(5) [1905] 1 C. L. J. 337.
(6) A. I. R. 1925 Mad. 1108=86 I. C. 434.
(7) [1905] 32 Cal. 1077=9 C. W. N. 868.
(8) [1921] 62 I. C. 833.
(9) [1919] 51 I. C. 829.
(10) A. I. R. 1930 Oudh 56=124 I. C. 435=5 Luck. 444.
(11) [1931] 8 O. W. N. 523.

to the plaintiff Lachhmi Narain to the amount of Rs. 122,960-1-0. They executed a pronote in favour of Lachhmi Narain for Rs. 22,960-1-0 and on the same date executed the mortgage deed in suit for Rs. 1,000,00 in his favour. The details of debts amounting to Rs. 122,960-1-0 are given in the mortgage deed as follows : (Then their Lordships gave the details of the said debts). Thus it will appear that this amount of Rs. 122,960-1-0 is made up of two items namely (i) on account of the bank debt Rs. 94-175-12-0 and (ii) on account of the debts of Lachhmi Narain plaintiff Rs. 28,784-5-0.

We will first deal with the item on account of the bank's debt. According to the plaintiff's case Amir Mirza Beg executed three pro-notes in favour of the plaintiff, one in 1910 or 1911 for Rs. 15,000, another on 21st February 1912 (Exs. 47) for Rs. 19,500 and the third on 20th March 1912 (Ex. 47) for Rs. 20,500. On 2nd April 1912 Hamid Mirza, Amir Mirza and Lachhmi Narain plaintiff jointly borrowed Rs. 65,000 from the Allahabad Bank on a hundi. Out of the amount raised by this loan Lachhmi Narain admittedly received Rs. 59,000, namely Rs. 55,000 in respect of three pro-notes above mentioned, and Rs. 4,000 on account of commission and interest. On the same date Amir Mirza Beg executed a deed of agreement Ex. 76 in favour of Lachhmi Narain in which he declared that the latter had signed the hundi in favour of the bank as a surety. It is also admitted and proved from a copy of the bank's account Ex. A-2 D. W. 2 that that very day, namely 2nd April 1912, Lachhmi Narain plaintiff put the amount of Rs. 59,000 which he received from Amir Mirza and Hamed Mirza in fixed deposit in the Allahabad Bank.

It may be noted that on the same date, i. e., 2nd April 1912 Amir Mirza Beg also executed a pro-note (Ex. 51) for Rs. 19,000 in favour of one Lala Ram Narain father of Brij Kishore to whom reference would be made hereafter.

Less than two months later on 29th May 1912 Amir Mirza, Hamid Mirza and Lachhmi Narain executed two joint hundis in favour of the Allahabad Bank, one for Rs. 90,000 : vide Ex. 44, and the other for Rs. 3,000 : vide Ex. 43. Both these hundis were executed on the security of Lachhmi Narain's fixed deposit in the bank amounting to Rs. 81,000. Out of this sum of Rs. 93,000, Rs. 65,000 were appropriated by the bank towards the previous debts dated 2nd April 1912.

Though the plaintiff had denied this fact in his deposition as a witness in the case yet Mr. Wasim, learned counsel for the plaintiff, has admitted before us that Rs. 22,000 out of the remaining Rs. 28,000 found their way to the plaintiff's hands. This sum of Rs. 22,000 was deposited by Lachhmi Narain the same day in the bank, thus increasing the amount of his fixed deposit from Rs. 59,000 to Rs. 81,000; see Ex. A 2, D. W. 2. The same fixed deposit of Rs. 81,000 was made security for the loan of Rs. 93,000 borrowed from the bank. Ex. 1 dated 8th October 1912, is the receipt of the Allahabad Bank showing that Lachhmi Narain paid Rs. 93,120-6-0 to the bank in the full discharge of the two hundis for Rs. 93,000. The bank item of Rs. 94,175-2-0 under consideration is made up of this sum of Rs. 93,120-6-0 and Rs. 1,055-6-0 on account of interest up to the date of the execution of the mortgage deed.

Having stated the history of this item we will now consider how much money was actually received by the mortgagors. It was argued on behalf of the plaintiffs that it was enough for them to show that Rs. 93,120-6-0 had been paid by the plaintiff to the Allahabad Bank and that the previous transaction could not be reopened in this case. We are unable to accept this argument. It is quite evident that the transactions with the Allahabad Bank were only part of a scheme adopted by the plaintiff in order to create evidence in support of his claim against defendants 1 'and 2. The plaintiff himself was a party to the bank transactions of 2nd April as well as of 29th May. The bulk of the money raised under transactions of both these dates never left the premises of the bank, and was only credited in the name of the plaintiff in his fixed deposit account. The consideration of the mortgage deed being denied by the defendants it is the duty of the plaintiff to prove that the consideration was real and genuine. Evidence having been adduced by both parties we have to arrive at a finding after examination of the entire evidence. (After considering the whole evidence, the judgment

proceeded): To sum up, the result is that out of the item of Rs. 28,784-5-0 the plaintiff has made good the consideration only to the following extent:

		Rs.	a.	p.
Item 1	... ...	150	0	0
Item 2	... ...	100	0	0
Item 3	... ...	26	5	0
Item 4	... ...	54	0	0
Item 5	... ...	16	5	0
Item 8	... ...	61	11	0
Item 9	... ...	425	0	0
Total Rs.		833	5	0
Add to this the total consideration made out in respect of the bank debts	... ...	21,345	6	0
Total Rs.		22,178	11	0

This amount is practically the same as found by the learned Subordinate Judge except for the corrections which we have made in regard to two items.

This disposes of all the arguments urged in support of the appeal and the cross-objections.

The result is that the appeal fails and is dismissed with costs. The cross-objections succeed to the extent of Rupees 130-4-0 only.

The decree of the lower Court will be modified to this extent that the amount payable to the plaintiffs will be put down at Rs. 22,178-11-0 instead of Rs. 22,048-7-0. In other respects the decree will stand. The cross-objections have practically failed except for an insignificant payment. The plaintiffs will pay the costs of the cross-objections to the appellants.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 8

KISCH, J.

Nanak Prasad and *others*—Plaintiffs—Appellants.

v.

Chandrika Prasad—Defendant—Respondent.

Second Rent. Appeal No. 15 of 1931, Decided on 17th August 1931, against decree of Dist. Judge, Gonda, D/- 17th December 1930.

(a) U. P. Land Revenue Act (1901), S. 126—Expropriety rights not given to party at partition cannot be claimed later—Partition record is conclusive as between parties to partition.

The partition record defines the rights of the parties to the partition as against each other finally and exhaustively and no party to a partition is entitled to deny the accuracy of the partition record, when to do so would be injurious to any other party. Hence it is not open to a party to assert expropriety or cognate rights, when such rights have not been given to them in the partition proceedings: 1 *R.D.* 843, *Foll.*; 1 *R.D.* 607 and 42 *All.* 91, *Ref.* [P 9 C 1, 2]

(b) U. P. Land Revenue Act (1901), S. 126—Expropriety rights given to party at partition—Entry of land in rent column of revenue papers at bila tasfia—No rent fixed—Such omission of partition officer is not sufficient to destroy expropriety rights.

Where expropriety rights have been given to a party during the partition proceedings and the entry of land in the rent column of the revenue papers is that it is bila tasfia and the party continues to hold the land in that capacity for about 12 years, the partition officer's failure or omission to fix the rent of the land as per provisions of S. 126 is not sufficient to deprive the party of his expropriety rights. [P 10 C 1]

L. S. Misra and *K. N. Chak*—for Appellants.

K. P. Misra—for Respondent.

Judgment.—The suits out of which these appeals arise and also the suits relating to Appeals Nos. 14 and 17 are closely connected and the facts in all the cases are identical. They were dealt with by the Courts below in a single judgment.

The three branches of the family of one Hira Lal constituted a joint Hindu family. The branches separated in 1917 when a perfect partition was made of the joint family village Gunwan in the district of Gonda, the village being partitioned into three mahals of five annas four pies each, one for each branch. The partition proceedings were drawn up on 18th April 1917 and were made final on 2nd May 1917. The partition was confirmed by the Deputy Commissioner of Gonda on 19th October 1918. There was a subsequent appeal by the plaintiffs in the present suits to the Commissioner and a further appeal to the Board of Revenue in connexion with the partition, these appeals being dismissed.

The five suits relate to certain plots which were the *sir* or khudkasht of over 12 years of the various defendants before the partition, but which in the partition proceedings were allowed to the mahals of the two sets of plaintiffs. No rent was fixed on these plots at the time of the partition. After the partition the defendants continued to cultivate them, the entry made in the rent column of the revenue papers subsequent to the partition being bila tasfia. This state of affairs continued until 21st July 1930,

when the plaintiffs instituted the present suits against the defendants under Ss. 108 and 127, Oudh Rent Act, for the recovery of arrears of rent for the last three years and their ejectment treating them as trespassers. The defence put up by the defendants was that they were ex-proprietory tenants of the plots in question.

Both the Courts below found in favour of the defendants and dismissed the suits.

The defendant in Appeals Nos. 14 and 17 of 1931 appears to have come to some agreement with the plaintiffs in those suits, and in spite of his success in the Courts below, when the appeals came on for hearing, he withdrew his defence and requested that the plaintiffs' suits be decreed against him. Separate orders have been passed in these two appeals and now I am only concerned with the remaining three cases.

It is contended on behalf of the plaintiff-appellants that the defendants were not given ex-proprietory rights in the plots in suit in the partition proceedings, that therefore they must be deemed to have waived such rights which accrued to them under the provisions of S. 126, North-West Provinces and Oudh Land Revenue Act, 1901, and that they cannot now be allowed to claim such rights after the confirmation of the partition. Reliance has been placed by the learned counsel for the plaintiffs-appellants on Select Decisions of the Board of Revenue in the case of *Mt. Shiba* v. *Umrao Singh* (1) and *Durga Pande* v. *Mewa Pande* (2). In the latter case the learned members of the Board of Revenue discussed at length all the previous rulings bearing on the point whether it was open to a party to assert ex-proprietory or cognate rights when such rights had not been given to them in the partition proceedings and came to the conclusion, in which they were fortified by the decision of the Allahabad High Court in *Gokaran Singh* v. *Ganga Singh* (3) that it was not. They held that the principle which governed the finality of partitions, and which had generally been accepted as authority by Courts, is that the partition record defines the rights of the parties to the partition as against each other finally and exhaustively, and no party to a partition is entitled to deny the accuracy of the partition record, when to do so would be injurious to any other party.

They further held that the provisions of Ss. 126 and 127, Land Revenue Act, give an exproprietary right in the circumstances described in them, but this is a right which may be waived, and if it is not claimed at the time of the partition, it is lost and cannot be claimed afterwards. There does not appear to be any decision of this Court on the point, but in my opinion the principles laid down in *Durga Pande* v. *Mewa Pande* (2) are sound law and not open to serious challenge. This decision would establish the contention of the learned counsel for the plaintiffs-appellants, if his premises were correct.

It is however contended by the learned counsel for the defendants-respondents that the defendants did claim, and were awarded exproprietary rights in the plots in suit in the partition proceedings. This is a question of fact which must be decided by reference to those proceedings which are before the Court. Paras. 6 and 7 of the partition proceeding which deal with *sir* and khudkasht of the cosharers, respectively, lay down that *sir* and khudkasht of over 12 years is to be allotted to the present holders and that as the partition will be chakbat, if this interferes with the chakbat partition, the *sir* and khudkasht of over 12 years of one cosharer will be given to another cosharer to make the partition compact as far as possible as is laid down in Ss. 125 and 126, Land Revenue Act. This means that the cosharers whose plots of *sir* and khudkhasht of over 12 years have, under these arrangements to be allotted to the mahal of another cosharer, will have exproprietary rights in such plots. Appended to these provisions of the partition proceeding is a list of *sir* and khudkasht plots of the various cosharers including the plots in suit. It thus seems to me to be clear that the partition officer had granted exproprietary rights in such plots in the partition proceedings. That this is so, and the parties well understood it to be so, is clear from the appeals filed by the plaintiffs to the partition in the Commissioner's Court. In these appeals the plaintiffs alleged that the very plots which form the subject of the present

(1) 1 R. D. 607.
(2) 1 R. D. 843.
(3) [1919] 42 All. 91=52 I. C. 779.

suits were the exproprietary holdings of the defendants and they wished them to to be allotted to the defendants' own mahals. These appeals were dismissed and further appeals to the Board of Revenue were also dismissed. After that the plaintiffs remained silent for about ten years leaving the defendants in undisturbed possession of the plots in question. Such being the facts it is clear to me that the defendants were given exproprietary rights in the plots in suit in the partition proceedings and cannot now be treated as trespassers by the plaintiffs. In my opinion therefore the conclusions of the Courts below are correct. It is true that no rent was fixed on the plots at the time of the partition proceedings as should have been done in accordance with the provisions of S. 126, Land Revenue Act, but this omission on the part of the partition officer cannot in my opinion be a sufficient ground for depriving the defendants of their exproprietary rights.

These appeals accordingly fail and are dismissed with costs.

B.V./R.K. *Appeals dismissed.*

A. I. R. 1932 Oudh 10

RAZA AND SMITH, JJ.

Asghar Ali and *Mohammad Ali*—Applicants.

v.

Commissioner of Income-tax, U. P., Ghazipur—Opposite Party.

Civil Misc. Appln. No. 314 of 1931, Decided on 2nd September 1931.

Income-tax Act (1922), S. 66 (2)—Assessee pleading for exclusion of certain sum from income of sales—Point argued before Income-Tax Officer and also before Commissioner of Income-Tax and decision given—Where their computation is reasonable High Court will not interfere.

Where a person assessed to income-tax sets up a case that a certain sum should have been left out of account in assessing income-tax, as no profits accrued to the assessee in respect of it and that the said sum should have been regarded as merely representing money paid out by him on behalf of his clients and afterwards recovered from the latter, such case may be said to raise a point of law within S. 66 (2), so that the said sum would well be excluded from the total amount of the sales income. But where the point has already been argued before the Income-tax Officer and the Commissioner of Income-tax and decision given on it against the assessee after full consideration, no question of law can be said to arise and where the method of computation regarding the assessment is reasonable considering the facts of the case, no case can be said to be made out for interference by the High Court. [P 10 C 2; P 11 C 1]

Mohammad Ayub—for Applicants.

H. K. Ghose Govt. Advocate—for Opposite Party.

Order.—This is an application purporting to be under S. 66, sub-S. 6, Income-tax Act (No. 11 of 1922), in reality it falls under sub-S. 3 of that section.

The application is by Messrs. Asghar Ali and Mohammad Ali, who appear to have a large business in Lucknow for the sale of scents, tobacco and oil. They were assessed to income-tax for the past year by an order of the Income-tax Officer, dated 16th December last, and they went in appeal against the assessment under S. 30, sub-S. 1, of the Act, to the Assistant Commissioner of Income-tax at Cawnpore, who on 26th February last made a small reduction in the amount to be assessed. Being still not satisfied, the applicants went under S. 66, sub-S. 2 to the Commissioner of Income-tax, who said that he was unable to discover that any question of law arose out of the grounds taken by the applicants, and accordingly rejected their application for the statement of a case to this Court.

We have heard the learned counsel for the applicants at some length. The only point which he has pressed before us is that in the statement of total sales, which appears in the order of the Income-tax Officer, dated the 16th December last, three items are included, namely.

	Rs.
(1) Packing charges	... 6,134.
(2) Postage	... 25,037.
(3) Railway freight	... 134.

These items total the considerable sum of Rs. 31,305. The applicants' case is that this sum should have been left out of account, as in respect of it no profit accrued to the applicants, and it may be regarded as merely representing money paid out by them on behalf of their clients and afterwards recovered from the latter.

We might have been inclined to think that this amount ought, as an arithmetical matter, to be excluded from the total amount of the sales income, and we might have been inclined to take the view that its inclusion in that total amount might be said to raise a question of law. It is clear however both from

the order of the Assistant Commissioner of Income-tax and from the order of the Commissioner of Income-tax, that this point was brought to their notice and was considered by them From what they say, it is clear that the flat rates which were applied for the purposes of the calculation of profits were framed on the understanding that the items under the above three heads were to be included in the total sales income. Had they been excluded it is clear from the orders of those two officers, that higher rates would have been applied for the purpose of calculating the profits unless the applicants were able to show from their books that lower rates were charged by them. In that connexion we may point out that the Income tax Officer states at the beginning of his order:

"As usual, no profit and loss account has been prepared, and stocks have not been valued."

In these circumstances, we do not think that any question of law really arises, and we think that the method of computation employed as regards the applicants' assessment was reasonable and that no case whatever has been made out for any interference by us.

The result is that the application is dismissed. Under S 66, sub S 6, Income-tax Act, we direct the applicants to pay a sum of Rs. 150 as costs.

B.V./R.K. *Application dismissed.*

A. I. R. 1932 Oudh 11

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Jai Singh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 163 of 1931, Decided on 31st August 1931, against order of Addl. Sess. Judge, Hardoi, D/. 22nd May 1931.

(a) Evidence Act (1872), S. 133—Criminal Trial—Accomplice—Person opening door to persons committing murder and helping them to burn the corpses is an accomplice—Penal Code (1860), S. 302.

Where a person with the knowledge that certain persons are contemplating murder, opens the window of the house in which the deceased reside to them, and after the commission of the offence co-operates with the culprits in sprinkling kerosine oil and piling up goods on the corpses for burning them, his acts constitute him an accomplice in the crime. [P 15 C 1]

(b) Evidence Act (1872), Ss. 133 and 114, Illus. (b)—S. 133 should be read with S. 114, Illus. (b)—Testimony of accomplice is generally tainted—Criminal trial.

Section 133 ought to be read with S. 114, Illus. (b), of the Act. It is a general rule of practice resting on wide human experience that an accomplice as participes criminis is an immoral person and his testimony is generally tainted. When he gives evidence under the promise of a pardon he may naturally be expected to favour the prosecution. [P 15 C 2]

(c) Evidence Act (1872), S. 133 — Accomplice— Evidence of — Practice is to require corroboration in material particulars.

Although according to S, 133, Evidence Act, in very exceptional cases if the Court is satisfied that the presumption of untrustworthiness attaching to accomplices in general is rebutted by special circumstances, the Court can accept the uncorroborated testimony of the accomplice. Yet the established practice of all the Courts in England as well as in India is ordinarily to require corroboration of the evidence of the accomplice in regard to material particulars: *A. I. R.* 1925 *Oudh* 1, *Foll.* [P 15 C 2]

(d) Evidence Act (1872), S. 133 — Accomplice—Evidence of— Corroboration must be with regard to circumstance showing connexion of particular accused with crime.

The corroboration of the evidence of an accomplice must be with regard to circumstances showing that the particular accused was connected with the crime : 132 *I. C.* 70, *Foll.* [P 16 C 1]

(e) Criminal P. C. (1898), S. 167 — Detention in police custody should be allowed only in special case and for limited period and on sufficient cause being shown.

The policy of legislature as disclosed by the provisions of S. 167 clearly is, that detention in police custody should be allowed only in special cases and for such limited periods as the necessities of the case might require. Such remands are not to be granted without sufficient cause being shown for them. [P 17 C 1]

J. Jackson, *Avadh Behari Lal* and *Jagannath Prasad*—for Appellants.

H. K. Ghose, *Govt. Advocate* — for the Crown.

Judgment.— This is an appeal by three persons Jai Singh, Anandi Din and Mata Din, who have been convicted by the Additional Sessions Judge of Hardoi under Ss. 302, 457 and 436, I P. C. The person first named, namely Jai Singh has been sentenced to death and the other two to transportation for life, under S. 302, I. P. C. Each of them has also been sentenced to two and five years' rigorous imprisonment under Ss. 457 and 436, I. P. C. respectively. The reference made by the learned Additional Sessions Judge for confirmation of the sentence of death passed against Jai Singh is also before us.

The learned counsel for the appellants has not disputed the facts relating to the

occurrence which gave rise to this prosecution. The prosecution and the defence are also at one up to a certain point as regards the antecedent facts concerning the history of the family of the principal appellant, Jai Singh. These facts so far as they constitute the common ground between the prosecution and the defence may be briefly stated:

One Nirmal Singh was possessed of considerable zamindari property paying land revenue of about Rs. 5,000 per annum. He died about ten years ago leaving four sons, namely Jai Singh, appellant, the eldest, and Narbir Singh the second son, by his first wife, and Bijai Bahadur and Suraj Bakhsh, minor, by the second wife, Mt. Kirpal Kuar. Narbir Singh married Mt. Deo Kumari alias Maiyan Sahib, a near relation of the Raja of Powayan, District Shahjahanpur. He died on 7th January 1923 leaving him surviving his widow Mt. Deo Kumari and two minor daughters Mt. Baba and Bibo Rani. The latter died soon after. Deo Kumari, Kirpal Kuar and Jai Singh lived in separate houses in village Raigaon. The house of Deo Kumari is on the north. Kirpal Kuar's house adjoins it on the south-east. Jai Singh's old house is on the south of Deo Kumari's house but Jai Singh has for some years been living in a new house a little removed from his old house and situate on the east of it.

On the death of Narbir Singh, applications for mutation of names in place of the deceased were made by Jai Singh as well as by Mt. Deo Kumari. Kunwar Bijai Varma, son of the Raja of Powayan, intervened and the parties settled their differences by means of a compromise (Ex. 33) which was filed in the mutation Court. The material terms of this compromise were, that mutation in respect of the entire property standing in the name of Narbir Singh should be effected in favour of Jai Singh and that the latter should pay Rs. 125 per month as maintenance allowance to Mt. Deo Kumari and give her two hundred bighas kham land in village Raigaon to be held by her as *sir*. In addition to this Mt. Deo Kumari was also to get twenty-five maunds of grain annually from Jai Singh and to appropriate the standing rabi crop sown by Narbir Singh. It further provided that Mt. Deo Kumari should remain the proprietor and owner of all the assets of a cloth shop run by Narbir Singh. At the same time she was made liable for all the debts and liabilities relating to this cloth shop. Jai Singh also undertook to perform the marriages of the two daughters of Narbir Singh and to bear all expenses in connexion therewith.

The wife of Bijai Bahadur having died his mother Kirpal Kuar arranged his second marriage with the daughter of one Chhota Singh of Chachrapur. Jai Singh did not approve of this union but Mt. Kirpal Kuar paid no heed to Jai Singh's opposition. The marriage took place on 4th May 1928. Jai Singh did not join it.

On the night between 20th and 21st May 1928, Mt. Deo Kumari went to sleep in her house with her daughter Mt. Baba. There were six other persons in the house that night, namely, Mt. Pumpa, wife of Sofley, a servant of Mt. Deo Kumari together with her two sons Babua a boy aged five years and Arjun a babe of about eleven months, Mt. Kausila the cook and her daughter Mt. Puni aged about 13 or 14 years, and one Pearey, another servant of Deo Kumari. Thus it will be seen that amongst the inmates of the house that night, there was only one adult male person, namely, Pearey and of the remaining seven, three were women and the remaining four young children Some time during the night all the inmates of the house with the exception of Pearey and Sofley's son, Babua, were massacred in cold blood. The dead body of Arjun the younger son of Sofley with its throat cut was left lying on a cot. The corpses of the remaining five were stacked in a room of the house and pieces of household furniture and everything else which the assailants could get hold of were heaped on them. Having poured kerosene oil over this heap, they set fire to it and locked the door of the room from outside. In the early morning of 21st May 1928 Pearey was found missing.

Mata Din, appellant who is a karinda of Jai Singh accompanied by Dhani Ram chaukidar, went to the police station of Pihani, a distance of ten miles from village Raigaon and lodged the first information report at 9 a. m. the same morning. In this report he stated that he had been sent to make the report by Jai Singh who had returned that very morning from Mohiuddinpur where he had

gone to join a marriage party. He added that he suspected that the offence was committed by Chachrapur people along with the servants of Bijai Bahadur as they felt aggrieved by JaiSingh not joining the marriage of Bijai Bahadur. The Sub-Inspector Nurul Hasan started for village Raigaon immediately after the recording of the report and reached the scene of occurrence at about 1 p. m. the same day. He found that the roof of some of the rooms of Deo Kumari's house had collapsed and after he had succeeded in putting out the fire, he got the corpses dug out from under the debris of the roof and all the articles piled upon them. He sent the dead bodies to the mortuary at Hardoi for post mortem examination and started investigation of the case.

Unfortunately the police were unable to trace out Peary or any of the other culprits. No doubt Nurul Hasan Sub-Inspector had some suspicions about Jai Singh being concerned in the crime but for want of evidence he could not be prosecuted. The police however started proceedings under S. 110, Criminal P. C. against Jai Singh and three of his servants including Mata Din and they were bound down to be of good behaviour by the Magistrate for a period of three years. The order of the Magistrate was confirmed by the Sessions Judge, but was set aside by a Bench of this Court: Ex. A-55.

In 1930 Sofley, whose wife Mt. Pumpa and infant son Arjun had been killed, happened to go to his brother at Ranka, district Palamau, in Behar. Garhwa, District Daltonganj, is the railway station nearest to Ranka. On the morning of 10th July 1930, when he was looking out for an ekka in Garhwa to take him to the railway station, he happened to come across Pearey at a confectioner's shop. He informed the police authorities that Pearey was an absconder, with the result that the police arrested him. He was kept in custody in Daltonganj jail from 10th to 24th July. After necessary inquiries made from Hardoi, Pearey was brought to Hardoi on the night of 25th July. The Hardoi police, assisted by Nurul Hasan Khan who was specially deputed for the purpose, took up the investigation. After several remands to which reference will be made later, Pearey was produced before the Subdivisional Magistrate on 15th August 1930 for the purposes of getting his confession recorded.

The Magistrate recorded the confession in jail on 16th August 1930. On the basis of this confession the three appellants before us and six other persons, namely, Hira Lal, Chunni, Balwa, Baji Lal, Kalaktar Singh and Murli, were arrested on 17th August. On 9th October 1930 the Subdivisional Magistrate, on the application of the Prosecuting Inspector, granted pardon to Pearey under S. 337, Criminal P. C. According to the statement of Pearey, Jai Singh, Anandi Din, Mata Din, Hira Lal, Chunni, Balwa, Baji Lal, Kalaktar Singh, Murli and four others belonging to Lucknow District, whose names were Bhaya Singh, Suraj Bali Singh, Chet Singh, and Chandrika Singh together with seven or eight Pasis who were not known to him, had rushed into the house on the fatal night of 20th May 1928 and participated in the commission of the crime. The identification proceedings in respect of the lastnamed four persons belonging to Lucknow District were held in jail on 10th September 1930. Pearey was unable to identify any one of them. These four persons were accordingly let off and the remaining nine persons were prosecuted for offences under Ss. 302, 436, 457 and 148, I. P. C. Ultimately they were all committed to take their trial in the Court of Session on the said charges.

The learned Sessions Judge held that the complicity of Hira Lal, Chunni, Balwa, Baji Lal, Kalaktar Singh and Murli had not been legally established. They were therefore acquitted. The remaining three accused were convicted and sentenced as stated in the beginning.

As mentioned before, the facts and circumstances attending the crime are not in controversy. The only question that required determination is whether the three appellants, Jai Singh, Anandi Din and Mata Din, did or did not commit the crime. Admittedly Pearey, approver, is the only eyewitness of the occurrence. The story told by him is briefly as follows:

For some time after the compromise arrived at in the mutation case, Jai Singh continued to pay the guzara to Deo Kumari. Thereafter the guzara was stopped with the result that she began to suffer much trouble. Sometimes she sent for money from Powayan and sometimes she met her expenses by pawning her orna-

ments. In connexion with Bijai Bahadur's marriage at Chachrapur, Jai Singh prohibited the sweeper, the barber, the kahars and other people from doing any work for Bijai Bahadur. He also directed Deo Kumari not to join the marriage. Jai Singh also closed the main gate and the marriage party had to pass through a back door. Deo Kumari, in spite of the orders of Jai Singh, joined the wedding stealthily at night. On 20th May 1928, at about 12 noon or 1 p. m., Deo Kumari sent Pearey to demand her maintenance allowance from Jai Singh. When he went to make the demand, Jai Singh was supervising the taking out of the grain by his servants from the store godown. When he made the demand, Jai Singh got angry and said that

"the demand should be made from Bijai Bahadur under whom she (Deo Kumari) lies with opened legs."

She heard these abuses in the tin shed in front of the room in which the corpses were burnt, where she happened to be sitting at the time, and retorted with great vehemence in a very loud voice. When Pearey went back she kept crying for some time and directed him to take a letter to Powayan and bring Bijai Varma or a motor-car to take her home. She also said that she would now realize her maintenance through Court. About two hours later, when he was going to the bazar, Jai Singh who was sitting on the chabutra in front of the room of his new kothi called him and inquired what Deo Kumari had been saying. He told him all that she had said. Jai Singh also asked Pearey if he was going to Powayan and on his making the reply that he would have to go if ordered, Jai Singh abused him and ordered Mata Din, Anandi Din and Murli to take him inside the bhusauri and strangle him there. They dragged him 20 or 25 paces and then on his entreaties, Jai Singh who was following a few paces behind, got him released and coming close to him told him that he would have to do as he desired otherwise he would be given a severe beating such as had been administered to Gaddhu Gaddi and a Pasi and Pasin.

As he remembered the serious injuries which had been inflicted on these persons and was terrified that he would be treated in the same manner if he failed to carry out Jai Singh's orders, he promised to obey. Jai Singh then ordered him to keep awake that night and to open the northern window of Mt. Deo Kumari's house when he heard a knock there. Mata Din said that everything must be finished that night and Jai Singh agreed that this should be done. He understood by these expressions that Deo Kumari was to be murdered that night. Accordingly he kept awake during the night. When after midnight he heard a knock at the window, he opened it. Soon after his opening the window 19 or 20 persons armed with swords, spears bankas and lathis entered the house. He recognized Jai Singh, Kalaktar Singh, Anandi Din, Baji Lal, Balwa, Chunni Kothari, Hira Lal, Mata Din, Chet Singh, Chandrika Singh, Suraj Bali Singh and Hira Singh. He did not recognize the seven or eight Pasis nor did he know their names. When the assailants entered the house everybody inside the house but himself, was fast asleep. Jai Singh killed Deo Kumari and her daughter Mt. Baba. The others attacked the rest of those who were sleeping. A dog which was inside the house began to bark and on being ordered by Jai Singh he turned it out of the house. Jai Singh ordered the corpses to be thrown inside the eastern room which was done by those who were with him. He further ordered that the goods inside the house should be piled upon them and after sprinkling kerosene oil fire might be set to the room. All this was accomplished.

A lock was put to the room in which the corpses and goods were burning. One tin containing kerosene oil was brought by Balwa from outside. Pearey informed Jai Singh that there was some kerosene oil in a tin in the house and pointed out the place where it was. All the oil in the two tins was sprinkled on the goods heaped on the corpses. On the orders of Jai Singh, Pearey also helped in heaping up goods on the corpses. He also brought a few pieces of fuel wood and got the Pasis to bring some beams, from the upper storey, which were all placed upon the corpses. The culprits then left the house and Jai Singh directed Pearey to follow him. Jai Singh took him inside his house and gave him Rs. 200 and directed him to go to the police station with Mata Din and lodge a report that Bijai Bahadur, Sundar Singh, Chhota Singh and many others of Chachrapur had com-

mitted the murders and set fire to the house. He promised to start after easing himself and being permitted to do so, went back inside the house of Deo Kumari.

As he was feeling very thirsty he began to drink some water there. Just at that time Babua, son of Sofley, got up and asked him where his mother and Deo Kumari had gone. He replied that they had gone to the house of Jai Singh's daughter and he should go to sleep. He lay down again and began to sleep. As it was about 4 a. m. and Pearey was afraid to go to the thana, he took some clothes and left the house for Jahani Khera railway station. He met some people on the way and at the railway station he also met Chet Singh, Chandrika Singh, Suraj Bali Singh and Bhaiya Singh, the four men from Lucknow District referred to above. At the railway station he boarded a train for Sitapur where he changed for Lucknow. From Lucknow he went to Benares and from Benares to Calcutta. He made some purchases in Calcutta. Ultimately he reached Garhwa and settled down there. He used to make a living by selling goods in neighbouring bazars until he was discovered by Sofley and placed under arrest.

The learned Additional Sessions Judge has in one place in his judgment remarked that it was only through compulsion that Pearey had been made a tool of by others and therefore he could hardly be regarded an accomplice in the strict sense of the term. The learned Government Advocate did not attempt to support this view of the learned Additional Sessions Judge and we think very rightly so. The fact of Pearey having agreed to open the window with the knowledge that Jai Singh meant that Deo Kumari should be murdered that night and the act of his giving admission to the culprits inside the house when he heard the knock as well as his conduct in cooperating with the culprits as he did when they sprinkled kerosene oil and piled up goods on the corpses clearly constitute him an accomplice in the crime. When he came to know of the conspiracy which had been hatched by Jai Singh for the murder of Mt. Deo Kumari, he never informed her. In his statement in the Sessions Court he clearly admitted that he agreed to the proposal of Jai Singh as he thought Maiyan Sahib was going to Powayan and his only chance was to be taken in service by Jai Singh. There can be no doubt that he was on his own showing actuated by sordid motives in joining the conspiracy. If his story is true he is guilty of the worst betrayal that one can think of and it is hardly possible to say anything in extenuation of his conduct. We can hardly believe that he committed all these acts in consequence of fear as, after he had promised to join the conspiracy, there was ample opportunity for him to give the necessary warning to Deo Kumari or to run away from the village. We have no hesitation in holding that Pearey is a guilty associate in the crime and must be regarded as an accomplice.

The learned Government Advocate made reference to S. 133, Evidence Act, and contended that a conviction is not illegal merely berause it proceeds upon the uncorroborated testimony of an accomplice This section ought to be read with S. 114, Illus. (b) of the Act, which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. It is a rule of general practice resting on wide human experience that an accomplice as participes criminis is an immoral person and his testimony is generally tainted. When he gives evidence under promise of a pardon he may naturally be expected to favour the prosecution. S. 133 simply lays down that a conviction on the uncorroborated testimony of an accomplice is not illegal. The effect of it is that in very exceptional cases if the Court is satisfied that the presumption of untrustworthiness attaching to accomplices in general, is rebutted by special circumstances, the Court can accept the uncorroborated testimony of the accomplice. But the established practice of all the Courts in England as well as in India is ordinarily to require corroboration of the evidence of an accomplice in regard to material particulars. The same view was taken by one of us in *Manna Lal* v. *Emperor* (1). Far from there being anything exceptional in the character of the accomplice with whom we are concerned, we have already observed that the conduct of Pearey, in betraying his mistress

(1) A.I.R. 1925 Oudh 1=75 I. C. 753=25 Cr. L. J. 49=27 O. C. 40.

as he did, is of the blackest hue. He tried to implicate four men belonging to Lucknow, none of whom he was able to identify in jail. We cannot but reject his explanation that the culprits belonging to Lucknow might have given false names to him, because he had met them several times and had come to know their names not only from them but also from several other persons. There is considerable force in the suggestion made by the defence that he mentioned these four names in order to oblige some of his fellow prisoners in jail. The learned Sessions Judge himself has disbelieved his testimony with regard to six of the persons who were placed before him for trial. Under the circumstances we must follow the general practice which is virtually now a rule of law and insist upon Pearey's testimony being corroborated in material particulars.

The next question arises as regards the nature of the corroboration necessary in order to give effect to the testimony of the accomplice against an accused person. The corroboration may relate either to the circumstances attending the commission of the offence or it may relate to facts and circumstances connecting and identifying a particular accused with the crime. The confirmation of the testimony of an accomplice as regards the circumstances attending the commission of the offence would no doubt indicate the presence of the accomplice at the scene of the occurrence but it would not afford any confirmation of the fact that a particular accused took part in the offence. For this reason there is a general consensus of judicial opinion that the corroboration must be with regard to circumstances showing that the particular accused was connected with the crime. The same rule was laid down by another Bench of this Court to which one of us was a party in *Durga* v. *Emperor* (2).

It therefore becomes necessary for us to examine the corroboration forthcoming with regard to the statement of Pearey, the approver, in the light of the observations made above. But before we do so it will be proper for us to discuss the contention forcibly urged by Mr. Jackson on behalf of the accused that the confession of Pearey, approver, recorded by the Subdivisional Magistrate under S. 164, Criminal P. C. on 16th August 1930 ought not to be regarded as a free and voluntary statement and that the procedure adopted in securing it, is open to serious objections. It is necessary to state a few facts bearing on this point.

Pearey, as stated before, reached Hardoi on the night of 25th July. That night he remained in the custody of the Hardoi police. Next day he was taken to the Magistrate who remanded him to jail. Four days later, on 30th July 1930, the Prosecuting Inspector made an application to the Subdivisional Magistrate in which it was stated that when the accused was brought to Hardoi, Police Sub-Inspector Pandit Har Swaroop Sharma questioned him in connexion with the case and he told him that he was ready to say the whole truth. He therefore asked that the accused be remanded to police custody for a period of seven days for making further investigation.

On 1st August 1930 the Subdivisional Magistrate passed an order under S. 167, Criminal P. C. directing that Pearey should be remanded to police custody for seven days. The reason given by him was that having seen the diary of the case he was of opinion that the case if challaned on the evidence then available was only half mature. He also said that he had been given to understand that if the accused was remanded to police custody further evidence would be obtained to find out the real facts of the case. In pursuance of this order Pearey was sent from jail to the kotwali on 2nd August and was kept there till 9th August, on which date he was again sent back to jail. On 12th August Pearey made an application expressing a desire to see the Prosecuting Inspector and the Superintendent of Police before he was required to attend the Court the next day which was the date fixed for the hearing of the case. On 13th August the Prosecuting Inspector made another application to the Subdivisional Magistrate asking that as the accused had applied from jail to see the Superintendent of Police, the latter "wishes to see the accused any time preferably tomorrow morning." He therefore requested that Pearey may be remanded to police custody for three days with a view to obtain all the information the accused wished to give. The

(2) [1931] 132 I. C. 70=32 Cr. L. J. 830.

same day the Magistrate passed the following order:

"For reasons recorded in my order dated 1st August 1930 I remand the accused Pearey in police custody for a period of three days from today evening."

The same evening he was removed to the kotwali. Next morning the Superintendent of Police not being free to hear Pearey's statement, sent him to the Police Sub-Inspector to whom Pearey made a detailed confession : Ex. A-21. The Superintendent of Police met Pearey on 15th August when he made a statement to him also. The same day Pearey was produced before the Subdivisional Magistrate for the recording of his statement under S. 164, Criminal P. C. The Magistrate did not record his statement that day but sent him to the jail lock-up and recorded his confession in jail on the following day. Thus it will appear that the police obtained in the first instance a remand into their custody for seven days on the representation that Pearey had told Pandit Har Swaroop Sharma that he was ready to say the whole truth. The statement made by Pearey in the Sessions Court on this point is to the following effect:

"On 2nd August I was sent to kotwali and kept there till 9th August when I was again sent to jail. Up to that time I had indicated no intention about making any confession. The Sub-Inspector Sandila and others asked me to state the truth. But I did not give any reply giving them satisfaction. I made no promise to confess nor any clue to the crime. I had not up to the time of seeing the Superintendent of Police spoken to any person including the police officers anything about the crime under consideration."

Thus either this statement of Pearey is false or the representation made by the Prosecuting Inspector to the Subdivisional Magistrate on 30th July 1930 is untrue. S. 167, Cl. (3) requires the Magistrate, authorizing detention in the custody of the police to record his reasons for so doing. The policy of the legislature as disclosed by the provisions of this section clearly is that detention in police custody should be allowed only in special cases and for such limited periods as the necessities of the case might require. Such remands are not to be granted without sufficient cause being shown for it. Assuming that the representation made by the Prosecuting Inspector was true and that the statement made by Pearey is false and unreliable, still we fail to see any sufficient reason for his being remanded to police custody for a period of seven days. If Pearey was prepared to say the whole truth he could not take more than a few hours to tell it. If he refused to make any statement when he was brought to the kotwali on 2nd August it passes our comprehension why the police detained him in their custody till 9th August. Pearey has stated, and this statement is accepted by the prosecution, that he did not make any confession or give any clue to the crime during these seven days. But three days later he is suddenly seized with compunction and when the Civil Surgeon was inspecting the undertrials on 12th August he dramatically expressed to him the desire to see the Superintendent of Police and the Court Inspector. We cannot help expresssing our disapproval of the light hearted fashion in which the Subdivisional Magistrate granted the further remand of three days as if the police were entitled to it as a matter of course. His order granting the remand shows a lack of appreciation of the responsibilities imposed on Magistrates in granting remands under S. 167.

The circumstances of Pearey having been detained in police custody for so long, as stated above, lend considerable strength to the argument urged by Mr. Jackson that Pearey has been induced to make the statement which he did under the influence of the police and that the application made by Pearey to see the Superintendent of Police and the Court Inspector was only a preconcerted device in order to make out that when he expressed his desire to make the confession, he had been free from police influence for three days. The circumstances are no doubt open to the greatest suspicion. However we are not prepared to reject the confession on this ground but it does make the necessity greater for requiring independent and reliable corroboration with regard to material particulars. (Their Lordships then discussed the evidence and proceeded as follows) : The case for the prosecution rests upon the evidence of the approver. As there is no reliable corroboration of his statement, identifying the accused with the crime, the appeal must succeed on this ground.

We accordingly allow the appeal, set aside the convictions of the three appel-

lants, Jai Singh, Anandi Din and Mata Din and direct that they be set at liberty at once.

R.M./R.K. *Appeal allowed.*

A. I. R. 1932 Oudh 8

RAZA AND SMITH, JJ.

Ramadhin—Prisoner—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 268 of 1931 and Criminal Ref. No. 30 of 1931, Decided on 29th September 1931, against order of Addl. Sess. Judge, Lucknow, D/- 27th August 1931.

(a) Penal Code (1860), S. 302—Court should not be guided by any medico-legal theory opposed to law—Criminal trial.

What the Court has to administer, in a trial for an offence under S. 302, I. P. C., is the law as it stands and not any form of medico-legal theory that is opposed to law. *R.* v. *Kopsch*, (1925) 17 *Cr. App. R.* 50, *Ref.* [P 20 C 1]

(b) Penal Code (1860), Ss. 184 and 302—Court is not concerned whether S. 84 is too narrow or drastic—Accused killing woman through jealousy was sentenced to transportation.

Whether S. 84 is unduly narrow or drastic is not a matter with which the Court is concerned.

Where the accused at the prospect of losing the object of his affection through excitement and jealousy of rage killed her so that if she was not his she could be at any rate no one else's, and there was nothing to show that as regards his bodily health the accused suffered from anything worse than minor ailments that all human flesh is heir to, and as regards his mental state .there was no evidence to show that he suffered from anything more than eccentricity.

Held: that the accused was not incapable by reason of unsoundness of mind of knowing the nature of his act and was guilty of the offence under S. 302: 15 *O. C.* 321, *Foll.*

That however, as the accused was not quite normal mentally and his act was not premeditated and was committed in a moment of extreme excitement the sentence of death should be altered to that of transportation for life.

[P 21 C 1, 2]

J. N. Misra and *K. N. Chak*—for Appellant.

H. K. Ghose, *Govt. Advocate*—for the Crown.

Judgment.—This is an appeal by one Ramadhin Sonal, aged 35, who has been convicted by the learned Additional Sessions Judge of Lucknow under S. 302, I. P. C., and sentenced to death subject to the confirmation of this Court.

The facts of the crime itself are not disputed, and do not require to be set out in great detail. The appellant, who is a widower, and one Mt. Ramkali, alias Kalawati alias Bitta, were in love with each other. Mt. Ramkali, who was the victim of the occurrence under trial was a young married woman, 18 or 20 years of age, she was related by marriage to the accused, and was married to a man named Sheo Shankar, a resident of a village called Hardoia, in the Rae Bareli District. She suffered from some ailment, for the treatment of which she used to come at times to Lucknow to the out patients department at the King George's Medical College. Once or twice she and relatives of hers had stayed at Lucknow with the appellant, but suspicions having arisen she stayed on the last occasion with one Mata Prasad, another marriage relation. She was accompanied on that occasion by her husband, Sheo Shankar.

On the morning of 31st January last, Mt. Ramkali went to the College, accompanied by Mata Prasad and his wife, Mt. Mahadei. Mt. Ramkali went in to see the lady doctor and as she did not re-appear for some time, Mt. Mahadei went to enquire, and was told that Ramkali had left. She then went out and found Ramkali and Ramadhin, appellant, sitting in an ekkagari. Mata Prasad was there too. He got Ramkali down from the ekkagari, and there was a tussle, Mata Prasad and his wife trying to get Ramkali away from Ramadhin, while Ramadhin sought to detain her. Finally Ramadhin produced a dagger, ("qarauli"), made in the form of a miniature sword. This he plunged into the neck of Ramkali, killing her instantaneously. The medical evidence shows that there were two incised wounds and a superficial cut, one incised wound was on the front of the left side of the neck, one was along the back, internal to the inner border of the left shoulder-blade, and the superficial cut was on the right hand. The wound on the neck penetrated the upper part of the left lung, and passed out through the wound on the back. The cut on the hand was probably caused by the hands being raised for protection. It was possible, the medical witness said, for all the three injuries to be caused by one and the same blow. The penetrating wound was the cause of death, and could have been inflicted with the dagger that has been produced. When striking Mt. Ramkali, Ramadhin is said to have

uttered some such words as "le jao", or "lo ab isko lejao," "take her away", or "Now take her away". There is some difference amongst the witnesses as to the precise words used.

The appellant was at once secured, and taken to the Kotwali, where Mata Prasad made a report.

That the appellant did in fact kill the unfortunate Mt. Ramkali is not disputed. The questions are, what was his personal history prior to the occurrence, and more particularly, what was the state of his mind when he committed the act. It was to elicting facts bearing on those points that the defence evidence which was voluminous, was directed, and further to throw light on them the learned Additional Sessions Judge examined as Court's witnesses the Assistant Jailor of the Lucknow District Jail, a subordinate medical officer of that Jail, and Rai Bahadur Dr. J. P. Modi, the well-known leader in forensic Medicine at the King George's Medical College and the author of the volume "Text-book of Medical Jurisprudence and Toxicology."

From the evidence given by the appellant's witnesses, it appears as regards his general health that he has suffered from headaches and giddiness in the past and various minor ailments such as coughs, fever, constipation and insomnia. As regards his general mental history, certain incidents (it does not seem necessary to set them out in detail, they are exhaustively set out in the judgment of the lower Court) were mentioned which show that the appellant was eccentric. On one occasion, in the spring of 1930, he is said to have assaulted a man named Dharam Bhikhshu owing to a difference of opinion in a discussion after an Arya Samaj meeting. He is further said to have been of a morose and melancholy disposition. Some of the witnesses say they entertained doubts as to his sanity, and a "vaid" named Pandit Bal Kishen deposed that he diagnosed that "insanity was to set in", to quote from the learned Additional Sessions Judge's record of the evidence. On the evidence of that witness, it should be mentioned, the learned lower Court poured scorn, and quite refused to believe it.

A witness for the defence however whose evidence was certainly entitled to respect was Dr. H. Hukku, a well-known Lucknow practitioner with British qualifications and experience. He gave evidence as to the causes and symptoms of insanity, and there were put to him the circumstances attending this present case. His reply to the case as it was stated to him was:

"I think it was impulsive insanity or homicidal insanity a form of partial intellectual mania. There was absence of motive, "lo le jao" is suggestive of maniacal condition. There was no hiding, there were no accomplices and there was the sudden shock of being deprived of the beloved."

As to the witnesses examined by the Court itself, as distinguished from the defence witnesses, the Assistant Jailor said he never formed the impression from anything the appellant said or did, that he was "mad or senseless." The subordinate medical officer of the Jail gave similar evidence. Dr. Modi saw the appellant twice on the day of the occurrence once soon after it took place, and again at 4-20 p.m. On the former occasion he had to talk with him. On the latter occasion, when the appellant was sent to him for medical examination as to certain hurts on him, he questioned him. The replies given by the appellant were, Dr. Modi said, reasonable and there were no symptoms of mental derangement or abnormality.

Leaving aside for the moment the evidence of Dr. Hukku, we are not of opinion that the defence evidence, even if believed, is sufficient to prove more than that the appellant did not enjoy good bodily health and that he acted at times in an eccentric manner. The learned Additional Sessions Judge, we may mention, said he disbelieved most of the evidence produced on behalf of the accused. He regarded it as designed:

"to somehow save him from the punishment which he deserves, for the sympathy of his friends, well-wishers and caste-fellows was bound to be aroused when the man was being tried for murder, which has capital sentence as possible punishment under the law."

The learned Additional Sessions Judge went on to say however:

"In the second place the evidence if believed falls far short of proving that the accused was labouring under some delusion or hallucination at the time of the murder and did not know the nature of his own act when he was committing it."

We have referred to the evidence of Dr. Hukku, who suggested that the killing of Mt. Ramkali must be regarded as an act of "impulsive insanity, or homicidal insanity." Dr. J. N. Misra, the

counsel for the appellant, putting the matter in a slightly different way, argued that the appellant's action was the result of "uncontrollable impulse."

Now it may be said to be well-known that there is a school of medico-legal thought which tends to regard all forms of crime as being the result of some mental abnormality, and the perpetrators of them as being the subjects more properly of medical treatment than of judicial punishment. What we have to administer, however is the law as it stands, and not any form of medico-legal theory that is opposed to that law. There are very relevant observations on the doctrine of "irresistible impulse," as it is there designated in "Taylor's Principles and Practice of Medical Jurisprudence," Vol. 1, Edn. 8, at pp. 845-6. Reference is made there to various English cases, including the famous *McNaughten's* case. In another case *R.* v. *Allnutt* (the details of the report are not quoted), a learned Judge is quoted as saying:

"What was the meaning of not being able to resist an impulse?

Every crime was committed under an impulse, and the object of the law was to compel persons to control or resist those impulses. If it was made an excuse for a person who had committed a crime that he had been goaded to it by some impulse which medical men might choose to say he could not control, such a doctrine would be fraught with great danger to society."

In another case *R.* v. *Kopsch* (1) it was remarked:

"If the fantastic theory of uncontrollable impulse were to become part of our criminal law, it would be merely subversive."

In the case now before us the appellant, when examined by the committing Magistrate, gave quite clear and reasonable replies to the questions put to him. He did not definitely suggest that he was insane at the time of the act under trial, or at any other time. He said that he was not conscious of what he did at the time in question, and that he had been ailing for the past three years, and was not conscious at times of what he did. He had, he said, suffered from constipation and vertigo. It was, we take it in consequence of the absence of any definite suggestion of insanity, and the absence of any appearance of it, that the special procedure prescribed by S. 465, Criminal P. C., was not adopted by the learned Additional Sessions Judge. Before the latter, the appellant, when questioned, again gave quite rational replies. He professed that he could not remember the incidents immediately attending the killing of the deceased, and suggested that his memory is generally defective, and that his mind does not work properly. He represented that he suffers from constipation and giddiness.

It cannot be said that when examined by the Courts below the appellant displayed any signs of insanity. Dr. J. N. Misra however who argued the case for the appellant with both erudition and ability, invited our attention to a passage contained in the treatise of Dr. J. P. Modi that has already been referred to, at pp. 336 and 337 (Edn. 2). The learned author there details six points which, according to him:

"the medical man takes .... into consideration before deciding whether the murder was the result of some delusion (homicidal mania)."

Those points are:

(i) The personal history of the murderer ("the murderer may be eccentric, melancholic, degenerate, neurasthenic etc"); (ii) the absence of motive; (iii) the absence of secrecy; (iv) multiple murders; (v) want of preparedness or pre-arrangement and (vi) want of accomplices.

Leaving out of consideration the fourth of the above points, which has no application here, the other five, Dr. Misra, argued, all exist as regards the present appellant. We are however not able to agree that that is so. The prospect of losing the object of his affections may very well be supposed to have excited in the appellant feelings of jealous rage, which led him to kill her, so that if she was not to be his, she should at any rate be no one else's. The annals of crime furnish many such cases. It cannot be said that there was absence of motive.

As regards absence of secrecy, again, the appellant seems to have acted under the influence of passion, and it is clear paid no attention to the unconcealed nature of his act.

As to the want of preparedness or pre-arrangement, it is to be remembered that the appellant had a dagger with him. Even if it be believed, as some of the defence witnesses say, that he was in the habit of carrying that dagger, the fact remains that he had it, and no further

(1) [1925] 19 Cr. App. R. 50.

preparation was necessary, as the tragic result showed.

As to the want of accomplices, that point carries no weight. There is no suggestion made that the appellant had conceived a definite intention of killing the young woman. In any case, as is said in Taylor's treatise, that has been referred to (Vol. 1, Edn. 8, p. 843):

"The lack of the power of combination is perhaps of all others the most striking charactoristic of insanity; hence it is a rule that when a lunatic commits a crime he does not confide in anybody; obviously the same may be true of the same criminal, so that the point attending alone is of little weight."

The result is that we were not impressed by Dr. Misra's ingenious attempt to bring this case within the scope of the points set out in the treatise of Dr. Modi.

The law we have to administer is stated in S. 84, I. P. C. Whether that section is unduly narrow or drastic is not a matter with which we are concerned. As to that point, we may refer to the observations made by a learned Additional Judicial Commissioner in the ruling reported in *Mahomed Hussain* v. *Emperor* (2) at p. 343. What we therefore have to consider is whether the appellant was at the time he killed Mt. Ramkali, incapable, by reason of unsoundness of mind, of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

On a consideration of all the facts and circumstances of the case, we find ourselves quite unable to hold that the appellant is entitled to acquittal by anything contained in S. 84, I. P. C. We do not believe that as regards his general bodily health he suffered from anything worse than the minor ailments that all human flesh is heir to, and as regards his mental state we are not satisfied by the evidence that he suffered from anything more serious than eccentricity. We are, in the words of the section, not of opinion that by reason of unsoundness of mind he was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law, and we are therefore of opinion that the Additional Sessions Judge rightly found him guilty of an offence punishable under S. 302, I. P. C. We are however of opinion that we ought to alter the sentence to one of transportation for life. Our reasons for this are that we are satisfied that the appellant is not quite normal mentally, and that his act was not premeditated, and was committed in a moment of extreme excitement. While therefore we maintain the conviction, we reduce the sentence from one of death to one of transportation for life. Apart from this alteration in the sentence, the appeal is dismissed.

R.M./R.K. *Order accordingly.*

(2) [1912] 15 O. C. 321=14 Cr. L. J. 81=18 I. C. 641.

A. I. R. 1932 Oudh 21

SMITH, J.

Munnu—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 35 of 1931, Decided on 22nd September 1931, Reference made by Sess. Judge, Gonda, D/- 27th August 1931.

Criminal P. C. (1898), S. 145 (5)—Onus lies on party denying dispute to prove its non-existence.

If any party or other person interested denies the existence of the dispute the onus lies on him to show that it does not exist. [P 22 C 2]

Ali Jawad—for Applicant.

Ali Mahommed, Asst. Govt. Advocate—for the Crown.

Dr. Zafar Husain—for Satnarayan and Rameshwar.

Judgment.—This is a reference by the learned Sessions Judge of Gonda, recommending that an order passed by a First Class Magistrate of that district, under S. 145, Criminal P. C., be set aside. The facts are that on 11th October last one Satnarain made an application to the Superintendent of Police against one Munna and a number of others, alleging that there was a dispute between him and them about two plots of grove land. He asked for police assistance in cutting the trees. The Sub-Inspector however reported on 21st October that there was no danger of a breach of the peace. Nothing more seems to have been done until 10th January last, when Satnarain again made an application to the Superintendent of Police substantially on the same lines as before, against Munna and others. Another Sub-Inspector reported on that application, on 19th February, to the effect that there was a danger of a breach of the peace; he recommended that action be taken under S. 145, Criminal P. C. The report was submitted

to the Magistrate concerned who, on 25th February, ordered a notice to be issued under S. 145, Criminal P. C., for 9th March. On the latter date he gave the parties notice in the following terms:

"Whereas it appears to me from the complaint of Satnarain, and the report of police station Tarabganj, that there is an apprehension of a breach of the peace between you, Satnarain and Rameshwar, on one side and Munna on the other, about a certain grove, I call upon you, both the parties, to file written statements in respect of your actual possession."

The proceedings of the Magistrate up to that point were not strictly in accordance with the provisions of S. 145, sub-S. (1), but substantially he complied with them, and both Satnarain and Munna, on 9th March 1931, put in written statements, Satnarain claiming that the groves were his, and Munna claiming that they were his (Munna's), having been bought by his father at auction. A supplementary written statement was put in on 31st March 1931 by Satnarain's brother Rameshar, and the evidence of the parties was recorded on that same date. The Magistrate passed orders on 7th April. He found Satnarain and Rameshar to be in possession of the plots in dispute, and forbade all disturbance of their possession until their eviction in due course of law.

The learned Sessions Judge was applied to in revision, and came to the conclusion that the order passed by the Magistrate was "ultra vires" and without jurisdiction. He has accordingly submitted the case with a recommendation that the order passed by the Magistrate be set aside. The Sessions Judge's view was that the Magistrate had disbelieved all the witnesses examined by the complainant about an apprehension of the breach of the peace, and that, according to the provisions of S. 145, sub-Cl. (5), he should have cancelled his preliminary order and stayed all further proceedings.

It is true that the Magistrate did not altogether believe the witnesses produced on the side of the complainant. He did not however definitely say that he did not believe that there was any danger of a breach of the peace. He concluded that there was, in fact, a "quarrel" between the parties, but he seems to have thought that the real cause of it was that Munna has collected some manure in a field of Satnarain's which he refused to remove. I say he "seems to have thought," because what he says on the point in his order is not very clear. He says:

"The real cause of the quarrel appears to be the one given by Jagai (P. W. 4). who says that Munna has kept a manure heap in Satnarain's field which he refuses to remove, but this differs totally from the cause of action given by complainant and hence it is difficult to accept it as true."

What the Magistrate meant by these last words is not clear, but he appears to have meant that he did not accept the complainant's "cause of action" as true, since he started by saying that the real cause of the quarrel appears to be the one given by Jagai. According to Jagai:

"Munna has forcibly kept a manure heap in Sat Narain's field, which Munna refuses to remove and says that if they went in the grove they would be killed outright."

The Magistrate seems to have been of opinion that there was a quarrel between the contending parties It is, moreover, to be noticed that sub-S. (5), S. 145 provides that:

"Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed but, subject to such cancellation, the order of the Magistrate under sub-S. (1) shall be final."

It is clear from this subsection that if any party or other person interested denies the existence of the dispute, the onus lies on him to show that it does not exist. In the present case Munna, though not saying in his written statement quite clearly that no dispute likely to cause a breach of the peace existed, described the allegations of Sat Narain as false and without foundation (*ghalat aur be bunyad*). It may be taken therefore that he intended to deny the existence of any such dispute.

His evidence however was mostly devoted to trying to make out his title to the groves in dispute, and his possession of them. As to the existence of any dispute, the evidence given by him and his witnesses was scanty. He himself denied that there is any dispute between him on the one side and Sat Narain and Rameshar on the other. One of his witnesses, Surajpal, made the following cryptic statement, according to the Magistrate's record:

"There is no enmity between them. There may be enmity now."

Another witness of Munna's, Ram Asre, said :

" There is no dispute, but the complainants want to take possession forcibly. There is no danger of ' marpit ' because the complainants want to get it from Court, and have filed an application."

Another witness, Lalta, said :

" There is dispute about both the groves. I cannot say about the apprehension of breach of peace."

It thus appears, from the evidence of Munna's own witness, Lalta, that there is a dispute about the groves, and if, as was stated by the witness Ram Asre, the complainants want to take forcible possession, it may reasonably be concluded that there is a danger of a breach of the peace. As I have said, the Magistrate himself was of opinion that a quarrel does exist, and the witness Jagai, on whose evidence, apparently, he relied stated, as I have said already, that Munna has threatened to kill the opposite parties if they go to the groves. The Magistrate should have stated more clearly whether he believed or not that a dispute likely to cause a breach of the peace exists. In view of his finding, however, that there is a "quarrel," and in view of the fact that it appears from some, at least, of the evidence produced on the side of Munna himself that " the complainants want to take possession forcibly," I am of opinion that it cannot be said to have been shown that no dispute exists, such as is likely to cause a breach of the peace.

The result is that I do not regard the Magistrate's order as being ultra vires, and I do not accept the reference of the learned Sessions Judge. The Magistrate's order will stand and the record will be returned.

R.M./R.K. *Reference rejected.*

A. I. R. 1932 Oudh 23

SMITH, J.

Sita Ram and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 251 of 1931, Decided on 28th September 1931, against order of Asst. Sess. Judge, Fyzabad, D/- 25th July 1931.

Criminal P. C. (1898), Ss. 297 and 423 (2) —Jury trial—Misdirection in summing up—Judge failing to bring to notice of jury certain facts—Possibility of jury returning different verdict if their attention was called to those facts—There is misdirection.

For practical purposes an omission in a summing up is not a misdirection unless it be on a point of substantial importance, or where the point has been fully dealt with by the defence counsel, or prime importance.

Where it is more than possible that if the Judge had called the attention of the jury to the fact that there was no corroboration of the evidence of a certain prosecution witness as regards certain accused, they might have returned a different verdict as regards them, the failure to do this amounts to misdirection. If the uncorroborated evidence is not sufficient to sustain the conviction of these accused, their conviction should be set aside instead of ordering a retrial: 3 *S. L. R.* 102 and 29 *Cal.* 782, *Rel. on.* [P 25 C 1]

Naimullah—for Appellants.

Ali Mohammad, Asst. Govt. Advocate —for the Crown.

Judgment.—This is an appeal by five men who have been convicted by the learned Assistant Sessions Judge of Fyzabad. Two of them, Nohar, Ahir, and Panchu, Ahir, were convicted under S. 397, I. P. C., and sentenced to seven years' rigorous imprisonment each. The other three, Sita Ram, Brahman, Ram Deo Singh, Thakur, and Mangal, Sonar, were convicted under S. 395, I. P. C., and sentenced to five years' rigorous imprisonment each. The trial was held with a jury.

There is said to have been a dacoity at the house of one Sidhari, Chamar, at a village called Khatimipur on the night of 24th-25th July 1930. The police did not at first send anybody up for trial, and the complainant was obliged to make a complaint about the dacoity in Court on 9th September 1930. Even so, there was considerable delay, but in the end, in April last, the five appellants were sent up for trial, and were convicted and sentenced as aforesaid.

Of the inmates of the house, Sidhari and his wife Mt. Gauri gave evidence, and two villagers named Ram Daur, and Ram Autar said that when the alarm was raised they went towards Sidhari's house and saw a number of men running away. Each of them claimed to have recognized amongst those men Mangal, Sita Ram and Ram Deo of the appellants. Ram Daur said he also recognized one Sukhari, Chamar, and Ram Autar said he also recognized four men, named Tirath, Jeo Dhan, Sukhari, Chamar, and Rameshar, Kori. With these additional men however we are not concerned. The evidence of Ram Daur and Ram Autar

was the only evidence materially to corroborate the evidence of Sidhari as regards the identity of the accused. The investigating officer, somewhat curiously, did not at first issue warrants for the arrest of any of the persons mentioned in the first report, nor did he search the house of any of them, so there was no property recovered. There can be no doubt that some men, at any rate, entered the house of Sidhari that night and stole some of his property. Sidhari was badly knocked about. He sustained several incised wounds, one of which, a triangular wound on the left side of the chest, was described as grievous. Sidhari claimed in his evidence to have recognized all the five appellants and a sixth man in the person of Tirath. He said that Nohar and Panchu attacked him with spears. His wife, Mt. Gauri, did not profess to have recognized any of the men who entered the house, and substantially the only evidence in support of Sidhari's was that of Ram Daur and Ram Autar, the nature of which has already been mentioned.

It was urged before me in the first place that the law relating to dacoity was not fully explained to the jury by the learned Assistant Sessions Judge, but I think there is no force in that suggestion. The Assistant Sessions Judge appears to have put the law before the jury in full detail, and if they failed properly to understand it, as appears from the fact that at first they found the appellants guilty of robbery only, although they found all five of them guilty of participation, that was not due to any fault of the Assistant Sessions Judge in explaining to them the law on the subject.

It was contended in the second place that the Assistant Sessions Judge did not lay before the jury sufficiently exhaustively the discrepancies which are to be found in the statements made by Sidhari at different times. His first report (Ex. 1) was made on 25th July 1930, and he made a statement (Ex. C) to the Sub-Inspector of Police that same night; on the next day he made another statement (Ex. B) to the Tahsildar, and on 9th September 1930, he made the complaint in Court which has already been referred to. That is Ex. 2 in the case. His statement before the committing Magistrate was taken on 22nd April . . . it is Ex. A in the case, and lastly his statement was recorded in the Sessions Court on 22nd July last.

It is possible that the Assistant Sessions Judge may not have called the attention of the jury to every possible discrepancy that may be said to exist in Sidhari's various statements, but it was not shown to me that any discrepancy was not put to them which was of importance, and which might possibly have led them to return a different verdict as regards all or any of the accused. The charge to the jury shows that the Assistant Sessions Judge was at considerable pains to lay before the jury a good many passages from the various statements made by Sidhari, and I do not think there is any reason to think that he omitted anything that was material. The most important point was that from certain portions of the statements made to the Sub-Inspector of Police on 25th July 1930, and the statement made to the Tahsildar on the following day, it appears that Sidhari said that only three men went into the house, and not six. That point was duly brought to the notice of the jury by the Assistant Sessions Judge, who had the relevant portions of those statements read to the jury.

The only point that can seriously be urged against the charge to the jury is this. The Assistant Sessions Judge, after setting forth the grounds on which Sidhari's evidence had been attacked for the defence, went on to say as follows:

"On behalf of the prosecution you have been told that you should not mind the discrepancies you may notice because Sidhari has deposed before you after the lapse of about a year from the date of the incident. It was also pointed out for the prosecution that as the names of the accused before you are all mentioned in the first information report (Ex. 1) you should hold that Sidhari's statement, that they entered his kothri on the night in question and injuries with spears were inflicted on his person by two of them, is substantially correct. It was further argued that as his statement was materially corroborated by other evidence you should believe it."

The Assistant Sessions Judge should clearly, in my opinion, have pointed out to the jury at that point that as far as the cases against Panchu and Nohar were concerned, there was no corroboration, material or otherwise, of the evidence of Sidhari, and he should have asked the jury to consider whether, in those circumstances, and having particular regard to the fact that Sidhari seems at time to have said that only three men went into the house, his evidence could safely be

accepted as against Nohar and Panchu without corroboration. His failure to do that seems to me to amount to misdirection. If any authority is needed on the point, I may refer to the following passage from a ruling reported in *Imperator* v. *Minha Sayo* (1), at p. 15 (of 11 *Cr.L.J.*):

"In India, where the Judge is bound by statute law to sum up the evidence for the prosecution and defence, any omission, however slight, is at least an irregularity, and may not unfairly be termed an error of law inasmuch as there has been a failure to conform with the law. Hence, in India, 'misdirection' is an appropriate term to apply to an omission in a summing up. But it was realized very early that, to treat every failure to conform with the Procedure Codes as a matter of law which could be made the subject of appeal under S. 418, Criminal P. C., or of second appeal in the case of civil suits, would lead to absurdity. Thus, on the civil side, it was found necessary to refuse to treat any error of law or defect in the procedure as a matter of law unless it were substantial and might possibly have produced error or defect in the decision of the case on the merits: see S. 100, Civil P. C., 1908, and on the criminal side, the test laid down was whether or not the omission was in the opinion of the Court of such importance as to have led to an erroneous verdict by the jury: S. 423 (2), Criminal P. C. Thus, for practical purposes, an omission in a summing up is not an error of law or a 'misdirection' unless it be on a point of substantial importance, or, where the point has been fully dealt with by the defence counsel, or prime importance."

I agree with the principles laid down in the passage of that ruling which I have quoted, and I think that it is more than possible that, if the Assistant Sessions Judge had clearly called the attention of the jury to the fact that there was no corroboration of Sidhari's evidence as against Nohar and Panchu, they might have returned a different verdict as regards those men. I do not think the convictions of those two men can be sustained, and I do not think it is a case in which a retrial ought to be ordered. I have pointed out that the evidence of Sidhari taken by itself was not very reliable and, in view of the fact that it is not corroborated against these two men, I think the evidence against them was not such as was sufficient to support a conviction. For the principles which ought to be applied in deciding what course to adopt in a case of this nature, I may refer to what was said in a ruling reported in *Jamiruddi Masalli* v. *Emperor* (2). I accordingly set aside the convictions and sentences of Nohar and Panchu, and, acquitting them, direct that they be released.

As regards the other three appellants, there was evidence corroborative of Sidhari's evidence in the statements made by Ram Daur and Ram Autar. The Assistant Sessions Judge put the evidence of those two witnesses fully and fairly before the jury, and it was quite competent for the jury to accept the evidence of those witnesses as sufficient corroboration of the evidence of Sidhari himself. I think there is no ground for interference in their cases, except in so far as it is rendered necessary by the fact that I have felt constrained to acquit Nohar and Panchu. The number of persons convicted of participation now stands at three only—in this connexion, of course, I bear in mind the point that has been referred to more than once already, that Sidhari himself more than once suggested that only three men went inside the house. I accordingly alter the convictions of Sita Ram, Ram Deo Singh and Mangal to convictions under S. 394, I. P. C., but I maintain their sentences, their appeals with this slight modification being dismissed.

P.N./R.K. *Appeal dismissed.*

(1) [1909] 3 S. L. R. 102=4 I. C. 597=11 Cr. L. J. 13.

(2) [1902] 29 Cal. 782=6 C. W. N. 553.

A. I. R. 1932 Oudh 25

RAZA AND SMITH, JJ.

Emperor

v.

Hasan Khan and *another*—Accused.

Criminal Ref. No. 38 of 1931, Decided on 9th Oct. 1931, by Dist. Mag., Sitapur.

(a) Criminal P. C. (1898), S. 423—Accused charged of higher offence but acquitted of it by trying Magistrate, cannot be convicted of that offence in appeal.

Where an accused is charged of offences under S. 147 read with Ss. 323 or 325, I. P. C., but is convicted under S. 323 and is definitely acquitted of offence under S. 325 by the trying Magistrate; in an appeal preferred by the accused, the appellate Court cannot convict him under S. 325. [P 26 C 2]

(b) Criminal P.C. (1898), S. 439 (4)—S. 439 is not to be construed as referring only to case where trial ends in complete acquittal—It applies when accused is acquitted of one charge and convicted of minor offence.

The prohibition contained in S. 439 (4) refers not only to a case where a trial has ended in a complete acquittal of the accused in respect of all charges or offences, but also to a case where the accused has been acquitted of one charge but convicted of the minor offence with which he is charged. There is no justification for attaching to sub-S. (4) the qualification that it must be construed as referring to cases where the trial has ended on a complete acquittal: *A. I. R.* 1928 *P. C.* 254, *Foll.* [P 26 C 2]

H. K. Ghosh, Govt. Advocate—for the Crown.

Order.—We have read the referring order of the learned District Magistrate and the explanation of te learned trying Magistrate.

The facts of the case are sufficiently set out in the referring order and they need not be repeated in detail.

Hasan Khan and Saadat Khan, Pathans of Moharasa, in the District of Sitapur, along with certain other persons, were charged with offences punishable under Ss. 147 and 323, I. P. C. Hasan Khan and Saadat Khan alone were further charged with an offence punishable under S. 325, I. P. C., for having voluntarily caused grievous hurt to one Ganga Din, deceased. The trying Magistrate held that no charge under S. 147 or S. 325, I. P. C., was made out against Hasan Khan and Saadat Khan, accused. He was however of opinion that they took a prominent part in the "marpit," and that they were responsible for the injuries caused to Ganga Din and certain other persons. He therefore convicted them under S. 323, I. P. C., and sentenced them, each, to six months' rigorous imprisonment and a fine of Rs. 50, (or in default, six weeks further rigorous imprisonment). Hasan Khan and Saadat Khan appealed to the learned Sessions Judge of Sitapur. He dismissed their appeals but modified their convictions. He altered the convictions from S. 323 to S. 325, I. P. C., but refused to enhance the sentences observing that he had no power to do so. The appeals were thus dismissed by the learned Sessions Judge on 22nd July 1931. The learned District Magistrate of Sitapur then submitted the present reference to this Court on 26th August 1931. He recommends that Hasan Khan and Saadat Khan should be convicted under S. 304, I. P. C., and the sentences passed upon them should be enhanced.

It appears that he has submitted this reference as regards the order of the trying Magistrate and not as regards the order of the Sessions Judge. He could not, of course, make any reference as regards the order of the Sessions Judge. We have to see now what should be done in this case. We have heard the accused persons, who have appeared in person before us. We have also heard the learned Government Advocate. One thing is clear. This Court cannot convict the accused persons of an offence punishable under S. 304, I. P. C., in these proceedings. As pointed out by their Lordships of the Privy Council in the case of *Kishan Singh* v. *Emperor* (1), where an accused is charged with an offence of murder under S. 302, I.P.C., but is convicted by the Sessions Judge of the offence of culpable homicide not amounting to murder, under S. 304, I. P. C., he must be deemed to be acquitted of the charge of murder, and the High Court in converting, in revision, the finding of acquittal of the accused on the charge of murder into one of conviction acts without jurisdiction. The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal. The prohibition contained in S. 439, sub-S.(4), Criminal P. C., which says that nothing in that section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction, refers not only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, but also to a case where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder. There is no justification for attaching to the subsection the qualification that it must be construed as referring to cases where the trial has ended in a complete acquittal.

On the basis of the principles laid down in this ruling, we think the learned Sessions Judge was not justified in convicting these men under S. 325, I. P. C. They had been definitely charged under that section, but acquitted by the trying Magistrate. They were convicted under S. 323 only, and the result of their appeals should not have been their conviction under S. 325 when they had been definitely acquitted by the trying Magistrate of the charge under that section. Their conviction under S. 323, I. P. C., cannot and should not therefore be altered. It is proved that they had taken a prominent part in the "marpit," which eventually resulted in the death of Ganga Din. They are responsible for the injuries caused to Ganga Din, even grant-

(1) A. I. R. 1928 P. C. 254=111 I. C. 332=29 Cr. L. J. 828=55 I. A. 390=50 All. 722 (P. C.).

ing that the injuries in question were not inflicted by them personally. We uphold their conviction under S. 323, I. P. C., under the circumstances mentioned above, but we are of opinion that the sentences passed upon them are inadequate. The maximum sentence which can be passed under S. 323, I. P. C., is one year. They will undergo one year's rigorous imprisonment, each instead of six months' rigorous imprisonment, as ordered by the trying Magistrate. They will also have to pay the fines imposed by the learned Magistrate. Their sentences are enhanced to this extent only.

R.M./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 27

SRIVASTAVA, J.

Kandhai and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 117 of 1931, Decided on 5th November 1931, against order of Sess. Judge, Fyzabad, D/- 26th August 1931.

(a) Criminal P. C. (1898), Ss. 413, 414 and 415 — Where two punishments of fine of Rs. 50 and of Rs. 20 are combined sentence is appealable.

The word "therein" as used in S. 415 refers to Ss. 413 and 414. In other words the section is intended to apply to cases in which two or more of the punishments mentioned in S. 413 or S. 414 have been combined. The punishments mentioned in S. 413 are sentence of punishment not exceeding one month passed by a Court of Session, and a fine not exceeding Rs. 50 imposed by a Court of Session, or District Magistrate or other Magistrate of the 1st Class. The punishment referred to in S. 414 is a fine not exceeding Rs. 200. Where therefore in a summary trial a Magistrate imposes two fines one of Rs. 50 and the other of Rs. 20 the case is one in which two punishments such as are referred to in S. 414 have been combined and the sentence is appealable. [P 28 C 1]

(b) Criminal P. C. (1898), S. 439—Court is not bound to treat application for revision as appeal.

Where the order of the Magistrate, being appealable on account of the combination of two punishments imposed, a party instead of filing an appeal against the order applies in revision, the Court is perfectly justified in rejecting that application summarily and it is not bound to treat that application as an appeal when no such request is made to it. [P 28 C 1]

A. N. Mulla—for Applicants.

Ali Muhammad—for the Crown.

Judgment.—This is an application for revision under Ss. 435 and 439, Criminal P.C., against the order dated 26th August 1931 of the Sessions Judge of Fyzabad upholding the order dated 12th August 1931 of a Magistrate, 1st Class of Fyzabad District, convicting the applicants summarily under S. 447, I. P. C. and S. 24, Cattle Trespass Act, and sentencing each of them to pay a fine of Rs. 50, in default two months rigorous imprisonment under S. 447, I. P. C., and a fine of Rs. 20, in default one month's rigorous imprisonment under S. 24, Cattle Trespass Act. Briefly stated the facts are that there is a military grass farm in Fyzabad. A portion of the land of this farm has been reserved for growing grass for the use of the military. This reserved area has been enclosed with barbed wire fencing. On the night of 21-22nd June 1931 the applicants were found grazing about sixty head of cattle in this reserved area. When the employees of the grass farm tried to secure the cattle in order to take them to the pound, the applicants resisted and rescued some thirty or thirty-five head of cattle with the result that the grass farm employees could manage to impound only nineteen head.

The learned Magistrate, in an elaborate judgment, after discussing the evidence at considerable length, held that the prosecution case had been fully established and that all the accused persons were guilty of committing criminal trespass and also of forcibly rescuing cattle and that they were therefore liable to conviction under S. 447, I. P. C., and S. 24, Cattle Trespass Act. He accordingly awarded them the sentences stated above under each of these sections. The accused filed an application for revision in the Court of the Sessions Judge of Fyzabad against this order of the Magistrate. The application was dismissed summarily by the learned Sessions Judge.

The first contention urged on behalf of the applicants is that as the Magistrate has awarded two punishments, one a fine of Rs. 50 under S. 447, and the other a fine of Rs. 20 under S. 24, Cattle Trespass Act, therefore the case is governed by S. 415, Criminal P. C., in spite of the provisions of S. 414 of that Code, the sentence was appealable to the Sessions Judge. S. 415 runs as follows:

"An appeal may be brought against any sentence referred to in S. 413 or S.414 by which any two or more of the punishments therein men-

tioned are combined, but no sentence which would not otherwise be liable to appeal, shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace."

The word "therein" as used in this section must in my opinion refer to Ss. 413 and 414. In other words the section is intended to apply to cases in which two or more of the punishments mentioned in S. 413 or S. 414 have been combined. The punishments mentioned in S. 413 are sentence of imprisonment not exceeding one month passed by a Court of Session and a fine not exceeding Rs. 50 imposed by a Court of Session or District Magistrate or other Magistrate of the 1st Class. It is admitted that this section does not apply to the case. As stated before the conviction by the Magistrate was in the exercise of his summary powers and therefore the relevant section is S. 414. The punishment referred to in this section is a fine not exceeding Rs. 200 only. In the present case the Magistrate has imposed two such fines, one of Rs. 50 and the other of Rs. 20. Thus the case is one in which two punishments such as are referred to in S. 414 have been combined. If any of these punishments stood by itself, the order by virtue of S. 414, could not be appealable but because the Magistrate impose two such punishments, therefore by reasons of the combination of the two punishments, S. 415 makes the order appealable. I therefore accept the applicants' contention. But the applicants cannot derive any benefit from it. The order of the Magistrate being appealable, the applicants instead of making an application in revision to the Sessions Judge ought to have filed appeals against their conviction and sentence. As they did not do so, the learned Sessions Judge was perfectly right in dismissing the applications for revision summarily. It was argued that the learned Sessions Judge ought to have treated the application for revision as an appeal. But no such request was made to him and he was not bound to do so. S. 439, Cl. (5), Criminal P.C., provides that where under this Act an appeal lies and no appeal is brought no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The result therefore is that the present application for revision is not maintainable. In this view of the matter it is not necessary for me to enter into the merits of the application.

The application fails and is dismissed.

K.N./R.K. *Application dismissed.*

A. I. R. 1932 Oudh 28

RAZA AND SMITH, JJ.

Emperor

v.

Zamin—Accused.

Criminal Appeals Nos. 209, 258, 259 and 270 of 1931 and Criminal (Jury) Ref. No. 1 of 1931, Decided on 14th October 1931, made by Asst. Sess. Judge, Fyzabad, by his order, D/- 20th July 1931.

Penal Code (1860), S. 368—Knowledge of kidnapping or abduction is essential—Word "knowledge" explained.

Section 368 is confined to knowledge only of fact of kidnapping or abduction. "Knowledge" means the state of mind entertained by a person with regard to existing facts which he has himself observed or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt. [P 30 C 1]

Ali Mohammad, Asst. Govt. Advocate—for the Crown.

Judgment.—The above appeals and reference are connected and can be disposed of together. The facts, briefly are as follows. A married girl named Parbhu Dei, a "Murao" by caste, is said to have been either kidnapped or abducted at Fyzabad on or about the 22nd-23rd January last by three men named Munne, Nazir and Kunnu, and taken on an "ekka gari" driven by one Zamin to a railway station whence Munne and Kunnu brought her by train to Lucknow. At Lucknow she is said to have been kept for several days at an "ashram" or widows' home, run by one Babu Ram with the assistance of one Badri. On 13th February she was married to one Thakur Dass, a resident of Jullandur, in the Punjab, and Thakur Dass, with whom were three companions in the persons of Bholanath, Chunni Lal and Jamna Dass, left with the girl by train on the evening of 14th February. One Sarabjit Singh however had got wind of what was going on and either out of genuinely disinterested motives or to spite Babu Ram himself boarded the same train as Thakur Dass and his party, and gave information to the police at Shahjahanpur, as a result of which Thakur Dass and those with him were arrested. In the end Nazir, Munne and Zamin were committed for trial on a charge under S. 366, I. P. C.,

and Babu Ram Badri, Thakur Dass, Jamna Dass, Chunni Lal and Bholanath on charges under S. 368, I. P. C. Kunnu was said to be absconding, so he was not before the Court. As a result of the trial, which was held with a jury, Munne and Nazir were convicted under S. 366, I. P. C. and Thakur Dass Badri and Babu Ram were convicted under S. 368, I. P. C. Each of them was sentenced to five years rigorous imprisonment; Jamna Dass, Chunni Lal, and Bhola Nath were acquitted. As regards the above men, the learned Assistant Sessions Judge of Fyzabad, who tried the case, accepted the unanimous verdict of the jury. As regards Zamin, the jury were unanimous in finding him also guilty under S. 366, I. P. C., despite the fact that the learned Assistant Sessions Judge had directed them to return a verdict of not guilty in his case. The Assistant Sessions Judge was of course entitled to do that under S. 289 (2), Criminal P. C, if he considered there was no evidence that Zamin was guilty of the offence charged against him. The Assistant Sessions Judge has referred the case of Zamin to this Court, as he was unable to accept the jury's verdict of guilty against him, and we have also before us appeals by the five convicted men. Babu Ram and Badri (Badri Parshad) are the appellants in Appeal No. 209, Thakur Dass (alias Thakur Prasad) is the appellant in No. 258, Nazir (Nazir Khan) in No. 259 and Munne in No. 270.

As regards Zamin we agree with the reasons given by the Assistant Sessions Judge for holding no case made out against him. We can only suppose that the jury were confused as to him as a result of the very long and elaborate charge addressed to them by the learned Assistant Sessions Judge. Acting under S. 307 (4), Criminal P. C., we acquit Zamin. If he is in custody he must be released forthwith. If he is on bail any bonds executed by him or on his behalf are discharged.

As regards the appeals by the convicted men, it was suggested to us that the joint trial was bad in law. We think there is no force in that suggestion. The whole chain of events beginning with the girl's kidnapping or abduction at Fyzabad and ending with her discovery at Shahjahanpur, can fairly be regarded as forming one and the same transaction. It would be in the highest degree inconvenient in a case of this nature to split the entire chain of events up into several distinct trials involving the repetition of much of the evidence in each of them.

As regards the charge to the jury, we think that the Assistant Sessions Judge was at pains to lay the case fairly and fully before the jury and that if he erred it was on the side of over elaboration, and not on the side of insufficiency of details.

Having said this much by way of preface we proceed to consider the cases of the various appellants.

The exact age of the girl is not very certain; she may be under 16. According to her mother's evidence she is 14, and according to medical evidence she is about 15. The jury concluded her to be aged "exactly 16 years but they found nevertheless, that she was kidnapped." If she is not under 16 of course she could not be kidnapped, but we are satisfied that there were materials justifying a finding that she was abducted since she is said to have been induced to go with the men concerned first by deceitful promises of being taken to the house of a relative of hers, and afterwards by threats of being killed. It was in fact abduction, and not kidnapping, that was mentioned in the charge sheets. For the purposes of Ss. 366 and 368, I. P. C., of course, kidnapping and abduction stand on the same footing. We are satisfied that the girl was either kidnapped or abducted and that the object of those who kidnapped or abducted her was one or more of the objects specified in S. 366, I. P. C. She alleges that she was in fact raped on several occasions quite apart from her ultimate marriage against her will to Thakur Dass. Those who kidnapped or abducted her therefore, were rightly convicted under S. 366, I. P. C. There was sufficient evidence to justify the jury's finding that Nazir and Munne were two of the men concerned. We see no reason to interfere, as far as they are concerned, either with the convictions or with the sentences. Their appeals are dismissed.

We now come to the cases of Babu Ram and Badri. As to them it is urged in appeal:

(i) They had no "knowledge" that Mt. Parbhu Dei had been kidnapped or abducted;

(ii) they did not "conceal" her, whether they had such knowledge or not.

As to the former point we are referred to a ruling reported in *A. I. R.* 1926 *Cal.* 226.

It is true that S. 368, I. P. C., is confined to "knowledge" only of the fact of kidnapping or abduction. It contains no words, as do certain other sections of the Code (such as Ss. 411, 497 and 498), such as, 'or having reason to believe'. It has therefore to be considered whether Babu Ram and Badri can be said to have known that Mt. Parbhu Dei had been kidnapped or abducted.

In that connexion we must mention that there is no doubt that the girl did, in fact spend some time at the ashram managed by Babu Ram and Badri. It appears that she arrived there on 30th January, and if that is so, there is a curious lacuna in the evidence as to where she was between the 22nd-23rd January and that date. However, as we have said, she certainly spent several days at the "ashram" that is not denied by Babu Ram and Badri. Their version is that she was brought there in the absence of Babu Ram, and was admitted by Badri, to whom she represented that she was a widow anxious to remarry.

It has therefore to be considered as we have said already whether Babu Ram and Badri can be said to have "known" that she had been kidnapped or abducted.

According to the girl Munno and Kunnu had some talk with Badri which she did not overhear. She herself, she said, told both Badri and Babu Ram that she was married, and had a husband and various other relatives living. She did not say that she ever gave them to understand that she had been kidnapped or abducted.

In these circumstances it is difficult to see how it can be held that Babu Ram or Badri "knew" her to have been kidnapped or abducted. Without going into a metaphysical discussion of the nature of knowledge, we may say that for practical and legal purposes "knowledge" means the state of mind entertained by a person with regard to existing facts which he has himself observed, or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt. Here it is not suggested that Babu Ram or Badri had any personal knowledge of the girl and her circumstances prior to her arrival at the "ashram" at Lucknow, so they can only be held to have had "knowledge" of her and her circumstances if the facts in those connexions were communicated to them by the girl herself or by others, which sources of information they had no reason to doubt. If the girl herself, or the men Munne and Kunnu, were alleged to have given to Babu Ram or Badri information that the girl had been kidnapped or abducted, we should have had no difficulty, in the absence of any suggestion that they had any reason to disbelieve what was told them, that Babu Ram and Badri knew that the girl had been kidnapped or abducted. As far as the evidence goes however we cannot say more than this that they had reason to believe, or suspect, that she had been kidnapped or abducted. We have no hesitation in saying that the arrival a the ashram of a Hindu girl, who alleged herself to be married, in the company of two Mussalmans, (we think the prosecution case to be adequately made out to that extent) may reasonably be held to have given rise to strong suspicions in the minds of Babu Ram and Badri, but the possibility of her having voluntarily left home remained and we are not prepared to hold that that possibility was negatived by anything communicated to Babu Ram and Badri by the girl or by her companions; in other words, we are not prepared to hold that Babu Ram or Badri "knew" the girl to have been kidnapped or abducted, so as to render them punishable under S. 368, I. P. C.

In these circumstances we think the conviction of those men under S. 368, I. P. C., was not in law justified by the evidence. As to whether the girl can be said to have been "concealed" at the ashram it is not necessary for us definitely to decide, but we may say that despite what is contained in certain rulings to which we have been referred on that point (N. W. R. High Court Reports, Vol. 5, 1873, pp. 133 and 189 and Punjab Record, Vol. IX, 1874, Criminal Judgment No. 10) we should have had no difficulty having regard to all the circumstances, in holding that Babu Ram and Badri "concealed" the girl. She said that she and other women in the "ashram" used to be kept at times under lock and key, and even if she was not continuously kept concealed or confined, (appa-

rently she was not so kept concealed or confined), she was, in our opinion kept concealed and confined at times. However, having regard to the view we take on the point of the knowledge of Babu Ram and Badri, it is not necessary to discuss that point further. We think that the conviction of Babu Ram and Badri under S. 368, I. P. C., was bad in law. It is possible that they might on the evidence have been properly convicted under some other section or sections of the Penal Code, but we do not think we need to consider that here. We set aside the convictions and sentences of Babu Ram and Badri under S. 368, I. P. C., and direct that they be forthwith released.

It should not be necessary for us to state that we are far from approving of such activities as Babu Ram and Badri appear to have been carrying on at the so-called ashram. We are told that those activities have now ceased, and we are glad to believe that that is so.

There remains the case of Thakur Dass. We need say little in that connexion. It is not made out that he knew the girl had been kidnapped or abducted. She did indeed say, at first that she told him, before her "marriage" that she had a husband living, but she afterwards said that she could not remember whether she told him that before her "marriage" to him. After that marriage she said she did not tell Thakur Dass that she had been forced to marry him. Yet again, she said that in the train she told Thakur Dass and his companions that she had not "married" with her consent. Little attention can be paid to what the girl has said at different times on this point. In any case, we are satisfied, that Thakur Dass cannot be said to have known that she had been kidnapped or abducted; so his conviction under S. 368, I. P. C., must be held to have been bad in law. We therefore set aside his conviction and sentence: he will be released forthwith.

We may mention with regard to the contents of sub-S. (2), S. 423, Criminal P. C., that we consider the verdict of the jury to have been erroneous as regards Babu Ram Badri snd Thakur Dass owing to the fact that the learned Judge did not adequately bring out in his charge to the jury the difference between knowledge, and the existence of grounds for belief or suspicion, and that at any rate the jury failed to understand the importance of the difference between those two things for the purposes of a conviction under S. 368, I. P. C.

P.N./R.K. *Order accordingly.*

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* A. I. R. 1932 Oudh 31

RAZA AND SMITH, JJ.

Girdhariji Singh—Complainant—Applicant.

v.

Jitendra Mohan Singh and *another*—Accused.

Criminal Revn. No. 98 of 1931, Decided on 17th October 1931, against order of Asst. Sess. Judge, Fyzabad, D/- 10th March 1931.

*** (a) Criminal P. C. (1898), S. 439—High Court can entertain revision application against order of acquittal at instance of private complainant.**

It is within the competence of a High Court should it see fit to interfere in revision against an order of acquittal at the instance of a private complainant to the extent of setting aside the orders of acquittal and directing a retrial. [P 32 C 2]

(b) Practice—Stay of—Matter subjudice in civil Court—Criminal trial should be stayed.

It is in the highest degree undesirable that there should be a determination of the matter in criminal Court when it is still subjudice in the civil Court.

(c) Criminal Trial—Trial by jury—Objections regarding constitution must be raised when trial begins.

No objections regarding the constitution of the jurors will be considered if not raised when the trial begins. [P 32 C 2]

J. N. Misra and *Sri Ram Misra*—for Applicant.

J. Jackson and *L. N. Shukla*—for Opposite Parties.

Judgment.—This is a criminal revision at the instance of a private complaint against the acquittal of two men, Jitendra Mohan Singh and Mathura Singh, who were tried with the aid of a jury by the learned Assistant Sessions Judge at Fyzabad. The charges against Jitendra Mohan Singh were under Ss. 465 and 477-A, I. P. C., or in the alternative, under S. 477-A read with S. 114, I. P. C. The charges against Mathura Singh were under Ss. 465 and 477-A and S. 204, I. P. C.

The facts briefly are that on 7th April 1909 one Raj Bahadur Singh executed a mortgage deed in favour of two men, Indra Bikram Singh and Jai Narain Singh. Jai Narain Singh is still alive.

Indra Bikram Singh is dead; the accused Jitendra Mohan Singh is one of Indra Bikram Singh's sons. The mortgagor, Raj Bahadur Singh is also dead, having died in the year 1919. The complainant in the present case is his son, Girdhari Singh. It is said that in the year 1929 Jai Narain Singh and Jitendra Mohan Singh threatened Girdhari Singh with a suit for the recovery of Rs. 62,000 on the basis of the mortgage that has been referred to above. Thereafter it is said Girdhari Singh having taken legal advice was informed that a claim on the basis of the deed aforesaid was time barred and he went to Jitendra Mohan Singh accused and told him that he had been so advised. Jitendra Mohan Singh said that he too would take legal advice. The suggestion made by the complainant is that certain alterations were made in the account books of the mortgagee and certain account books were destroyed in order to create evidence which would bring a suit on the basis of the mortgage deed within time. Jai Narain Singh and Jitendra Mohan, it should be mentioned are carrying on a joint banking business, in which Mathura Singh is the manager.

A criminal complaint was lodged by Girdhari Singh against Jitendra Mohan Singh and Mathura Singh on 11th March 1930. As a result of the magisterial inquiry Jitendra Mohan Singh and Mathura Singh were committed for trial on charges that have already been set forth. The trial began in the middle of December 1930, and continued till 10th March 1931, on which date the learned Assistant Sessions Judge, accepting the opinion of the majority of the jurors, found both the accused not guilty of the offences charged against them and acquitted them. It was not until the 14th of August last that this application in revision was made to this Court against the acquittal of the accused in that trial. We are informed that the complainant had, in the meantime, moved the appropriate authorities to get an appeal instituted by Government against the acquittals, but Government refused to institute such an appeal.

On behalf of the applicant we have heard Dr. J. N. Misra at very considerable length. He has cited to us numerous rulings both of this Court and of other Courts, as to our competency to entertain this application at the instance of a private complainant despite the fact that Government has declined to institute an appeal. We do not think it necessary to set out any of those rulings in detail, since we are prepared to hold that it is within our competency should we see fit, to interfere in the matter at the instance of this private complainant to the extent of setting aside the orders of acquittal and directing a retrial.

On the merits various points have been taken. The first is that the jury with the aid of which the Sessions trial was conducted, was not properly constituted. We see no reason to attach any particular importance to the suggestions made on that point especially in view of the fact that the jurors were not objected to when the trial began. That was the time for the parties to raise any objections.

As to the merits of the matter in other ways, we find ourselves in some difficulty by reason of the fact that on 12th March 1931, that is to say two days after the decision of the Sessions trial, a civil suit was filed on the basis of this mortgage deed. This suit is still pending and that fact is the one that impresses us most in deciding what action we ought to take with regard to this revision. For us to go into all the details of the accounts would, needless to say, be to consider matters which will come up for decision in the civil suit. If a retrial of the criminal case were ordered, the effect would be that the same circumstances would be under consideration both in the criminal Court and in the civil Court. The object of the applicant in making this application in revision is, it is hardly necessary to point out, to obtain if possible, the conviction of the men who were acquitted in the Sessions trial, and it is we think in the highest degree undesirable that there should be a determination of the matter in the criminal Court when it is still subjudice in the civil Court. The case is one of high valuation and will be liable to go up on appeal to the highest tribunal. In these circumstances, we think it best now that one criminal trial has already been concluded that the dispute should, for the future, be conducted in the civil Court, which is the competent Court to decide the matters which are really at issue between the parties.

We do not think it necessary to say anything more save this that the learned Assistant Sessions Judge made a most elaborate and apparently exhaustive charge to the jury, and there is no ground for any suggestion that he did not put the matter fully before them. However that may be, for the reasons given, we do not think that in this particular case we ought to interfere in revision and order a retrial. We accordingly dismiss this application.

V.B./R.K. *Application dismissed.*

A. I. R. 1932 Oudh 33

RAZA AND SMITH, JJ.

Sadho Ram—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 100 of 1931, Decided on 26th October 1931, against order of Sess. Judge, Hardoi, D/- 20-6-1931.

Criminal P. C. (1898), S. 106—Merely committing offence for which person could have been convicted under S. 352, Penal Code, is not sufficient for order under S. 106—Person convicted only under S. 504, Penal Code—Order cannot be made under S. 106, Criminal P. C.

An order under S. 106, Criminal P. C., can be made against a person convicted under S. 352, Penal Code, but he must be actually convicted under S. 352, Penal Code, for justifying the order. Mere committing of an offence for which he could have been convicted under S. 352 is not sufficient for justifying it. An offence under S. 504, Penal Code, does not necessarily involve breach of the peace. It involves only an intention to provoke a breach of the "public peace" or knowledge that the provocation given is likely to cause a breach of the "public peace." Such an offence cannot be said to be one "involving a breach of the peace," and if a conviction takes place under S. 504, Penal Code, and no other section, an order under S. 106, Criminal P. C., cannot properly be made: 35 *Cal.* 315; 26 *Mad.* 469; *A. I. R.* 1921 *Lah.* 96; 30 *Cal.* 93; 29 *Mad.* 190; 30 *Cal.* 366 and *A.I.R.* 1930 *Cal.* 802, *Rel. on*; 43 *Bom.* 554 and 33 *All.* 771, *Diss. from.* [P 34 C 1, 2]

Ali Jawad—for Applicant.

Ali Muhammad—for the Crown.

Order.—This criminal revision has been referred to a Bench of this Court in view of the conflicting views of various High Courts on the matter at issue. The facts appear in the order of one of us by which the matter was referred to a Bench. The question is whether the applicant, having been convicted under S. 504, I. P. C., only was rightly called on for security under S. 106, Criminal P. C.

Two rulings exist with reference to that very section (S. 504). One is reported in *Yakub Syed* v. *Emperor* (1) and the other in *Asoka Prasanna* v. *Emperor* (2). The latter is a Calcutta ruling. In the Bombay case it was held that an order under S. 106, Criminal P. C., could rightly be made when a conviction has taken place under S. 504, I. P. C. In the Calcutta case it was held that an order under S. 106, Criminal P. C., cannot be passed upon a conviction under S. 504, I. P. C. The Calcutta case follows the interpretation put upon the words "offence involving a breach of the peace" in an earlier Calcutta ruling reported in *Arun Samanatha* v. *Emperor* (3). In that ruling S. 110 (e), Criminal P.C., was under consideration..... the words "offences involving a breach of the peace" therein occur. It was held that those words mean offences in which a breach of the peace is an ingredient, and not offences provoking or likely to lead to a breach of the peace. The ruling reported in *Yakub Syed* v. *Emperor* (1) was referred to in *Asoka Prasanna* v. *Emperor* (2) and was impliedly dissented from. So also was a ruling reported in *Emperor* v. *Manik* (4). In that ruling an order under S. 106, Criminal P. C., was under consideration which had followed upon a conviction under S. 424, I. P. C. That order was upheld. Discussing the meaning of the words "offence involving a breach of the peace," the learned Judge who decided the case said:

"The word "involve" in my opinion connotes the inclusion, not only of a necessary, but also of a probable feature, circumstances, antecedent condition or consequence."

The ruling reported in *Arun Samanatha* v. *Emperor* (3) was expressly dissented from, as were also two other Calcutta rulings. *Baidya Nath* v *Nibaran* (5) and *Raj Naraain* v. *Bhagbat* (6). In *Baidya Nath* v. *Nibaran* (5) the convictions were under Ss. 447 and 426, I. P. C., and in *Raj Narain* v. *Bhagbat* (6) under S. 143, I. P. C. In each case a consequent order under S. 106, Criminal P. C., was held to be bad. The Alla-

(1) [1919] 43 Bom. 554 =20 Cr. L. J. 543= 51 I. C. 783.
(2) A. I. R. 1930 Cal. 802=1930 Cr. C. 1087= 32 Cr. L. J. 359=129 I. C. 413.
(3) [1903] 30 Cal. 366.
(4) [1911] 33 All. 771 = 12 Cr. L. J. 405 = 11 I. C. 589.
(5) [1903] 30 Cal. 93=6 C. W. N. 471.
(6) [1908] 35 Cal. 315=7 Cr. L. J. 392.

habad ruling above referred to dissented also from one reported in *Muthia Chetty* v. *Emperor* (7). In that ruling an order under S. 106, Criminal P. C., was under consideration which had followed upon a conviction under S. 143, I. P. C. The order was set aside, on the reasoning that:

"The words involving a breach of the peace in the section, require that a breach of the peace should be an ingredient of the offence proved, and that before the section can be put in force there must be a finding that a breach of the peace has occurred."

The ruling reported in *Baidya Nath* v. *Nibaran* (5) was followed as also was an earlier Madras ruling *Kannookaran* v. *Emperor* (8). Offences punishable under S. 143, I. P. C., we may point out, are now expressly excluded from the purview of S. 106, Criminal P. C.

The last ruling we propose to refer to is reported in *Abdulla* v. *Emperor* (9). In that case the convictions were under Ss. 143 and 297, I. P. C., and a consequent order under S. 106, Criminal P. C., was set aside. The rulings reported in *Arun Samanatha* v. *Emperor* (3), *Raj Narain* v. *Bhagabat* (6) and *Kannookaran* v. *Emperor* (8) were followed. In the Lahore case it was said:

"The Magistrate passed that order in view of the fact that criminal intimidation in a public place was one of the ingredients of the offences committed. It is however not sufficient in order to justify the passing of an order under S. 106, Criminal P. C., against any person that he should have committed the offence of criminal intimidation, but it is necessary, as is clear from the section itself, that he should have been convicted of that offence. In this case the petitioner has not been convicted of criminal intimidation. Nor was either of the offences of which he was convicted one involving a breach of the peace, as no breach of the peace actually took place."

That case resembles the present one before us in asmuch as here the convicted man is said to have raised a lathi at the complainant and hence as was pointed out in the order of reference to this Bench he might have been convicted under S. 352, I. P. C., in which case an order under S. 106, Criminal P. C., would undoubtedly have been justified. He was not so convicted, however and what we have to look at is the nature of the offence of which he was convicted. We agree on that point with what was said in the passage we have quoted from the Lahore ruling, so what remains to be considered is whether, when a conviction takes place under S. 504, I. P. C., an order under S. 106, Criminal P. C., can rightly be made. An offence punishable under S. 504, I. P. C., does not necessarily involve a breach of the peace. It involves only an intention to provoke a breach of the "public peace," or knowledge that the provocation given is likely to cause a breach of the "public peace." On the whole, we think that such an offence cannot be said to be one "involving a breach of the peace," and that if a conviction takes place under S. 504, I. P. C., and no other section, an order under S. 106, Criminal P. C., cannot properly be made. We adopt, that is to say, the narrower view of the meaning of the words "offence involving a breach of the peace," that has been taken at Calcutta, Madras and Lahore, in preference to the wider interpretation that has found favour at Allahabad and Bombay.

The result is that we allow this revisional application as far as the order under S. 106, Criminal P. C., is concerned. We set that order aside. If the applicant did not furnish the security demanded of him, and is consequently in jail, he must be released at once. If he furnished it, his bond and his surety's bond are discharged.

P.N./R.K. *Revision partly accepted.*

(7) [1906] 29 Mad. 190=3 Cr. L. J. 461.
(8) [1903] 26 Mad. 469=2 Weir 48.
(9) A. I. R. 1921 Lah. 96=63 I. C. 869=22 Cr. L. J. 709=2 Lah. 279.

A. I. R. 1932 Oudh 34

WAZIR HASAN, C.J. AND SRIVASTAVA, J.

Wajid Ali Khan—Defendant—Appellant.

v.

Jafar Husain Khan and *another*—Plaintiffs—Respondents.

First Appeal No. 1 of 1931, Decided on 2nd November 1931, against decree of Addl. Sub-Judge, Hardoi, D/- 10th November 1930.

(a) Mahomedan Law — Divorce — Hanafi School—Express and implied divorce—Terms explained—"Talak" is only term of express divorce in Urdu—All others signify implied divorce.

Where an Indian Mahomedan husband says to his wife: "I give up all relations and would have no connexion of any sort," these words are not "express" with the meaning of the Hanafi Mahomedan law to effect a divorce; nor are they understood in that law as implying divorce. The express words are well known to be talak and its grammatical variations. These words viz., "talak" with its grammatical variations are terms of art and the technical meaning which they have acquired by usage is "free-

dom from the bondage of marriage" and not from any other bondage. Once they are used they must be given effect according to their technical import and evidence as to any intention to the contrary is not permissible according to the Hanafi Mahomedan law. Apart from the word "talaq" there are no other words of Urdu used by the Musalmans of India bearing the same technical meaning as the word "talak" bears. The expressions of the "implied divorce" according to the text of Hedaya are always regarded as ambiguous and the meaning of "divorce" is given to them only on proof of the accompanying intention or the surrounding circumstances. This is certainly so in the Hanafi Mahomedan law though there is some difference in this respect between that law and the Shafai law. The aforesaid words uttered by the husband should be held to be ambiguous, and where it is admitted that the intention of the user of those words was not to effectuate a divorce the words must be treated as innocuous altogether. [P 38 C 1, 2]

(b) Mahomedan Law — Text — Hedaya — Hamilton's translation is not only correct but best and elegant—(Obiter).

The translation of the original Arabic text of the Hedaya by Hamilton is not only accurate but is also best in form and elegance: 33 *Mad.* 22, *Ref.* [P 39 C 1]

Ghulam Hasan and *Iftikhar Husain*—for Appellant.

M. Wasim, *Manni Lal* and *Siraj Husain*—for Respondents.

Judgment.—This is the defendant's appeal from the decree of the Additional Subordinate Judge of Hardoi, dated 10th November 1930.

Mt. Saghir-un-nisa was married to the defendant, Wajid Ali Khan, on 12th March 1909, according to the Hanafi Mahomedan law at Shahabad in the district of Hardoi. She died on 11th May 1928 and plaintiff 1, Jafar Husain Khan, is her brother and Mt. Mahmud-un-nisa, plaintiff 2, is her sister. It is admitted that the plaintiffs and the defendant are the sole heirs-at-law of Mt. Saghir-un-nisa entitled to share in equal moieties in the inheritance. The plaintiff's case is that Mt. Saghir-un-nisa's dower was fixed at Rs. 80,000 as a deferred dower at the time of her marriage with the defendant. The plaintiffs are thus entitled to recover Rs. 40,000 from the defendant. They also claim from the defendant certain ornaments the value of which they stated to be Rs. 1,063-8-0. Lastly they asked for a decree for a sum of Rs. 25,000 only by reason of the insufficiency of the defendant's means. In defence the defendant pleaded that the amount of dower fixed at the marriage was only Rs. 10,000; that Mt. Saghir-un-nisa had relinquished her claim for dower, whatever the amount, by executing a document, dated 4th February 1924; that early in December 1921 the defendant had irrevocably divorced Mt. Saghir-un-nisa and that therefore counting the period of limitation for a claim for dower from December 1921, the present suit was barred by time. The Court was also asked to determine the reasonable amount of dower under S. 5, Oudh Laws Act, 1876, for which a decree might be passed against the defendant.

On the question of the amount of dower fixed at the marriage of Saghir-un-nisa with the defendant the finding of the learned Additional Subordinate Judge is that it was Rs.80,000. The issue as to the release of dower has been decided by him in the negative and against the defendant. On the question of the alleged divorce in December 1921 his finding is again in the negative and against the defendant. As to what was the reasonable amount of dower, having regard to the means of the husband and the status of the wife, for which a decree should be made in favour of the plaintiffs in the present case, his finding is that the defendant is possessed of property of the value of at least Rs. 90,000 and his opinion on this issue is that Rs. 30,000 was the reasonable amount of dower within the meaning of S. 5, Oudh Laws Act. Finally, he decreed the plaintiffs' suit for their half-share of Rs. 15,000. As regards the ornaments, he has found that the plaintiffs are entitled to a decree of Rs. 125 for their share in the value of the ornaments. Except the last-mentioned finding, every other finding of the learned Additional Subordinate Judge has been challenged before us.

There is no documentary evidence whatsoever to show as to what the amount of dower was, but it is agreed that it was fixed at the marriage. The plaintiffs have therefore produced witnesses to prove that the dower was fixed at Rs. 80,000. On the other hand, the defendant has also examined witnesses in support of his case as to the amount of the dower. At the hearing of the appeal the record of the evidence produced on both sides was read to us in extenso. The conclusion at which we have reached is that the finding of the learned Additional Subordinate Judge is correct and must be accepted. The plaintiffs' witnesses are Israr Husain Khan, Abdus

Sattar Khan, Muhammad Raza Khan and Amir Husain Khan. All these four witnesses were present at the marriage. Amir Husain Khan acted as a vakil at the marriage and Muhammad Raza Khan was a witness. Abdus Sattar Khan is the nephew of Mt. Saghir-un-nisa and Israr Husain Khan joined the marriage as a friend of the defendant. The qazi who recited the formula is now dead. The learned Additional Subordinate Judge has answered some of the criticizms advanced on behalf of the defendant against the testimony of those witnesses and has accepted their evidence as reliable and worthy of credence.

In the arguments before us nothing was urged which would induce us to disagree with the learned Additional Subordinate Judge in his opinion as to the trustworthiness of the plaintiffs' witnesses. He has also given reasons for forming the opinion that the fixing of the amount of dower at Rs. 80,000 was in consonance with the probabilities and the circumstances of the case. He has pointed out that one Hakim Khadim Husain Khan, who was a holder of the title of Khan Bahadur, an Honorary Magistrate, and one of the most respectable men of Shahabad, acted in loco parentis at Mt. Saghir-un-nisa's marriage. Her father had died. She was the first cousin of Khadim Husain Khan and the marriage took place at his house. The evidence on both sides agrees that the amount of dower was settled by him. In the case of Khadim Husain Khan's own daughters like sum of money, that is, Rs. 80,000, had been fixed as the dower. The learned Additional Subordinate Judge has pointed out to the fact that Mt. Saghir un-nisa's sister's dower, that is plaintiff 2's, was also settled at Rs. 80,000. We are of opinion that these are sufficiently weighty grounds in support of his finding.

On the side of the defendant he himself went into the witness-box and produced five more witnesses in support of his allegation as to the amount of the dower. Obviously the evidence of the defendant himself cannot be accepted without strong corroboration. Such a corroboration is not available out of the testimony of his witnesses, all of whom have been disbelieved by the learned Additional Subordinate Judge. He has examined the statements of these witnesses with great care and rejected them as unworthy of belief. The result of his consideration of the evidence as a whole is thus stated by him:

"Thus it would appear that the evidence of the plaintiff with regard to the amount of dower is much more worthy of belief than the defendant's evidence which could not impress me."

We affirm this finding. The plea of the relinquishment of dower has a short history behind it. The defendant filed two written statements in this case; the first on 17th April 1930. This written statement has unfortunately not been translated and printed for the record of this appeal. In para. 12 of this written statement it was stated that Mt. Saghir-un-nisa had relinquished her claim for dower in favour of the defendant long before her death. No mention was made of any deed of relinquishment. The defendant filed a second written statement on 14th May 1930 and in para.12 of that written statement he mentioned a deed of release with reference to its date, 14th February 1924. Along with this written statement the defendant produced in Court what purported to be the original deed of relinquishment. It was brought on the record of the case and marked as Ex. A-3. The plaintiffs then asked for a certified copy of it and received it. Subsequently the defendant also obtained a certified copy of the same. After this the original Ex. A-3, disappeared from the record of the case. The defendant then substituted the certified copy which he had obtained and which was also marked as Ex. A-3. In the circumstances the certified copy has been accepted as admissible in evidence in proof of the issue relating to the relinquishment. As to the loss of the original the learned Additional Subordinate Judge is of opinion that it was

"to the advantage of the defendant, for the plaintiffs have been deprived of the opportunity of disproving its genuineness by comparison of signature of Saghir on the original with her other signatures."

He further points out that the amount of dower is not mentioned in this deed of release. This fact, he thinks, raises strong suspicion against the authenticity of the release. The learned Additional Subordinate Judge further comments on the fact that in the deed of release the marriage is stated to have taken place 20 years before its execution. This will place the marriage in February 1904

while as a matter of fact it took place in March 1909; but, says the learned Additional Subordinate Judge:

"the present suit was instituted 20 years and some months after the marriage."

He therefore opines that the deed of release was fabricated after the institution of the suit. The recital in the deed of continuous happy relations between the defendant and Mt. Saghir-un-nisa is also untrue according to the learned Additional Subordinate Judge. As to the direct evidence in proof of the deed of release furnished by the testimony of the defendant and his three witnesses, Obaidullah, Muhammad Ahmad and Muhammad Tahir Khan, the learned Additional Subordinate Judge is of opinion that it is unworthy of credence. He has examined evidence in detail and has given reasons for his opinion. We are not prepared to disagree with him. We therefore maintain the finding that the release is not proved.

The question as to the means of the husband for ascertaining the reasonable amount of dower has been considered by the learned Additional Subordinate Judge with care and caution. We adopt his finding that the dower in the present case should be fixed for the purpose of S. 5, Oudh Laws Act, at Rs. 30,000 only. It now remains to consider the plea of divorce. The question of divorce has been argued before us mainly as a proposition of law. So far as the facts are concerned we were asked in the first instance to accept the defendant's and his witnesses' testimony to the effect that the defendant pronounced the well-known formula of talak thrice in rapid succession, that is to say he actually said "*main ne tumko talak dia*" (I have divorced thee). We agree with the learned Additional Subordinate Judge that it is impossible to accept this evidence as true. We also accept his view of the event as they happened. This view is supported by a letter of Mt. Saghir-un-nisa dated 3rd December 1921: Ex. 9. Ex. 12 is the envelope containing Ex. 9 and bears postmark "Bhopal, 3rd December 1921." The letter is in the handwriting of Mt. Saghir-un-nisa herself and was addressed to her brother Jafar Husain. On the record of the case it has come from the custody of Jafar Husain. We hold, in agreement with the learned Additional Subordinate Judge, that only so much of the facts in connexion with the question of divorce are proved as are proved by the contents of this letter.

It appears that one fine morning when the defendant was ready to leave his house for his office he found that his breakfast was not ready. Thereby he lost temper and addressing Mt. Saghir-un-nisa said that:

"He was entirely giving up all relations and would have no connexion of any sort with her."

As to the true import of those words Mt. Saghir-un-nisa asks in this letter the opinion of his brother as to whether they amounted to an irrevocable divorce. So far as we can gather anything from this letter as to the state of her own mind it is clear that she never treated the utterances of the defendant as a final divorce. The defendant in his evidence in the case says :

"I really never intended to divorce her. Excepting sexual intercourse I treated Saghir in all respects after divorce till her death exactly as I treated her before the divorce. Saghir was unfit for sexual intercourse on account of her illness from 1918 till her death. There was no change in the treatment of Saghir too towards me before and after divorce."

After the death of Mt. Saghir-un-nisa the defendant performed the obsequies as if she was his undivorced wife. Thus it is clear that there was no divorce either in thought or in action, but it is argued that the words used by the defendant as evidenced by the contents of the letter amount in law as a complete divorce. This is the question which we have to decide. The latest pronouncement of their Lordships of the Judicial Committee is contained in the decision of *Ma Mi* v. *Kallander Ammal* (1). Sir John Wallis, in delivering the judgment of the Judicial Committee, said :

"According to that law (Mahomedan law), a husband can effect a divorce whenever he desires. He may do so by words without any talaknama or written document, and no particular form of words is prescribed. If the words are "express" or well understood as implying divorce, such as talak, no proof of intention is required. If the words used are ambiguous the intention of the user must be proved."

With reference to this pronouncement argument was addressed to us that the words used by the defendant in this case are not ambiguous and if they are not ambiguous divorce would come into effect in spite of the defendant's intention to the contrary.

(1) A. I. R. 1927 P. C. 15=100 I. C. 1=54 I.A 61=5 Rang. 18 (P.C.).

We have already rejected the evidence that the defendant used the word "talak" in addressing Mt. Saghir-un-nisa on that particular morning. The words which we have found on the authority of the letter (Ex. 9) to have been used were: "I give up all relations and would have no connexion of any sort." These words are certainly not "express" within the meaning of the Hanafi Mahomedan law to effect a divorce nor are they understood in that law as implying divorce. The express words are well-known to be "talak" and its grammatical variations ; the root being composed of letters (tu, lam, q). These words are terms of art and the technical meaning which they have acquired by usage is "freedom from the bondage of marriage " and not from any other bondage. Once they are used they must be given effect according to their technical import and evidence as to any intention to the contrary is not permissible according to the Hanafi Mahomedan law. Several illustrations of the express formula "talak" are given in the Hedaya. (Thou art the objective of divorce. Thou art divorced. I have divorced thee). In the Hedaya the reason for treating these expressions as terms of art is given as follows :

"Therefore they amount to express divorce. To this is attached reversibility and such a divorce is free from the question of intention because usage preponderates."

Now it is clear that the word "talak" with its grammatical variations has acquired this technical meaning by reason of usage. It may be a moot question whether the same meaning must always be attached to these words when used by the Urdu speaking Mahomedan community of India. The question assumes a more serious importance when words other than "talak" are found to have been used by a member of the same community. We on our part are unable to affirm that apart from the word "talak " there are words of Urdu used by the Mussalmans of India bearing the same technical meaning as the word "talak" bears. We find this question raised in an Urdu translation of the Hedaya by Maulana Syed Ameer Ali printed in Newal Kishore Press, Lucknow. It is interesting to note that even in the use of the word "talak" the change in phonetics alters the meaning. Hedaya says:

"If it is said mutlaqa with sukuh on ta then this is not divorce without the intention."

All this shows how much the legal effect of the use of the word " talak " depends upon the accuracy of its form and the usage which has clothed it with that technical connotation. We are not aware of and we have tried in vain to find in Arabic text books of Mahomedan law any other word than " talak " as a well-understood expression implying divorce without proof of intention or circumstances. All other expressions are treated in the books not under (express divorce) but under (implied divorce). The expressions of the latter class are always regarded as ambiguous and the meaning of " divorce " is given to them only on proof of the accompanying intention or the surrounding circumstances. This is certainly so in the Hanafi Mahomedan law though there is some difference in this respect between that law and the Shafai law.

The chapter on divorce in Hedaya begins by saying "there are two kinds of talak, express and by implication." After having dealt with the former the Hedaya proceeds: "Now as to the second class, and they are kinayas which do not effect divorce without intention or the force of surrounding circumstances". Under this heading several forms of expressions are given which may or may not have the effect of a divorce according to the intention and the circumstances. It is not possible to identify the expression used in this case in Urdu with any of the expressions dealt with by the author of the Hedaya in Arabic. One thing is however clear that it is not shown by proof nor is it within our knowledge that the words used by the defendant in this particular case have acquired by usage the meaning which the word " talak " bears among the Mahomedans of India, At the best they may be used with the intention of effecting a divorce or they may be used without such an intention. We are clearly of opinion that they are ambiguous and as it is admitted that the intention of the user of those words was not to effectuate a divorce the words must be treated as innocuous altogether. Amongst the Indian Mahomedans they are frequently used for the purpose of dissociating oneself from the company or the presence of the addressee, of relieving such a person from the obligations of rendering service to the user and also for the purpose of withdrawing restraints from the movements of the addressee.

Amongst the expressions given under the heading of " divorce by implication" in the Hedaya are certain expressions which when used in anger constitute divorce even in the absence of any intention to effect a divorce and on this part of the book great reliance was placed by the learned advocate for the defendant in support of his arguments. The particular passage in the Hedaya is as follows : (In expressions such as "count," "choose," " your work is in your hands," intention against divorce will not be affirmed because anger indicates that divorce was intended). It is argued that in the circumstances in which the defendant used the expressions aforementioned they establish a divorce.

We are of opinion that this is not the meaning of the passage which we have just now quoted. When read with the context it will be found that the passage is used in relation to the question of assent on the part of the wife or exclamations of contumely or reproach on the part of the husband. It is also clear from the context of the passages preceding the one just now quoted that expressions such as these when used by a husband in reply to a requisition of divorce are construed to effect a divorce as they cannot bear a construction of denial ; but apart from this we are quite clear in our mind that expressions such as the defendant used in the present case in Urdu are never, among the members of the community to which he and his deceased wife belonged, understood proprio vigore to effect a divorce. It will be seen that we have refrained from referring to Hamilton's Hedaya because it was suggested in *Asha Bibi* v. *Kadar Ebrahim Rowther* (2) that it may not be a correct translation of the original Arabic text, being a translation of the Persian version of the Hedaya. We ourselves do not agree with this suggestion. Whenever we had occasion to refer to the Hedaya in its original Arabic form we have found that the translation by Hamilton is not only accurate but is also best in form and elegance if we may respectfully say so.

On the above grounds we agree with the learned Additional Subordinate Judge on the above question also and dismiss the appeal with costs.

B.V./R.K. *Appeal dismissed.*

(2) [1909] 33 Mad. 22=3 I. C. 730.

A. I. R. 1932 Oudh 39

SMITH, J.

Suraj Bali Tewari—Plff.—Applicant.

v.

Kandhaiya Bakhsh Singh and *others*—Defendants—Opposite Parties.

Civil Revn. No. 66 of 1931, Decided on 29th September 1931, against order of Munsif, Musafirkhana at Sultanpur, D/- 6th May 1931.

Specific Relief Act (1877), S. 9—Section does not bar revision.

Applications in revision are not in definite terms barred by S. 9 but they are not lightly to be entertained: 33 *All.* 647, *Foll.* [P 40 C 1]

H. N. Misra—for Applicant.

Bhagwati Nath—for Opposite Parties.

Judgment.— This is an application under S. 115, Civil P. C. against a decision by the Munsif of Musafirkhana in the Sultanpur District, in a suit under S. 9, Specific Relief Act. The plaintiff, who is the applicant here, alleged that he had been dispossessed from certain plots which he was cultivating. The dispossession according to him, took place on 7th July 1930, and he instituted his suit on 15th December 1930. There had been a previous suit between this same plaintiff and two out of the four defendants in the present suit. In that suit it was alleged that those two defendants had carried off certain cut crops of the plaintiff on 18th May 1930. The Munsif found the present suit to be barred by time. He regarded the limitation as running from some time in May and not from the date in July, referred to by the plaintiff, that is to say, his finding was that the plaintiff was dispossessed in May and not in July. If the dispossession took place in May of course the suit was beyond time.

I should not feel inclined to interfere under S. 115, even apart from the concluding portion of S. 9, Specific Relief Act, as I do not see that the Munsif can be said to have acted in the exercise of his jurisdiction illegally or with material irregularity, and it is not suggested, of course, that he exercised a jurisdiction not vested in him by law or failed to exercise a jurisdiction so vested. It is possible that he was wrong in regarding the dispossession of the plaintiff as having taken place in the month of May and not in the month of July, but it is at least arguable that he was not wrong.

As regards the concluding words of S. 9, Specific Relief Act, it is clear that

decrees and orders under that section were intended by the framers of the Act to be as far as possible final. Applications in revision are not in definite terms barred by the section, but it is clear that they are not lightly to be entertained. The plaintiff is not left without a remedy. For the principles applicable, I may refer to a ruling reported in *Ram Kishen Das* v. *Jai Kishan Das* (1).

The result is that I decline to interfere in revision, and the application is dismissed with costs.

V.B./R.K. *Application dismissed.*

(1) [1911] 33 All. 647=11 I. C. 814.

A. I. R. 1932 Oudh 40

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Mt. Brij Raj Kuar—Defendant—Appellant.

v.

Ram Dayal—Plaintiff—Respondent.

Second Appeal No. 386 of 1930, Decided on 16th October 1931, against decree of Addl. Dist. Judge, Lucknow, D/- 10th October 1930.

(a) Transfer of Property Act (1882), S. 53—Preference to one creditor — Transactions are not void.

Transactions with the object of giving preference to one creditor over another are not void under S. 53: *A. I. R.* 1915 *P. C.* 115 and *A. I. R.* 1929 *P. C.* 279, *Foll.* [P 42 C 1]

(b) Hindu Law — Maintenance—Widow—Husband living—Wife's right of maintenance is personal obligation on husband — After husband's death it becomes legal liability on husband's relatives, if he leaves them some property—It may become charge on property by virtue of agreement or decree—But wife is never her husband's creditor for her maintenance—Her rights are governed by Transfer of Property Act (1882), S. 39.

As soon as the marriage takes place the wife under the Hindu law becomes entitled to be maintained by her husband. The marriage tie gives rise to this obligation on the husband, but the obligation is only of a personal character. On the husband's death, this personal liability is transmuted into a legal liability against his heirs if he dies separate or against the surviving coparceners if he is joint at the time of his death. While the husband is alive his personal obligation to the wife of maintaining her is altogether independent of the possession of any property by the husband. But when he dies the liability of the heirs to provide maintenance for the widow of the deceased is limited to the property which descends to them by inheritance. Similarly in the case of a joint family the obligation arises by reason of the fact that the interest of the deceased in the family property passes to the remaining coparceners by survivorship. But whether the husband is alive or dead and whether he was joint or separate, in neither case is the maintenance as such a charge upon the estate. But in a case where the wife by reason of desertion of the husband or other justifying cause becomes entitled to claim separate maintenance and makes such a claim and obtains a decree, a charge may arise in her favour by virtue of it. If in such a case any arrears of maintenance are due to her she might also be regarded as a creditor. So also after the death of the husband if the widow obtains a decree or enters into an agreement with the holder of the estate whereby the amount of her maintenance is fixed and made a charge upon the estate, such decree or agreement can give rise to a charge in her favour. The right of maintenance of the wife or the widow has sometimes been loosely described as a charge on the husband's estate. But in the strict legal sense of the word "charge" it cannot be correctly so described. She has in fact merely a claim against the estate which does not ripen into a charge until the maintenance is fixed and made a charge upon the whole or any portion of the estate by a decree or agreement. In case the property is transferred with the intention of defeating her right of receiving the maintenance then in such a case her rights against the property in the hands of the transferee will be regulated by the provisions of S. 39, T. P. Act. [P 42 C 1, 2]

(c) Hindu Law—Maintenanace — Widow—Wife's right of maintenance comes after debts contracted by her husband.

Where wife's right of maintenance against her husband is merely a matter of personal obligation with him, in such a case, the debts contracted by the husband must take precedence over the wife's claim for maintenance: 27 *Mad.* 45; *A. I. R.* 1926 *Lah.* 167; *A. I. R.* 1927 *Mad.* 1187, *Foll.* and *A. I. R.* 1927 *Mad.* 657, *Dist.* [P 43 C 1]

H. Husain, *B. P. Misra* and *B. K. Bose*—for Appellant.

S. D. Misra—for Respondent.

Judgment.—This is a second appeal by the defendant against the decision dated 10th October 1930 of the Additional District Judge of Lucknow affirming the decision dated 14th May 1930 of the Subordinate Judge of Malihabad at Lucknow.

The facts are as follows: Madho Singh, defendant 2. owned zamindari shares in three villages, namely, Ramnagar, Peteona and Keraura. He and his brother Mathura Singh made a mortgage of the entire share owned by them in village Ramnagar to one Sheo Bakhsh Singh for Rs. 6,000. They also executed a second mortgage in respect of the same share on 14th August 1919 in favour of the plaintiff, Ram Dayal. Sheo Bakhsh, the prior mortgagee, obtained a decree for sale which was made absolute on 23rd February 1924 for recovery of a sum of about Rs. 23,336-15-0. The plaintiff Ram Dayal also obtained a decree for sale on foot of his mortgage. This decree was made absolute on 19th April 1926 for Rupees

3425-7-3. The entire share was sold in execution of the decree of Sheo Bakhsh on 9th April 1927 for Rs. 14,119. On 19th November 1927 Sheo Bakhsh obtained a personal decree against Madho Singh and Mathura Singh for Rupees 9,445-15-0, the balance of the mortgage money which remained unrealized. As the whole mortgaged property had been sold in execution of the decree of Sheo Bakhsh, the plaintiff Ram Dayal also applied for a personal decree against Madho Singh and Mathura Singh and obtained a simple money decree against them on 6th January 1928 for Rs. 3,765-5-3 and future interests.

The entire share owned by Madho Singh and Mathura Singh in village Peteona was also mortgaged by them to one Hira Lal who obtained a preliminary decree for foreclosure on 17th February 1930 for Rs. 62,628-13-6. They were required to pay this amount on or before 16th August 1930, otherwise the share was to be foreclosed.

As regards village Keraura, Madho Singh was the exclusive owner of a 13 annas 4 pies share in that village. On 2nd May 1927, he executed a deed of gift (Ex. A-11) in respect of his entire interest in this village together with his residential house, cattle shed, the whole of the household property and groves, orchard, *sir*, khudkasht etc., in favour of his wife Mt. Brij Raj Kuar, defendant 1. The deed directs Brij Raj Kuar to pay Rupees 9,000 to Lala Majlis Rai, Rs. 1,000 to Bharat Singh, Rs. 400 to Gobre, Rs. 100 to Lalta Singh Thakur, Rs. 200 to Lalta Prasad, Brahman, and Rs. 300 to Manohar Lal. It also contains a recital to the effect that the gift was made as the donor was intending to go on pilgrimage and had to provide maintenance for his wife and in consideration of the love and affection which he had towards her.

The plaintiff in execution of his simple money decree put to sale Madho Singh's interest in village Peteona no less than three times but nobody came forward to make any bid presumably because of the encumbrance of Hira Lal. He then proceeded to execute his decree against village Keraura and attached the 13 annas 4 pies share belonging to Madho Singh in that village. Mt. Brij Raj Kuar objected to the attachment on the ground that the share had already been gifted to her by her husband Madho Singh. The execution Court relying on the deed of gift, Ex. A-11, upheld the objection and released the share from attachment. Thereupon the plaintiff instituted the suit which has given rise to this appeal for a declaration that the deed of gift dated 2nd May 1927 is void and that the gifted property is liable to pay the amount due to him under his decree. His case was that the deed of gift had been executed by Madho Singh to defraud and defeat his creditors and was therefore invalid. He also pleaded that in any case Mt. Brij Raj Kuar was a universal donee under S. 128, T. P. Act, and was as such liable to pay the debts of Madho Singh to the extent of the property received by her.

The suit was resisted by Brij Raj Kuar on several grounds. She denied that the deed of gift was executed to defraud the creditors and pleaded that it was a bona fide transaction executed to pay off certain debts of the donor and in lieu of the services and maintenance of the donee. She also disputed that she was a universal donee.

The learned Subordinate Judge held that the deed of gift was fraudulent and had been executed by Madho Singh to defeat and delay his creditors, and accordingly decreed the suit. On the question of Mt. Brij Raj Kuar being a universal donee, the finding of the learned Subordinate Judge was against the plaintiff. On appeal the learned Additional District Judge has found on both these points against Brij Raj Kuar. He held that the gift was not made in good faith and that the transaction had been brought about by both the husband and wife acting in concert in order to defraud the creditors. He also held that Mt. Brij Raj Kuar was a universal donee and as such liable to pay the debts of Madho Singh.

Mt. Brij Raj Kuar has appealed, challenging the findings of the learned Additional District Judge on oath on these points. We have therefore to see whether or not the deed of gift is a bona fide transaction which is not open to question by the creditors and whether the position of Brij Raj Kuar is or is not that of a universal donee under S. 128, T. P. Act.

The main contention on behalf of the defendant-appellant is that Mt. Brij Raj Kuar was entitled to maintenance from her husband and as such her position in

relation to her husband was that of a creditor. It is argued that the object of the gift was at best to give preference to one set of creditors against the others, and as such the transaction cannot be impugned as fraudulent within the meaning of S. 53, T. P. Act. In this connexion reliance has been placed on the decisions of their Lordships of the Judicial Committee in *Musahar Sahu* v. *Hakim Lal* (1) and *Ma Fwa May* v. *S. R. M. M. A. Chettyar Firm* (2).

In the first case it was held that a transfer of property is not made with intent to defraud, defeat or delay creditors, within the meaning of the Transfer of Property Act 1882, S. 53, because its effect or object is to prefer one creditor to another, even if it is made with the intention of defeating an anticipated execution. What the section invalidates is a transfer which removes the whole, or a part, of the debtor's property from the creditors as a body, to the benefit of the debtor. In the second case it was held that a mortgage executed for adequate consideration being partly the discharge of a genuine debt, no benefit being retained by the mortgagor, is not invalid under S. 53, T. P. Act, 1882, as being made to defeat or delay creditors, even though the mortgagor who is heavily indebted, thereby prefers the mortgagee over other creditors, one of whom has instituted a suit and before registration of the mortgage has obtained an order before decree attaching the mortgagor's property. Thus the principle is well settled that transactions with the object of giving preference to one creditor over another are not void under S. 53, T. P. Act. The question is whether it can be made applicable to the present case. The first premise of the argument is that Brij Raj Kuar being entitled to maintenance from her husband, had a charge on his property for such maintenance and was in the position of a creditor. We are unable to assent to this proposition. As soon as the marriage takes place the wife, under the Hindu law, becomes entitled to be maintained by her husband.

The marriage tie gives rise to this obligation on the husband, but the obligation is only of a personal character. On the husband's death, this personal liability is transmuted into a legal liability against his heirs if he dies separate or against the surviving coparceners if he is joint at the time of his death. While the husband is alive his personal obligation to the wife of maintaining her is altogether independent of the possession, of any property by the husband. But when he dies the liability of the heirs to provide maintenance for the widow of the deceased is limited to the property which descends to them by inheritance. Similarly in the case of a joint family the obligation arises by reason of the fact that the interest of the deceased in the family property passes to the remaining coparceners by survivorship. But whether the husband is alive or dead and whether he was joint or separate, in neither case is the maintenance as such a charge upon the estate. But in a case where the wife, by reason of desertion of the husband or other justifying cause, becomes entitled to claim separate maintenance and makes such a claim and obtains a decree, a charge may arise in her favour by virtue of it. If in such a case any arrears of maintenance are due to her, she might also be regarded as a creditor. So also after the death of the husband if the widow obtains a decree or enters into an agreement with the holder of the estate whereby the amount of her maintenance is fixed and made a charge upon the estate, such decree or agreement can give rise to a charge in her favour.

The right of maintenance of the wife or the widow has sometimes been loosely described as a charge on the husband's estate. But in the strict legal sense of the word "charge" it cannot be correctly so described. She has in fact merely a claim against the estate which does not ripen into a charge until the maintenance is fixed and made a charge upon the whole or any portion of the estate by a decree or agreement. In case the property is transferred with the intention of defeating her right of receiving the maintenance then in such a case her rights against the property in the hands of the transferee will be regulated by the provisions of S. 39, T. P. Act.

Thus at the time of the execution of the deed of gift in favour of Brij Raj Kuar she had no charge for her maintenance on the husband's estate and she could not be regarded as a creditor. Her

(1) A. I. R. 1915 P. C. 115=32 I. C. 343=43 I. A. 104=43 Cal. 521 (P. C.).
(2) A. I. R. 1929 P. C. 279=120 I. C. 645=56 I. A. 379=7 Rang. 624 (P. C.).

right of maintenance against her husband was merely a matter of personal obligation with him. In such a case the consensus of judicial opinion is that the debts contracted by the husband must take precedence over the wife's claim for maintenance. In *Jayanti Subbiah* v. *Alamelu Mangamma* (3) it was held that under the Hindu law the maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or acquired, and his debts take precedence over her claim for maintenance. In *Sunder Singh* v. *Ram Nath* (4) a Bench of the Lahore High Court and in a later Madras case *Unnamalai Ammal* v. *F. W. Wilson*, *A. I. R.* 1927 *Mad.* 1187, a Bench of that High Court also expressed opinions to the same effect.

The learned counsel for the appellant has relied upon a single Judge decision of the Madras High Court in *Meenakshi Ammal* v. *Ammani Ammal* (5). In that case a Hindu wife who had been deserted by her husband had made a claim for past maintenance against him and it was held that she was a creditor within the meaning of S. 53, T. P. Act. This case is easily distinguishable. In the present case there is no suggestion that at the time of the gift any differences had arisen between Brij Raj Kuar and her husband entitling her to claim separate maintenance. On the contrary the recitals in the deed of gift show clearly that she was on the best of terms with her husband and that the relations between the parties were most cordial and affectionate. It may be observed that even in this case it was recognized that "the creditors of her husband have a prior claim to the widow." We have therefore no hesitation in coming to the conclusion that Brij Raj Kuar could not be regarded as a creditor of Madho Singh at the time of the execution of the deed of gift in her favour.

The deed of gift directs the donee to pay the debts due to six of the creditors of Madho Singh. Two of these, namely, Lala Majlis Rai and Bharat Singh, held mortgages on the property which formed the subject of the gift. Thus these persons being secured creditors and the property being burdened with liability for their debts the provision for payment of their debts cannot be regarded as a preference. As regards the remaining four creditors, both the lower Courts have found that the alleged pro-note debts in favour of these persons were quite fictitious. This finding has not been questioned before us. The defendant having failed to prove the genuineness of these debts no question of preference arises in regard to them. The situation therefore at the time of the execution of the deed of gift was that the whole of the share in village Ramnagar had already been sold and the share in village Peteona was heavily encumbered. Both the Courts below have found that its value was not more than fifty to fifty-two thousand. As stated before the mortgagee obtained a foreclosure decree in respect of this property on 17th February 1930 for Rs. 62,628-13-6. This incumbrance on the property is more than its market value. There remained the share in village Keraura. The value of this share as found by the two lower Courts is about Rs. 20,000. It is subject to the mortgages of Majlis Rai and Bharat Singh aggregating Rs. 10,000 in value. In such circumstances, can it be said that the transaction was made in good faith? Madho Singh could not but be aware that there was a balance of Rs. 9,000 odd due to Sheo Bakhsh and that he stood indebted to the plaintiff to the extent of over Rs. 3,000. The only property possessed by him from which these debts could be realized was his equity of redemption iu village Keraura. Taking all these facts into consideration both the lower Courts have come to the conclusion that the consideration of the deed of gift was grossly inadequate and that it was the result of a design on the part of the husband and wife to defraud the creditors. We are not prepared to say that the inference is not justified.

As regards S. 128, T. P. Act, we are of opinion that it does not apply to the case. The deed of gift relates only to the share of village Keraura. The share in village Peteona is not included in the gift. In spite of the incumbrance existing on village Peteona, the share had not been foreclosed and the donor still retained the ownership of it. The deed of gift therefore does not cover the donee's "whole property." Brij Raj Kuar there-

(3) [1904] 27 Mad. 45.
(4) A. I. R. 1926 Lah. 167=93 I. C. 1013=7 Lah. 12.
(5) A. I. R. 1927 Mad. 657=101 I. C. 610.

fore cannot be considered to be a universal donee.

As a result of our finding that the deed of gift is fraudulent the appeal fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 44

WAZIR HASAN, C. J. AND KISCH, J.

Sitla Prasad Singh — Plaintiff — Appellant.

v.

Savgir Singh and *others* — Defendants —Respondents.

Second Appeal No. 137 of 1931, Decided on 2nd November 1931, against order of Sub-Judge, Sultanpur, D/- 5th February 1931.

Civil P. C. (1908), O. 32, R. 7—O. 32 does not apply to proceedings under N. W. P. and Oudh Land Revenue Act (1901), S. 234.

The provisions of O. 32, Civil P. C., have not been expressly made applicable to proceedings under the Land Revenue Act either by that Act or by the Code of Civil Procedure itself.

Where a minor is represented in mutation proceedings by his mother who bona fide entered into a compromise with the other party without the leave of the Court as required by R. 7, O. 32, the compromise is not bad merely for want of such leave. If the minor, on attaining majority can show that the compromise is not in his interest he can have his remedy under the general law. But where it is found as a fact that it is to his benefit want of leave of Court will not help him to set it aside: 21 *O. C.* 220 and *S. D.* 4 *of* 1899, *Ref.* [P 45 C 2]

G. Imam—for Appellant.

H. D. Chandra—for Respondents.

Judgment.—This is an appeal from the decree of the Subordinate Judge of Sultanpur, dated 5th February 1931, affirming the decree of the Munsif, Musafirkhana, Sultanpur, dated 8th September 1930 dismissing the plaintiff's suit for possession of a share in village Gaura, Pergana Baraunsa, District Sultanpur.

The facts of the case are not in dispute. One Saheb Bakhsh Singh was the owner of shares in two villages Baraulia and Gaura. He had no son by a lawful wife but he had several sons of whom the first born appears to have been Sitla Prasad Singh, the present plaintiff appellant by his kept mistress. On 31st May 1918 Saheb Bakhsh Singh executed a deed of gift in respect of his entire property in favour of the plaintiff-appellant who was then a minor. No mutation of names was however effected in respect of the deed of gift and subsequent to the deed Saheb Bakhsh Singh mortgaged on two occasions small portions of the property in question in order to pay off his debts. After the death of Saheb Bakhsh Singh, five years after the execution of the deed of gift, and while the plaintiff-appellant was still a minor his mother acting as next friend of her minor sons applied for mutation of names in their favour over the whole of Saheb Bakhsh Singh's property. The application was opposed by the defendants-respondents who alleged themselves to be the reversioners of Saheb Bukhsh Singh. Thereupon the plaintiff-appellant's mother applied for amendment of the mutation application and for mutation to be made in favour of Sitla Prasad Singh alone on the basis of the deed of gift. The defendants respondents contested the amended application and in the course of the proceedings the plaintiff-appellant's mother and the defendants-respondents entered into a compromise under the terms of which the plaintiff-appellant was to get the Baraulia property, which in area is about three-fourths of the property of Saheb Bukhsh Singh and the defendants-respondents were to get the Gaura property. The terms of this compromise were communicated to the mutation Court and mutation was effected accordingly by the order of the Court. The suit out of which the present appeal arises was instituted by Sitla Prasad Singh some three years after he attained majority to recover possession of the Gaura property on the ground that he is not bound by the compromise made by his mother in the mutation proceedings during his minority.

Both the Courts below came to the conclusion that the compromise arrived at in the mutation proceedings was in the nature of a family settlement and was not open to question by the plaintiff on attaining majority. The lower appellate Court further found as a fact that the compromise was for the benefit of the minor as he obtained the larger part of the property without incurring the heavy expenses of litigation with uncertain result in view of the peculiar circumstances of the case as set out above, which might have put difficulties in the way of the plaintiff establishing his title.

Before us the case for the appellant has been argued on a somewhat different basis, namely, that the compromise in the mutation proceedings having been entered into by the mother of the minor without the leave of the Court contrary to the provisions of O. 32, R. 7, Civil P. C., it is not binding on the plaintiff-appellant. It may be observed that this is a new point that has been raised for the first time in this Court in second appeal. We have however considered the point on the merits and we find ourselves unable to accept the conclusion of the learned counsel for the appellant. If the compromise had been entered into in a suit under the Civil Procedure Code there would have been no doubt as to the soundness of the contention that the compromise entered into by the next friend of the minor without the leave of the Court was voidable: *Ganesha Row* v. *Tuljaram Row* (1). Even the fact that the compromise was for the benefit of the minor would not have altered the legal position: *Bhiva* v. *Devchand Bechar* (2).

It has however been contended by the learned counsel for the defendants-respondents that the provisions of O. 32, R. 7 do not apply to mutation proceedings in a Revenue Court. We have given our careful consideration to this question and we are not prepared to hold that the contention of the learned counsel for the respondents is incorrect. In S. 135, Oudh Rent Act, 1886, it is clearly laid down that the provisions of the Code of Civil Procedure 1908, shall so far as they are not inconsistent with the provisions of the Act, apply to all suits and other proceedings under the Act. No such provision however finds a place in the North-West Provinces and Oudh Land Revenue Act, 1901, but where the procedure under that Act is to be governed by the provisions of the Code of Civil Procedure it is expressly stated, as for example, in S. 204 of the Act. Under S. 234, Land Revenue Act the Local Government is empowered to make rules in respect of matters dealt with under the various clauses of the Act and in S. 10 of Circular No. 6 of the Board of Revenue, Department 2 (dealing with the rules affecting the procedure of the Revenue Courts) it is laid down that previous to appointing a guardian ad litem uuder the provisions of O. 32, Act 5 of 1908, the Court shall ascertain whether the person whom it is proposed to appoint is willing to act. Tne provisions of O. 32, Civil P. C. have not been expressly made applicable to proceedings under the Land Revenue Act either by that Act or by the Code of Civil Procedure itself and the circular as it stands does not appear to go further than to lay down that in the case of a minor litigant a guardian shall be appointed.

We have been unable to discover any sufficient justification for holding that the whole of O. 32 does in fact govern procedure under the Land Revenue Act. In *Mt. Shakur-un-nissa Bibi* v. *Abdul Majid Khan* (3) the Board of Revenue took the view that the Code of Civil Procedure does not of its own force govern the procedure in proceedings under the Land Revenue Act. In a case which is on all fours with the present case it was held by the late Court of the Judicial Commissioner of Oudh *Harpal Singh* v. *Sukhrani* (4) that the provisions of the Code of Civil Procedure do not apply en bloc to proceedings in Courts constituted under the Land Revenue Act, and that where a minor was represented in mutation proceedings by his elder brother who bona fide entered into a compromise with the other party without the leave of the Court as required by O. 32, R. 7, Civil P. C., the compromise was not bad merely for want of such leave. We are not called upon to find a reason for the omission to apply the provisions of O. 32, Civil P. C. to the proceedings under the Land Revenue Act, but it may be observed that the remedy allowed by the general law is always open to a party dissatisfied with a compromise entered into during his minority in proceedings before a Revenue Court, namely, to have it set aside if he can show that it was not beneficial to him. In the present case however as we have already observed it has been found as a fact that the compromise in question was for the benefit of the minor.

(1) [1913] 36 Mad. 295=40 I. A. 132=19 I. C. 515 (P. C.).
(2) [1911] 35 Bom. 322=10 I. C. 909.
(3) [1899] S. D. 4 of 1899.
(4) [1918] 21 O. C. 220=48 I. C. 119.

We accordingly see no reason to interfere with the decree of the Court below and dismiss the appeal with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 46

SRIVASTAVA AND KISCH, JJ.

Suraj Bali—Defendant—Appellant.

v.

Lala Mahadeo Prasad—Plaintiff—Respondent.

Second Appeal No. 304 of 1930, Decided on 14th September 1931, against decree of Addl. Dist. Judge, Lucknow, D/- 19th July 1930.

(a) Limitation Act (1908), Arts. 142 and 144—Art. 142 is restricted to suit for possession or dispossession—Art. 144 is residuary article—Which article applies is to be determined with reference to pleadings.

Article 142 is restricted to suits for possession on dispossession or on discontinuance of possession. In order to bring a suit within the purview of Art. 142 it must be shown that the suit was in terms as well as in substance based on an allegation of the plaintiff having been in possession and having subsequently lost it either by dispossession or by discontinuance of possession. Art. 144 on the other hand is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title, in which there is no allegation of prior possession and subsequent dispossession or discontinuance of possession, must fall within Art. 144.

The question whether the article applicable to a particular suit is Art. 142 or Art. 144 has to be determined by a reference to the pleadings.

A brought a suit for possession of a house with certain shops against *B*, alleging that the property had been purchased by his grandfather and that his father used to carry on business in the house and shop in partnership with *B's* father and that after the dissolution of the partnership *B's* father used to carry on the business on his own account on payment of rent. After his father's death *B* continued to be in possession of the property on the same terms. *B* denied *A's* title and the alleged tenancy and pleaded adverse possession.

Held: that the suit was governed by Art. 144 and not by Art. 142: *A. I. R.* 1925 *Oudh* 42, *Dist.* [P 47 C 1, 2]

(b) Adverse possession—Mere possession for any length of time does not create title—Possession must not only be open and exclusive but also adverse.

Mere possession for any length of time does not per se create any title by adverse possession. In order to acquire such title the possession must not only be open and exclusive, but it must also be shown to have been adverse for the full statutory period. Notoriety of possession may in some cases justify a presumption that the true owner was aware of the character of the possession being adverse. But whether in the absence of direct proof of actual knowledge on the part of the true owner such a presumption should be raised against him or not must depend upon the special facts and circumstances of each case.

Where the party pleading adverse possession alleged that he had executed a sale deed of the property and had obtained reconveyance of the same and had executed some mortgages which were afterwards redeemed by him and had also executed some sarkhats in favour of certain tenants:

Held: that the transactions were not of such a character that the plaintiff suing for possession could be presumed to have knowledge about them. [P 48 C 1]

(c) Adverse Possession—Proof—Payment of water and house-tax is not conclusive proof.

Every occupier of a house is liable to pay water and house taxes. The payment of these by person pleading adverse possession is not irreconcilable with the plaintiff's ownership of property in a suit for possession. [P 48 C 1]

(d) Oudh Civil Rules R. 282, Cl. (10)—Vakalatnama by pleader for respondent filed on first date of hearing—Court can tax only half of ordinary fee.

Where the pleader for the respondent files his vakalatnama not after filing of the appeal and before the first date of hearing, the Court is justified in taxing only half of the ordinary fee. [P 48 C 2]

Mahesh Prasad and *Mohammad Ayub*—for Appellant.

H. Husain and *Ali Zaheer*—for Respondent.

Judgment.—This is a defendant's appeal against the judgment and decree dated the 19th July 1930 of the Additional Subordinate Judge of Lucknow setting aside the decision dated 31st of August 1929 of the Subordinate Judge of the same place. It arises out of a suit for possession of a house with certain shops situate in bazar Daliganj in the city of Lucknow.

The plaintiff's case was that the property in suit had been purchased by his grandfather Ram Dayal on 16th October 1865, that the plaintiff's father used to carry on a grain business in partnership with Bhawani Din, father of the defendant, in the house and shops in suit; that after the dissolution of the partnership, which took place many years ago, Bhawani Din continued to carry on the grain business on his own account in the house and shops in question on payment of Rs. 3 per mensem as rent. It was also alleged that the rent had been fixed so low as Bhawani Din undertook to keep the house in repair. After the death of Bhawani Din the defendant has continued in possession of the house and shops aforesaid on the same terms. In 1926 plaintiff instituted a suit against the defendant for recovery of the arrears

of rent, and the defendant in his written statement filed in that suit on the 5th January 1927 denied that he was in possession as a tenant and questioned the proprietary title of the plaintiff. That suit was ultimately withdrawn with liberty to institute a fresh suit. The present suit was instituted on 22nd May 1928, the denial made in the written statement dated 5th January 1927 being alleged as the cause of action for the suit.

The defendant contested the suit on various grounds. He questioned the plaintiff's title and denied the alleged tenancy. He also set up the bar of limitation and pleaded that he had acquired title to the property in suit by adverse possession.

The learned Subordinate Judge upheld the defences raised and dismissed the plaintiff's claim.

On appeal the learned District Judge held that the property in suit had been purchased by the plaintiff's grandfather under a registered sale deed, Ex. 3, and that the plaintiff's title as owner of the property in suit had been satisfactorily established. On the question of limitation he held that the suit was governed by Art. 144, Lim. Act, and that the defendant had failed to make good his plea of adverse possession. He accordingly gave the plaintiff a decree for possession of the property in suit.

The main question urged on behalf of the defendant-appellant is that the plaintiff's suit for possession was barred by time. It has been strenuously argued that the suit was governed by Art. 142 and not by Art. 144, Lim. Act. The distinction between the two articles has been repeatedly pointed out in decided cases: *Sukhdeo* v. *Ram Dulari* (1), *Yakub Khan* v. *Sheo Dularey* (2) and *Zahida Begam* v. *Mumtaz Ali Khan* (3). Art. 142 is restricted to suits for possession on dispossession or on discontinuance of possession. In order to bring a suit within the purview of that article it must be shown that the suit was in terms as well as in substance based on an allegation of the plaintiff having been in possession and having subsequently lost it either by dispossession or by discontinuance of possession. Art. 144 on the other hand is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title in which there is no allegation of prior possession and subsequent dispossession or discontinuance of possession must fall within this article. It is also equally well settled that the question whether the article of limitation applicable to a particular suit is Art. 142 or Art. 144 has to be determined by a reference to the pleadings. We have already stated the allegations on which the plaintiff based his claim. These allegations were further amplified in the oral pleadings. Having carefully examined the pleadings we are unable to discover any allegation about the plaintiff having lost possession either by dispossession or by discontinuance of possession. As we have stated before, the plaintiff bases his case on title acquired by his grandfather Ram Dayal under the sale deed dated the 16th October 1865. He admitted that the defendant had been for a long time in possession as a tenant and based his cause of action on the denial of his title by the defendant. We can therefore see no room for the application of Art. 142 to this case. Strong reliance was placed by the appellant's learned counsel on the decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Gur Sahai Kandu* v. *Chhedi* (4). The facts of that case are no doubt somewhat parallel to the facts of this case but it will appear from the observations made at p. 133 that in that case the plaintiff stated that the defendants denied the plaintiff's title and alleged "that this amounted to the plaintiff's dispossession." There is no such allegation in this case and the case seems distinguishable on this ground. We accordingly agree with the opinion of the lower Court that the suit is governed by Art. 144 and not Art. 142, Sch. 1, Lim. Act.

Another branch of the defendant's argument on the question of limitation was that they had succeeded in establishing their adverse possession for over 12 years. The learned District Judge rejected the evidence bearing on this point on the ground that there was no evidence to show that the defendants made any assertion of hostile title to the knowledge of the plaintiff or his father.

(1) A. I. R. 1926 Oudh 313=95 I. C. 825=29 O. C. 131.
(2) A. I. R. 1930 Oudh 310=126 I. C. 703.
(3) A. I. R. 1931 Oudh 382=134 I. C. 599.
(4) A. I. R. 1925 Oudh 42=76 I C. 964=27 O. C. 130.

In answer to this it was argued that the possession of the defendant being open, visible and notorious it was not necessary that the adverse character of the possession should be brought home to the plaintiff or his predecessor-in title by direct evidence. It is not denied that mere possession for any length of time does not per se create any title by adverse possession. In order to acquire such title, the possession must not only be open and exclusive, but it must also be shown to have been adverse for the full statutory period. Notoriety of possession may in some cases justify a presumption that the true owner was aware of the character of the possession being adverse. But whether in the absence of direct proof of actual knowledge on the part of the true owner such a presumption should be raised against him or not must depend upon the special facts and circumstances of each case. The facts relied on in the present case are that Bhawani Din executed a sale deed of the property in suit and afterwards obtained a reconveyance from the vendee in his favour. He also executed some mortgages which were afterwards redeemed by him. The defendant and his father also executed some sarkhats of the shops in favour of certain tenants. These transactions are not of such a character that the plaintiff could be presumed to have knowledge of them. It is said that if the plaintiff had looked into the registration records he could have become aware of the sale deeds and the mortgage deeds. But there was no duty cast on him in law to do so.

Next it is said that the defendant had been paying water-tax and the house tax in respect of the house and shops in suit. Every occupier of a house is liable for payment of these taxes. The payment of such taxes is not irreconcilable with the plaintiff's ownership of the property.

Thus there is hardly any evidence of an unequivocal character which could justify us in presuming that the plaintiff must have known that the possession of the defendants was in assertion of a hostile title. We are not therefore prepared to say that the learned District Judge was wrong in holding that the defendant had failed to establish that he had perfected his title by adverse possession.

It was also argued that the taxation of the defendant's pleader's fee in the lower Court was wrong. The decree shows that only half the pleader's fee has been taxed. R. 289, Cl. 10, Oudh Civil Rules, provides that only one-half of the ordinary fee will be allowed on account of the legal practitioner of the respondent unless the legal practitioner has filed either his vakalatnama or a slip in the form appended to this paragraph after the filing of the appeal and before the first date fixed for hearing of the case. In this case the vakalatnama was filed on the first date fixed for hearing of the case but not before that date. The lower Court was therefore right in taxing only half of the ordinary fee. It was contended that the pleader who filed his certificate of fee had also been appearing in the trial Court and was therefore entitled to appear in the Court of appeal without filing a fresh vakalatnama, and that the rule quoted above should not apply to such a case. The question does not arise because the legal practitioner concerned did actually file his vakalatnama in the Court of appeal and did not act on the vakalatnama filed in the lower Court. We must therefore overrule the contention.

Lastly, it may be mentioned that the plaintiff's counsel contended that he had succeeded in establishing that the defendant had been in possession as a tenant and had been paying rent as such. The lower appellate Court did not record any clear finding on this point. The evidence relied upon in support of this contention consists mainly of an entry in the account book Ex. 1, in respect of a sum of Rs. 214 credited for rent. The trial Court did not accept this entry as correct. It also disbelieved the oral evidence bearing on the point. We can see no sufficient reason to disagree with the finding of the first Court and must therefore hold that the alleged tenancy has not been proved.

The result is that the appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 49

WAZIR HASAN, C. J. AND
SRIVASTAVA, J.

Mt. Janaka—Plaintiff—Applicant.

v.

Sheo Charan and *others*—Defendants—Opposite Parties.

Civil Revn. No. 74 of 1930, Decided on 21st September 1931, against order of Sub-Judge, Bara Banki, D/- 16th July 1930.

(a) Limitation Act (1908), S. 19—Acknowledgment under S. 19 does not operate as new contract but merely extends time.

Section 19 allows extension of limitation when an acknowledgment of liability is made before the expiration of the period prescribed. An acknowledgment satisfying the requirements of that section does not create any new right of action but only enlarges the time and has the effect of making a new period run from the time of the acknowledgment. In other words according to the Indian law such acknowledgment does not operate as a new contract but only keeps alive the original cause of action : 22 *Cal.* 434 (*P. C.*) and 33 *Cal.* 1017 (*P. C.*), *Expl.* and *Ref.*; *A. I. R.* 1929 *All.* 980, *Dist.* [P 50 C 1]

(b) Contract Act (1872), S. 25 (3)—There must be express promise to pay old time barred debt.

A promise such as is referred to in S. 25, Cl. (3) must be an express promise to pay a debt after the period of limitation in respect of it has expired : 30 *All.* 268, *A. I. R.* 1921 *Pat.* 29 and *A. I. R.* 1929 *Pat.* 258, *Ref.* [P 51 C 1]

(c) Contract Act (1872), S. 62—Suit on bond insufficiently stamped—Promise to pay old debt—Old debt not proved—Novation—New contract held not enforceable.

In a suit on a bond the bond was insufficiently stamped and the consideration for the bond was an old debt but the old debt could not be proved.

Held ; that under these circumstances, the new transaction, viz., the creation of the bond in suit, could be treated as novation of the original contract. The new contract however was not capable of being enforced by reason of the pro-note being insufficiently stamped. It was therefore very doubtful whether the attempted novation having failed to produce a new enforceable contract, the original contract could be regarded as having come to an end. But whether it had come to an end or not in either case the plaintiff's position was beset with difficulties. If the original contract had ceased to be operative the plaintiff could not enforce the novated contract by reason of the formal defect in the pro-note obtained by her. If on the other hand the original contract still subsisted the plaintiff could not get a decree on its basis for the simple reason that there was no evidence in proof it. [P 50 C 2]

Ramapat Ram and *Ramanath* — for Appellant.

Ghulam Imam for *Ali Zaheer* — for Opposite Parties.

Judgment.—This is an application for revision of a decision of the Subordinate Judge of Barabanki in the exercise of his Small Cause Court jurisdiction.

The plaintiff came to Court on the allegation that on 12th April 1927 the defendant borrowed from her Rs. 254 bearing interest at Re 1-8-0 per cent per mensem promising to repay the money on demand, and that he executed a pro-note and a receipt in respect of it in the plaintiff's favour. The defendant denied the pro-note. The plaintiff examined one attesting witness of the receipt.

It transpired from his evidence that only one stamp of one anna had been affixed to the pro-note at the time of its execution. His evidence also showed that no money was paid when the pro-note was executed and that the entire consideration of the pro-note was credited for some previous debt.

The learned Subordinate Judge came to the conclusion that the other stamp of one anna appearing on the pro-note had been affixed subsequent to its execution. He therefore held that the pro-note was not sufficiently stamped and impounded it. Thus the pro-note having gone out of evidence, the plaintiff tried to fall back on the previous debt. As there was no evidence of the original transaction and the receipt purported to be for ready money, the learned Subordinate Judge held that no decree could be passed on the basis of the original liability. He also observed that even if the receipt were regarded as an acknowledgment of the previous liability, the suit could not be decreed on a bare acknowledgment divorced from the original transaction, and dismissed the suit.

It is admitted on behalf of the plaintiff that there is no evidence on the record in respect of the previous debt. We do not know the amount of that debt or the date on which it was incurred. There is nothing to show whether the debt was subsisting on 12th April 1927 when the pro-note was executed or had become time barred. The learned counsel for the plaintiff has however contended that the transaction of 12th April 1927 constitutes a novation of the contract and that the receipt given in acknowledgment of the consideration of the pro-note should be deemed to carry with it a promise to pay which can form the foundation of an action.

He claims that he is entitled to a decree on the basis of the acknowledg-

ment contained in the receipt. In support of the contention reliance is placed upon two decisions of their Lordships of the Judicial Committee in *Kalka Singh* v. *Puras Ram* (1) and *Mani Ram* v. *Seth Rupchand* (2) and also upon a decision of a Bench of the High Court at Allahabad in *Govind Singh* v. *Bijay Bahadur Singh* (3). S. 19, Limitation Act, allows extension of limitation when an acknowledgment of liability is made before the expiration of the period prescribed. An acknowledgment satisfying the requirements of that section does not create any new right of action but only enlarges the time and has the effect of making a new period run from the time of the acknowledgment. In other words according to the Indian law such acknowledgment does not operate as a new contract but only keeps alive the original cause of action.

In *Kalka Singh* v. *Paras Ram* (1) occurs the following observation :

"In the next place, although an unqualified admission of a debt no doubt implies a promise to pay it, their Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner. It must depend on the construction of the instrument in each case."

In this case the existence of the amount of the old debt was admitted in the bond on which the suit was founded and therefore no question arose as to the consideration for the implied promise as a new contract. All the elements of a legally enforceable contract are present in the case. The suit however failed on the ground that the promise to pay the old debt was conditional and the obligor could be compelled to pay it only in the stipulated manner and not otherwise.

In *Maniram* v. *Seth Rupchand* (2) the question was one of the interpretation of an acknowledgment for the purpose of saving limitation under S. 19, Limitation Act. It was pointed out that the acknowledgment was made before the statutory period had run out and it was held that every requisite of the provisions of S. 19 was admittedly complied with. In the circumstances the only question which remained for decision was as to whether the acknowledgment in question was an acknowledgment of "liability." In deciding this question their Lordships referred to the observation of Mellish, L. J. in *In re River Steamer Co., Mitchell's claim* (4) and said :

"An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary."

It will thus be seen that in neither of these cases the question arose as to whether the implied promise constituted a legally enforceable contract on which a cause of action could be founded. Obviously a bare promise to pay is not a contract enforceable at law unless it is supported by consideration. The only consideration on which the promise can rest in this case would be the liability for the original debt. That debt however is not proved.

Section 62, Contract Act, deals with the novation of contracts. In the case of novation a new contract is substituted in place of the original contract which ceases to be operative. The transction which took place on 12th April 1927 could be treated as novation of the original contract. The new contract however in the present case is not capable of being enforced by reason of the pronote being insufficiently stamped. It is therefore very doubtful whether the attempted novation having failed to produce a new enforceable contract, the original contract could be regarded as having come to an end. But whether it has come to an end or it has not, in either case the plaintiff's position is beset with difficulties. If the original contract has ceased to be operative she cannot enforce the novated contract by reason of the formal defect in the pronote obtained by her. If, on the other hand, the original contract still subsists she cannot get a decree on its basis for the simple reason that there is no evidence in proof of it.

The same argument was put by the learned advocate for the applicant in another form also. It was contended with reference to the provisions of S. 25 (3), Contract Act. 1872 that a promise to pay a barred debt is sufficient consideration for a new contract and this contract should be implied in the terms of the receipt executed by the debtor. The argument may be answered in two ways. First, it clearly assumes that there was

(1) [1895] 22 Cal. 434=22 I. A. 68 (P.C.).
(2) [1906] 33 Cal. 1047=33 I. A. 165=2 N. L. R. 130.
(3) A. I. R. 1929 All. 980=121 I. C. 108.
(4) [1871] 6 Ch. 822=25 L. T. 319=19 W. R. 1130.

an old debt. We have already said that there is no proof of such a debt. Secondly we are of opinion that a promise such as is referred to in S. 25, Cl. (3), Contract Act, must be an express promise to pay a debt after the period of limitation in respect of it has expired. We are supported in this view by the decisions of the Allahabad and Patna High Courts in *Gobind Das* v. *Sarju Das* (5), *Ram Bahadur Singh* v. *Damodar Prasad Singh* (6) and *Deoraj Tewari* v. *Indrasan Tewari* (7). If the contention of the plaintiff is to be accepted in the wide form in which it has been put it would lead to startling results.

As we have stated above, an acknowledgment in order to be effective under S. 19, Limitation Act, must be made before the expiration of the statutory period yet in every case in which an acknowledgment fails, under S. 19 by reason of its having been made after the debt had become barred by time, a decree could be claimed on the basis of the same acknowledgment on the ground of its containing an implied promise to pay. Such a view would result in nullifying almost completely the provisions of S. 19, Limitation Act.

As to the decision of the Allahabad High Court in *Govind Singh* v. *Bijay Bahadur Singh* (3) all that need be said is that the trial Court in that case had found that the defendant's previous indebtedness had been established and that the plaintiff's claim in respect of the original debt was within time when a fresh pro-note was executed. As we have pointed out before, there is no evidence to prove these facts in the present case. The Allahabad case is therefore not in point.

For the above reasons; we dismiss the application with costs.

B.V./R.K. *Application dismissed.*

(5) [1908] 30 All. 268=5 A. L. J. 274=(1908) A. W. N. 129.
(6) A. I. R. 1921 Pat. 29=60 I. C. 514=6 Pat. L. J. 121.
(7) A. I. R. 1929 Pat. 258=120 I. C. 470=8 Pat. 706.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1932 Oudh 51

RAZA, J.

Lala Bishambhar Nath and *another*—Plaintiffs—Appellants.

v.

Nisar Ali—Defendant—Respondent.

Second Appeal No. 53 of 1931, Decided on 21st September 1931, against decree of Dist. Judge, Hardoi, D/- 27th January 1931.

(a) Civil P. C. (1908), S. 100—Legal effect of proved fact and admissibility of evidence are questions of law—Whether fact is proved is question of fact.

The proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence, and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved when evidence for and against has been properly admitted is essentially a pure question of fact : *A. I. R.* 1918 *P. C.* 92, *Ref.* [P 52 C 2]

(b) Civil P. C. (1908), S. 100—Legal inference from document is question of law.

When the question is one of a right construction of a document of title or of a legal inference from a document the question is one of law: 34 *All.* 579 and *A. I. R.* 1919 *P.C.* 60, *Ref.* [P 52 C 2]

(c) Land Tenure—Oudh—Superior proprietorship how proved stated—Person challenging title of superior proprietor has to prove his own title as against superior proprietor's.

The effect of Lord Canning's proclamation of confiscation of 1858 was that the whole of the rights in the soil of Oudh with the exception of the estates specially exempted passed from the former owners and became the property of the Crown. The confiscation did not and could not mean that the rights in the soil became vested in no one. They became vested in the Crown, and the Crown becoming absolute owner, all subordinate rights likewise ceased to exist. The restoration however by the Crown of its proprietary rights involved automatically the restoration of the rights of subordinate proprietors originally held by them against the former proprietor.

Where a talukdar becomes entitled to an entire village as superior proprietor all the rights which were afterwards declared by decrees made by the Courts of the first regular settlement must be deemed to be subordinate rights. It is necessary for them who claim any land as a superior proprietor to prove some title derived from the talukdar himself or his successor-in-interest subsequent to the date of the second summary settlement. It is for the person denying or challenging the title of such superior proprietor to prove his superior or subordinate right in the land in suit as against the superior proprietor or his successor-in-interest : *A. I. R.* 1927 *Oudh* 74 and *A. I. R.* 1929 *Oudh* 80, *Ref.* [P 53 C 1]

(d) Possession—Possession is not same as user.

Possession is not necessarily the same thing as actual user. The nature of the possession is to be d for and the evidence of its conti-

nuance must depend upon the character and condition of the land in dispute. [P 54 C 1]

M. Wasim and *Haider Husain*—for Appellants.

Ghulam Hasan—for Respondent.

Judgment.—This is an appeal from a decree of the learned District Judge, Hardoi, dated 27th January 1931, setting aside a decree of the learned Munsif, Hardoi (North), dated 30th October 1930.

The facts of the case are sufficiently set out in the judgment of the learned District Judge and it is not necessary to repeat them in detail.

The dispute in this case relates to certain plots in the abadi land of village Gopamau in the District of Hardoi.

The village Gopamau was included in the taluka which was owned by one Murtaza Bakhsh Talukdar. The plaintiffs acquired a 4-annas share in the said village (including abadi) by purchase at auction-sale which was held in execution of a decree against certain successors of the talukdar in the year 1912. Then there was a partition of the village among the cosharers and the plaintiffs' share of 4-annas was constituted into a separate mahal of 16 annas. The plots in dispute were allotted to the plaintiffs on partition and were duly entered in their chitthi. In the year 1927, Ghurey and Narain began to build on two plots out of the plots in suit and the plaintiffs had to sue them for possession of the same. Nisar Ali defendant in the present suit was examined as a witness in the suits which were brought by the plaintiffs against Ghurey and Narain. He set up his own title stating that he himself had made over the land to them (Ghurey and Narain). However the plaintiffs' suits were decreed on 19th September 1927, and they eventually got possession of the land then in dispute in August 1928. The plaintiffs were constructing a building on two plots out of the plots in suit between August and December 1928. The defendant interfered and served a notice on the plaintiffs claiming title to all the plots in suit. The present suit was then brought by the plaintiffs on 11th April 1930. The plaintiffs sued for declaration of their title, and, in the alternative, for possession of the plots. They also prayed for a perpetual injunction prohibiting the defendant Nisar Ali from interfering with their building.

The defendant admitted that the plaintiffs had purchased the 4-annas share of Murtaza Bakhsh Talukdar in 1912. But he denied that the plots in suit were owned or possessed by Murtaza Bakhsh Talukdar or the successors or legal representatives of the talukdar or the plaintiffs. He claimed title in himself as a reza milkiat dar as one of the heirs of one Murtaza Khan.

The plaintiffs' claim was decreed by the learned Munsif.

The defendant appealed and his appeal was allowed by the learned District Judge. The result was that the plaintiffs' suit was dismissed with costs.

The plaintiffs have now come to this Court in second appeal.

In my opinion this appeal should be allowed.

As I understand the judgment of the learned District Judge, he has dismissed the suit on the following findings:

(1) There is no presumption that Murtaza Bakhsh Talukdar was owner of all the property comprised in the taluka. The plaintiffs have therefore failed to establish their title and possession.

(2) The defendant has also failed to prove his title and possession.

(3) The plaintiffs' claim must be rejected as they have failed to prove their title and possession.

I have examined the record and heard the learned counsel on both sides at some length. Though the question of decision appears to be one of fact, its proper determination turns upon the application of certain legal principles to the facts proved and the true conclusion to be drawn from those facts viewed in the light of those principles. The proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence, and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved when the evidence for and against has been properly admitted is essentially a pure question of fact: see *Nafar Chandra Pal* v. *Shukur Sheikh* (1) (at p. 195 of 46 *Cal.*). When the question is one of a right construction of a document of title or of a legal inference from a document the question is one of law: see *Fateh*

(1) A. I. R. 1918 P. C. 93=51 I. C. 760=45 I. A. 183=46 Cal. 189 (P.C.).

Chand v. *Kishun Kunwar* (2) and *Satgur Prasad* v. *Raj Kishore Lal* (3).

It has been found in this case that the plaintiffs are purchasers of a 4-annas share in Gopamau which originally belonged to Murtaza Bakhsh Talukdar. The effect of Lord Canning's proclamation of confiscation of 1858 was that the whole of the rights in the soil of Oudh with the exception of the estates specially exempted passed from the former owners and became the property of the Crown. The confiscation did not and could not mean that the rights in the soil became vested in no one. They became vested in the Crown and the Crown becoming absolute owner, all subordinate rights likewise ceased to exist. The restoration however by the Crown of its proprietary rights involved automatically the restoration of the rights of subordinate proprietors originally held by them against the former proprietor: see *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (4) and *Deputy Commissioner, Sitapur* v. *Mt. Munni* (5). When the village Gopamau was included in the taluka of Murtaza Bakhsh he became the full proprietor thereof. He became entitled to the entire village as superior proprietor.

All the rights which were afterwards declared by decrees made by the Courts of the first regular settlement must be deemed to be subordinate rights. It is necessary for them who claim any land as a superior proprietor to prove some title derived from the talukdar himself or his successor-in-interest subsequent to the date of the second summary settlement. In my opinion the presumption of a talukdar's ownership of all property comprised in the taluka applies to the plaintiffs in the present case to the extent of a 4-annas share in Gopamau. It was for the defendant to prove his superior or subordinate right in the land in suit as against the plaintiffs. He has however failed to do so. There is no evidence on the record to show that he or his predecessor-in-title ever held any plot out of the plots in suit as a reza milkiat dar. It appears of course that there are reza milkiat dars in Gopamau abadi: see the wajibularz Ex. A-1; but there is no presumption that because the defendant's predecessor-in-title Murtaza Khan was a rezadar of some land in the village he and his successors should be held to be rezadars of the plots in suit also. The presumption of full or superior proprietary right is in favour of the plaintiffs who are the successors-in-interest of the talukdar. There can be no presumption of proprietary or subordinate right in favour of the defendant in respect of the abadi lands in Gopamau. When the village Gopamau was partitioned among the cosharers, the plots in suit were allotted to the plaintiffs and were duly entered in their chitthi. It is of course true that the defendant was no party to that partition and the partition is not therefore binding on him, but the fact remains that he has failed to establish his title to the land in suit. He is not a cosharer of the village and he has no right to or interest in the land in suit. He can claim no right to or interest in the land in suit against the plaintiffs or other cosharers of Gopamau. It appears that Nos. 886 to 890 were already held by the plaintiffs (or their ancestors) before they acquired the 4-annas share mentioned above in 1912. Baijnath and Jagannath were the plaintiffs' ancestors and their names were entered in the Khasra prepared at the first regular settlement. The learned District Judge was of opinion that the entries in the settlement Khasra (Ex. 11) do not help the plaintiffs' case. I am not prepared to agree with his interpretation of the document in question. Having regard to the entries in the settlement Khasra (Ex. 11) and the wajibularz (Ex. A-1), I am of opinion that the plaintiffs' ancestors held the said numbers as "rezadars." They themselves occupied No. 888 and the other numbers were occupied by their raiyats named in the Khasra. The plaintiffs have properly got all these numbers also entered in their chitthi.

So far as I see, the plaintiffs' title is sufficiently established in this case. The sale certificate (Ex. 16), the partition chitthis (Ex. 1 read with Exs. 2 and 9) and the decrees (Exs. 7 and 8) are all in plaintiffs' favour and make out their title. As to plaintiffs' possession over the plots in suit I think their possession must be presumed having regard to the

(2) [1912] 34 All. 579 =39 I. A. 247=16 I. C. 67 (P.C.).
(3) A. I. R. 1919 P. C. 60=55 I. C. 486=46 I. A. 197=42 All. 152 (P.C.).
(4) A. I. R. 1927 Oudh 74=99 I. C. 876=2 Luck. 4.
(5) A. I. R. 1929 Oudh 80=110 I. C. 56=3 Luck. 446.

nature of the property (parti and abadi land). It should be borne in mind that possession is not necessarily the same thing as actual user. The nature of the possession is to be looked for and the evidence of its continuance must depend upon the character and condition of the land in dispute. When the plaintiffs' title is made out, it should be presumed, having regard to the nature of the property that they have all along been in possession, because the presumption of possession follows the title. The defendant had pleaded adverse possession but he failed to establish such possession and his plea was properly rejected by the lower Courts. No such plea has been argued in this Court.

The result is that I allow the appeal and setting aside the decree of the learned District Judge restore the decree of the learned Munsif. The appellants will get their costs from the respondent in all the three Courts.

B.V./R.K. *Appeal allowed.*

A. I. R. 1932 Oudh 54

RAZA AND SMITH, JJ.

Ram Hait—Appellant.

v.

Pohkar and *another*—Respondents.

Second Appeal No. 341 of 1931, Decided on 7th September 1931.

(a) Transfer of Property Act (1882), S. 74—Mere lender of money is not entitled to subrogation.

The mere fact that money is borrowed and used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit depends upon the existence of an agreement between the borrower and the lender by which it is provided that the subsequent lender must be substituted for the earlier creditor. A claim to subrogation can be sustained only when there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagee and though such an agreement may be presumed when the money is expressly advanced for the purpose of paying off an incumbrance, there can be very little doubt that the mere fact that the money borrowed by the debtor is used to pay off a prior mortgagee does not entitle the lender to the benefit of the discharged security. The real question in all such cases is whether the payment made by the stranger was a mere loan to the debtor on his personal security or whether it was made under an agreement that he should be substituted for the creditor. In order that the right of subrogation should accrue in favour of a person with defective title it is necessary that the person making the payment should have an ostensible title at least.

[P 55 C 2, P 56 C 1, 2, P 57 C 1]

(b) Transfer of Property Act (1882), Ss. 58 and 100—Oral agreement to execute mortgage does not constitute mortgage.

A mere oral agreement to execute a mortgage cannot constitute a mortgage or charge upon the property within the meaning of Ss. 58 and 100, T. P. Act: 36 *Mad.* 426; 41 *All.* 372 and *A. I. R.* 1930 *P. C.* 76, *Ref.* [P 56 C 2]

Radha Krishna—for Appellant.

Hyder Husain for *R. B. Lal*—for Respondents.

Judgment.—This appeal has been referred to a Bench of this Court for decision under S. 14 (2), Oudh Courts Act.

The following facts are no longer in controversy:

Mt. Suraj Dei (defendant 2) executed two mortgages in respect of the same property in favour of Jewan Ram and Badri on different dates. The mortgage in favour of Jewan Ram was executed on 16th June 1919, and that in favour of Badri on 24th June 1919, Badri (since deceased) was the grandfather of Ram Het (defendant 1). Both the mortgagees obtained decrees for sale of the property on the basis of their mortgages. The decree based on the mortgage of 24th June 1919, was passed on 22nd March 1922, whereas the decree based on the mortgage of 16th June 1919, was passed on 16th October 1922. It appears that the property was put up for sale first in execution of the decree of 16th Obtober 1922 based on the earlier mortgage of 16th June 1919. On 20th May 1926, Mt. Suraj Dei (mortgagor) made an application stating that she had entered into an agreement with Pokhar (plaintiff) to execute in his favour a mortgage with possession of the property which was under sale and that Pokhar was present in Court to make a deposit of Rs. 100. She prayed for time to execute the mortgage in favour of Pokhar and to deposit the balance of the decretal amount. It appears that this application was not granted and sale of the property was not stayed by the Court. However Rs. 100 were actually deposited by Pokhar on 20th May 1926, and the balance of Rs. 244 was also deposited by him subsequently on 19th June 1926. Jewan Ram himself purchased the property in execution of his decree at the auction sale. As the decretal amount had been deposited in Court, the sale which had taken place in favour of Jewan Ram was set aside by order of the Court. Mt. Suraj Dei

instead of executing a mortgage in favour of Pokhar executed a pro-note in his favour for Rs. 400 on 19th June 1926. This sum of Rs. 400 included the two sums which had been deposited by Pokhar in Court in satisfaction of Jewan Ram's decree. However she executed a mortgage in favour of Pohkar about two years later, on 11th June 1928, for Rs. 1,000, which included the sum of Rs. 588 due on the pro-note mentioned above. Ram Het (defendant-appellant) purchased the property on 24th June 1929, in execution of the decree which had been passed in favour of his grandfather Badri on the basis of the second mortgage mentioned above, that is, the mortgage of 24th June 1919. Pohkar (plaintiff) instituted the suit which has given rise to this appeal for a declaration that he is entitled to priority in respect of Rs. 588 (at least) which represents the amount paid by him in respect of the mortgage of 16th June 1919 by right of subrogation.

The suit was dismissed by the trial Court but that decision was reversed by the Court of first appeal. The appellant before us is Ram Het.

It is contended on behalf of the defendant-appellant that Pokhar was a mere volunteer when he made the payment in question and had no interest in the mortgaged property. It is also contended that there is no evidence of any agreement that by making the payment in question he would acquire the rights of the prior mortgagee Jewan Ram. It is therefore argued that Pohkar is not entitled to any priority and cannot claim the rights of the prior mortgagee by subrogation.

It is contended on behalf of the plaintiff-respondent (Pohkar) that as the money paid by him has satisfied the mortgage in favour of Jewan Ram, and as the said payment was made in anticipation of a proposed mortgage, the (plaintiff) is entitled to be subrogated to the rights of Jewan Ram the prior mortgagee.

It is noticeable that it is neither alleged nor shown on behalf of Pohkar, the plaintiff in this case, that there existed an agreement between him and Mt. Suraj Dei by which it was provided that he would be substituted for the earlier creditors (Jewan Ram and Badri).

In disposing of this appeal, we have to see if Pohkar is entitled to claim the right of subrogation against Ram Het, the heir and legal representative of Badri deceased.

When a person is allowed by law to stand in place of a mortgagee he is said to be subrogated or substituted in place of the latter:

"The right of one creditor to stand in the place of another comes under the technical head of subrogation, a term which has descended to us from the Roman law and which means nothing more than substitution. In the English law however the word is not unfrequently used in a narrower sense namely substitution by operation of law. . . . . No person can safely lend money to a mortgagor to pay off a charge on the property without taking an assignment of the security. If he does not take this precaution, it is very likely he will be told that the loan was made simply with the object of clearing off the incumbrance so as to let in intermediate mortgage as a first charge on the estate, a view which must take the lender by surprise, though it may be a perfectly legal deduction from acknowledged legal principles. . . . . A claim to subrogation can be sustained only when there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagee and though such an agreement may be presumed when the money is expressly advanced for the purpose of paying off an incumbrance, there can be very little doubt that the mere fact that the money borrowed by the debtor is used to pay off a prior mortgage does not entitle the lender to the benefit of the discharged security. The real question in all such cases is whether the payment made by the stranger was a mere loan to the debtor on his personal security or whether it was made under an agreement that he should be substituted for the creditor. The law does not usually thrust benefits on people for which they do not themselves stipulate and we find that in the Roman law and the systems based on it, subrogation is permitted only when there is an agreement to that affect with the borrower; see Ghose's Law of Mortgage, Vol. 1, pp. 352, 360 and 364, 5th Edn."

In the case before us the plaintiff has not set up any such agreement as already observed. It is not his case that any such agreement was entered into between him and Mt. Suraj Dei.

Pohkar had no interest in or charge upon the property or the right to redeem the property at the time he advanced money to Mt. Suraj Dei or deposited money in Court on her behalf to satisfy the decree which Jewan Ram had obtained in respect of the property on the basis of his prior mortgage of 16th June 1919.

As pointed out in the case of *Narayana Kuttigoundan* v. *Pechiammal* (1) at (pp. 432 to 434:

(1) [1913] 36 Mad. 426=15 I. C. 206.

"The principle governing the right of subrogation in cases where it is claimed by a person who without any previous interest in the property discharge a mortgage on it is expressed in Jones on Mortgage (S. 874) thus:

"Under the equitable principle of subrogation one who pays a mortgage debt under an agreement for an assignment, or for a new mortgage for his own protection or for the benefit of another, acquires a right to the security held by the other.' The learned author quotes a passage from a recent Georgia case: *Wilkins* v. *Gibson* (2) which may be cited here. 'It has been said that subrogation was a benevolent doctrine and equity would apply it in any case in which justice required it; and under sanction of this elastic expression cases can be found where it was applied without the semblance of an agreement. We think the safer and better rule to be and we therefore hold that a subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt, which in the event of default by the debtor he would be bound to pay, or where he had some interest to protect or where he advanced the money under an agreement express or implied made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor.' The rule is stated in similar terms by Scheldon in his book on subrogation. It has been said that: 'Whenever a payment is made by a stranger to a creditor in the expectation of being substituted to the place of the creditor he is entitled to such substitution. But the doctrine generally adopted and that of these very cases when limited to the point actually decided is that a conventional subrogation can result only from a direct agreement express or implied made with either the creditor or debtor and it is not sufficient that a person paying the debt of another should have merely an understanding on his part that he is to be subrogated to the right of the creditor though, if the agreement has been made a formal assignment will not be necessary. The English cases do not carry the principle further. In India the scope of the rule appears to be narrower still. A mere agreement either with the creditor holding a mortgage or with the debtor owing it, cannot give a person lending money to discharge the mortgage, a lien over the property: see S. 54 (sic), T. P. Act. An agreement with the creditor or the debtor may entitle him to sue him for the execution of a mortgage deed or a deed of assignment of the mortgage as the case may be, but mortgages for a sum of Rs. 100 and upwards can be created only by a registered instrument and a mere agreement to mortgage is insufficient to create a lien. In England and in America it may be that the principle of equity would enable the Courts to treat an agreement for a mortgage as giving the lender an equitable interest in the property agreed to be mortgaged. But equitable interests are not recognized in this country as distinct from legal interests though many principles of law are borrowed from the principles of English Jurisprudence. . . . . In *Jagat Dhar Narain Prasad* v. *A. M. Brown* (3) it was held that an agreement to give a mortgage would be enough to create a charge by way of subrogation though the decision of the case itself does not seem to have required the enunciation of the principle. It appears that the important distinction between the English and the Indian law pointed out above was overlooked in these cases. No doubt a person having an agreement may sue for the specific performance of the agreement to execute or assign a mortgage and in suits for the execution of the mortgage deed the Courts have sometimes passed not only a decree for specific performance but for sale also following on the execution of the conveyance. But this does not justify the view that the agreement itself can be treated as creating a charge."

The mere fact that money is borrowed and used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit depends upon the existence of an agreement between the borrower and the lender by which it is provided that the subsequent lender must be substituted for the earlier creditor : see *Gulzari Lal* v. *Aziz Fatima* (4), at p. 375.

As pointed out by their Lordships of the Privy Council in the case of *Hukum Chand Kslwal* v. *Radha Kishan Moti Lal* (5):

"an agreement between *A* and *B* providing that the executant *A* should give a regular mortgage of his immovable property for money advanced by *B*, cannot constitute a mortgage or charge upon such property within the meaning of Ss. 58 and 100, T. P. Act. The said agreement merely creates a right in *B* to obtain another mortgage viz., a regular deed of mortgage of the said immovable property to be executed by *A*."

The agreement on which Pohkar, the plaintiff in this case, may rely was simply an agreement by which it was provided that Mt. Suraj Dei would execute a mortgage in his favour in respect of the property in suit.

Such an agreement, which is said to be an oral agreement, cannot constitute a mortgage or charge upon the property within the meaning of Ss. 58 and 100, T. P. Act. The said agreement (if enforcible) merely created a right in Pohkar to obtain a regular deed of mortgage of the property to be executed by Mt. Suraj Dei. The respondent's learned counsel contends that Pohkar by making the payment in question had an interest to acquire a charge by suing for specific performance of the agreement. In our opinion this contention is not well founded. The alleged agreement did not constitute a mortgage or charge upon the property.

(2) 113 Ga. 31.
(3) [1906] 33 Cal. 1123 = 10 C. W. N. 1010=1 C. L. J. 121.
(4) [1919] 41 All. 372=50 I. C. 375.
(5) A. I. R. 1930 P. C. 76=123 I. C. 157 (P.C.).

By making the payment in question simply, Pohkar did not and could not acquire an interest in or charge upon the property or upon the right to redeem the property. He acquired no title to the property by making the payment in question. It must be remembered that in order that the right of subrogation should accrue in favour of a person with defective title it is necessary that the person making the payment should have an ostensible title, at least. Pohkar had no such title even, at the time he made the payment in question. He had no interest to protect at the time he agreed to advance money to Mt. Suraj Dei. It cannot be denied that Pohkar can claim no right of subrogation under S. 92, T. P. Act (as amended by Act 20 of 1929). That section is in the following terms:

"Any of the persons referred to in S 91 other than the mortgagor and any co-mortgagor shall, on redeeming property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee, whose mortgage he redeems, may have against the mortgagor or any other mortgagee. The right conferred by this section is called the right of subrogation and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems. A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated. Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

Section 91 is in the following terms:

"Besides the mortgagor any of the following persons may redeem or institute a suit for redemption of the mortgaged property, namely; (a) Any person (other than the mortgagee of the interest sought to be redeemed) who has an interest in or charge upon the property mortgaged or in or upon the right to redeem the same. (b) Any surety for the payment of the mortgage debt or any part thereof. (c) Any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property."

In the case before us Mt. Suraj Dei never agreed by a registered instrument that Pohkar shall be subrogated to the rights of Jewan Ram. No such agreement is alleged or proved in this case. It is noticeable that mention of such an agreement was made in the application (Ex. 2) which Mt. Suraj Dei made on 20th May 1926, asking for time to be allowed to her in order to execute a mortgage deed in favour of Pohkar. No mention of such an agreement was made also in the mortgage (Ex. 1), which she executed in favour of Pohkar on 11th June 1928. Nothing was said in the plaintiff's mortgage deed about the prior mortgage or about the satisfaction of the decree which had been passed on the basis of the mortgage.

If this case is to be decided under the Transfer of Property Act, as it existed before it was amended by Act 20 of 1929, even then Pohkar could claim no right to be subrogated to the rights of the prior mortgagee Jewan Ram: see Ss. 74, 91 and 101 of the old Act.

Some other authorities were also referred to during the course of arguments, but we do not think it necessary to refer to them, as they do not appear to be in point.

The result is that we allow the appeal and setting aside the decree of the learned Subordinate Judge dated 19th August 1930, restore that of the Munsif dated 26th October 1929. The appellant, Ram Het will get his costs from the respondent, Pohkar, in all the three Courts.

K.N./R.K. *Appeal allowed.*

A. I. R. 1932 Oudh 57

RAZA AND SMITH, JJ.

Mt. Pranpati and *others*—Defendants—Appellants.

v.

Mt. Hasiban and *another*—Plaintiffs—Respondents.

Second Appeal No. 71 of 1931, Decided on 16th October 1931, against order of Addl. Dist. Judge, Lucknow, D/- 17th November 1930.

Mortgage—Redemption — Mortgagor dispossessed from plot comprised in mortgage acquiescing in such dispossession—He cannot put forward claim for profits.

If a mortgagor is dispossessed from a certain plot comprised in the mortgage (or is not given possession of the same under the terms of the mortgage) and acquiesces in such dispossession he cannot be heard at the time of redemption in support of his claim as to the loss of profits if any: 24 *All.* 521 (*P.C.*); *A. I. R.* 1922 *Oudh* 102; *A. I. R.* 1926 *Oudh* 224 and *A. I. R.* 1927 *Oudh* 594, *Ref.* [P 59 C 1]

M. L. Tilhari—for Appellants.

Haidar Husain—for Respondents.

Judgment.—This is an appeal from a decree of the learned Additional District Judge of Lucknow, dated 17th November 1930, modifying a decree of the learned second Munsif of Lucknow, dated 26th March 1930.

This appeal arises out of a redemption suit.

The mortgage in suit was executed by one Mt. Sahebzadi in favour of Pandit Raj Nath for Rs. 150 in respect of a 3 pies share in village Behta, pargana Mahona, Tahsil Malihabad, District Lucknow, on 31st March 1880.

The plaintiffs are the legal representatives of the original mortgagee.

The dispute in this case relates to a plot 542 (old) measuring 13 biswas, comprised in the 3 pies share mentioned above.

The plaintiffs claimed redemption on payment of nothing and asserted that they were entitled to recover Rs. 351-8-0 surplus profits of the said plot after deduction of the mortgage money (Rs. 150). They alleged that the said plot was exempted from the mortgage deed.

The claim was resisted by the defendants. They alleged that they and their predecessors-in-title had become owners of the said plot by right of adverse possession. They alleged further that the plaintiffs were not the legal representatives of the original mortgagor.

The learned Munsif decided almost all the points against the defendants and decreed the plaintiffs' suit on payment of Rs. 150 only.

Defendants 2 and 3 appealed to the learned District Judge and the plaintiffs filed cross-objections, claiming accounting in respect of plot 542 (old) mentioned above.

The learned Additional District Judge held that the defendants were in possession of the plot in dispute, but their possession was that of a mortgagee and not that of a proprietor. As to the mesne profits, the learned Judge held that the plaintiffs are entitled to the profits of plot 512 for the whole period during which the mortgagee and his legal representatives remained in possession of the same. He found also that the plaintiffs are entitled to the property in suit as the legal representatives of Mt. Sahibzadi deceased. He modified the decree of the first Court and passed the following order:

"The decree of the lower Court is modified and the cross-objections are allowed with proportionate costs in both Courts. The account will be prepared in the office. After deducting Rs. 150 on account of the mortgage money the surplus will be paid by the appellants to the mortgagors respondents."

The defendants have now come to this Court in second appeal. The whole appeal depends upon the correct interpretation of the mortgage deed in suit (Ex. 1). It is not necessary to discuss the questions of law in the way in which they have been discussed in the course of arguments before us, if the deed is carefully examined and correctly interpreted. We have examined the deed carefully and in our opinion no plot was exempted from the mortgage, which was executed by Mt. Sahibzadi in respect of the entire 3 pies share. It is true that it was stated in the deed that the executant, Mt. Sahibzadi, will remain in possession of No. 542 in dispute, but this does not mean that she had excluded the said number from the mortgage. She was to be allowed to remain in possession of the said number, but she had mortgaged her entire 3 pies share, which of course, included the said number, to the mortgagee, Pandit Raj Nath. It appears that the mortgagee had agreed to allow the mortgagor to remain in possession of the said plot by way of concession.

The mortgage was to be redeemed after 20 years on payment of the principal amount only, without any accounting. This was expressly provided by the deed. There was an express contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall so long as the mortgagee is in possession of the property be taken in lieu of interest of the principal money. It appears of course that the mortgagee took possession of the entire share, including the plot in dispute, after the mortgage was executed in his favour, but the fact remains that the mortgagor raised no objection to that and allowed the mortgagee to hold that plot along with the other property comprised in the mortgage. She acquiesced in such dispossession for some reason or other. It is now too late for her legal representatives to claim mesne profits from the mortgagee in respect of the said plot. If the mortgagor or her legal representatives had any grievance in this connexion, they ought to have sued the mortgagee for possession of the said plot, but they did not do so. Where a mortgagee after dispossession from the property which constitutes the mortgage security acquiesces in the situation he

cannot put forward a claim for interest: see *Partab Bahadur Singh* v, *Gajadhar Bakhsh Singh* (1); *Mahadeo* v. *Sitla Bakhsh Singh* (2); *Dubri* v. *Ramnaresh Singh* (3) and *Sheo Shankar Pande* v. *Raj Jus Lal* (4). In the same way if the mortgagagor is dispossessed from a certain plot comprised in the mortgage (or is not given possession of the same under the terms of the mortgage) and acquiesces in such dispossession, he should not be heard at the time of redemption in support of his claim as to loss of profits (if any). As the plot in dispute is comprised in the mortgage, and the deed provides clearly that there shall be no accounting between the parties at the time of redemption, the plaintiffs' contention as to the accounting and the defendants' contention as to acquisition of the property by right of adverse possession, in respect of the plot in dispute, must be overruled.

No other point remains to be decided in this appeal. Hence we allow this appeal, and setting aside the decree of the learned Additional District Judge, restore that of the learned Munsif. The appellants will get their costs from the respondents in this Court. They will pay the plaintiffs' costs minus the costs of the cross-objections in the lower appellate Court. We do not disturb the order of the first Court as to costs.

R.M./R.K. *Appeal allowed.*

(1) [1902] 24 All. 521=29 I. A. 143=8 Sar. 310 (P.C.).
(2) A. I. R. 1922 Oudh 102=65 I. C. 408.
(3) A. I. R. 1926 Oudh 224=93 I. C. 237.
(4) A. I. R. 1927 Oudh 594=105 I. C. 164.

A. I. R. 1932 Oudh 59

KISCH, J.

Shiva Shankar Bakhsh Singh—Appellant.

v.

Sh. Ruh Ulla and *another*—Respondents.

Secont Rent Appeal No. 37 of 1931, Decided on 2nd September 1931, against decree of Dist. Judge, Unao, D/- 16th February 1931.

Oudh Rent Act (1886), S. 127—When tenant occupies grove for cultivation, his tenure ceases.

The right of a tenant to retain possession of grove land lasts only so long as he maintains it as a grove, but when he occupies it for the purpose of cultivation the grove tenure ends and the landlord is at liberty to treat him as a trespasser; *A. I. R.* 1930 *Oudh* 144, and 61 *I. C.* 192, *Ref.* [P 59 C 2]

Kashi Prasad Srivastava—for Appellant.

Judgment.—In my opinion there is no substance in this appeal. The plaintiff zamindar had sued to eject the defendant-appellant from a certain plot of land under S. 127, Oudh Rent Act, on the ground that it formerly constituted a grove but had ceased to have the character of a grove and had been cultivated by the defendant. The defence was that the suit should have been brought under S. 107-A, Oudh Rent Act, for resumption of a rent-free plot, and not under S. 127, and also that the Wajibularz of the village gave the defendant a right to retain possession of any trees that might remain on the land, even after it had ceased to have the character of a grove. Both these pleas were repelled by the Courts below and the plaintiff's suit was decreed.

These two points are the grounds on which the defendant-appellant has come up to this Court in second appeal. The Wajibularz has been read out to me by the learned counsel for the defendant-appellant. The provision on which he relies lays down that when the trees of a grove have been cut or fallen the tenant shall have a right to remain in possession of the remaining trees. It has however been found as a fact by the lower appellate Court that there are no trees left on the plot in suit except the stump of one Aonla tree. It is clear therefore that this provision of the Wajibularz has no application to the case.

With regard to the section applicable to the case, it is the established law that the right of a tenant to retain possession of grove land lasts only so long as he maintains it as a grove, but when he occupies it for the purpose of cultivation the grove tenure ends and the landlord is at liberty to treat him as a trespasser. This principle has been given effect to in a large number of decisions which it is unnecessary to quote and is to be found even in the decision of this Court on which the learned counsel for the appellant himself relies: *Mt. Maharaj Kunwar* v. *Court of Wards, Deara* (1). One very clear decision of the Board of Revenue on the subject may also be men-

(1) A. I. R. 1930 Oudh 144=124 I. C. 664=5 Luck. 536.

tioned: *Pancham Lal* v. *Sirdar Nihal Singh* (2).

There is accordingly no ground whatever for questioning the finding of the lower appellate Court and the appeal is dismissed under O. 41, R. 11.

K.N./R.K. *Appeal dismissed.*

(2) [1921] 61 I. C. 192.

A. I. R. 1932 Oudh 60

KISCH, J.

Sita Ram Manoon Lal—Defendant—Applicant.

v.

Harakh Chand—Plaintiff — Opposite Party.

Appeal No. 17 of 1931, Decided on 11th September 1931, against decree of 1st Addl. Small Cause Court Judge, Lucknow, D/- 28th April 1931.

Provincial Small Cause Courts Act (1887), S. 25—High Court can exercise powers to prevent miscarriage of justice or gross illegalities.

High Courts should not ordinarily exercise their powers under S. 25, unless they have reason to suppose that there has been a real mismanagement of the case or actual perversity in decision. High Court can exercise such powers simply and solely for the purpose of preventing miscarriage of justice or gross illegalities: *A. I. R.* 1926 *Oudh* 264 and 519, *Appr.* [P 60 C 2]

The defendant after formally closing his evidence stated to the Court that he had inadvertently omitted to examine *R* summoned by the plaintiff and present in Court at the time of the hearing of the suit but who had left the Court premises. The defendant was given an opportunity to examine him on payment of costs to the plaintiff. On the date fixed for the examination of *R* the defendant, who had not summoned him, applied to examine seven other persons and supported his application by an affidavit by his counsel saying that the latter understood that the Court had allowed the defendant either to examine *R* or other witnesses to prove his handwriting. The Court refused to allow other witnesses to be examined, but gave the defendant a further opportunity to produce *R*. It was alleged that the defendant failed to obtain the attendance of *R* both on a summons and on a warrant and the Court refused to give any further adjournment in the matter.

Held: that the Court had shown more leniency towards the defendant and that there was no cause for complaint and as there had been no miscarriage of justice, the High Court should not interfere. [P 61 C 2]

K. P. Misra—for Applicant.

Bhagwati Nath Srivastava and *Raj Kumar Srivastava*—for Opposite Party.

Judgment.—In the suit out of which this application arises the plaintiff sued the defendant for the balance of the cost of certain cloth supplied to him by the plaintiff. Admittedly the cloth was sold by the plaintiff to the defendant at its cost price and the plaintiff further allowed the defendant a discount of 25 per cent. The plaintiff claimed that this discount was allowed to the defendant only against immediate cash payment whereas the defendant contended that it was allowed to him in all circumstances. There were certain other minor points for decision in the suit, but the present application only relates to the question of discount.

On this point the learned Judge of the Small Cause Court found in favour of the plaintiff and decreed his suit. The grounds of the present application are that the Court below did not give the defendant sufficient opportunity to produce evidence to prove an account (Ex. A-1) alleged to have been prepared by the plaintiff's Munim Rameshar at the time of the transaction in which the discount is shown without any mention that it was only to be allowed on cash payment within two days as was alleged by the plaintiff.

I have been taken through the whole proceedings of the case by the learned counsel for the applicant and I do not consider that this is a case in which this Court should interfere in revision. In the case of *Mahabir* v. *Ram Saran Singh* (1), it was laid down by the late Chief Judge of this Court that High Courts should not ordinarily exercise their powers under S. 25, Provincial Small Cause Courts Act, unless they have reason to suppose that there has been a real mismanagement of the case or actual perversity in decision. In *Mahammad Saadat Ali Khan* v. *Kuer Lal* (2), the same Judge laid down that it behoves a High Court to exercise such powers simply and solely for the purpose of preventing miscarriage of justice or gross illegalities. These decisions appear to me to be a very valuable guide as to the cases in which this Court should exercise its powers of revision under S. 25, Provincial Small Cause Courts Act, and accepting the principles laid down therein, this is not a case for interference.

The applicant's case is that he has not been given a fair opportunity of proving (Ex. A-1) by the production of Rameshar

(1) A. I. R. 1926 Oudh 264=93 I.C. 108.
(2) A.I.R. 1926 Oudh 519=93 I.C. 912.

the alleged writer of the document, or other evidence to prove the handwriting of the said Rameshar. Rameshar was admittedly the plaintiff's munim at the time of the transaction, but he only remained in the plaintiff's service for three months, when he was dismissed, and he is no longer in the plaintiff's service. He was summoned as a witness by the plaintiff and was present in Court at the time of the hearing of the suit, but he was not produced by the plaintiff. On the same date the defendant-applicant formally closed his evidence, but thereafter stated that he had inadvertently omitted to examine Rameshar and asked for an opportunity to examine him. It appears that Rameshar had by then left the Court premises and the defendant was given an opportunity to examine him on payment of costs to the plaintiff.

On the date fixed for the examination of Rameshar the defendant, who had not summoned him, applied to examine seven other persons and supported his application by an affidavit by his counsel saying that the latter understood that the Court had allowed the defendant either to examine Rameshar or other witnesses to prove his handwriting. I find this statement very difficult to accept in view of the very clear terms of the Court's order. The Court refused to allow other witnesses to be examined, but gave the defendant a further opportunity to produce Rameshar. It is alleged that the defendant failed to obtain the attendance of Rameshar both on a summons and on a warrant and the Court refused to give any further adjournment in the matter. It is contended on behalf of the applicant that Rameshar was being kept out of the way by the plaintiff and therefore the defendant ought to have been allowed a further opportunity to produce him or other witnesses to prove Rameshar's handwriting. The facts however seem to me equally explicable by the desire of the defendant that Rameshar himself should not be put into the witness-box. The defendant could have examined him before closing his evidence, but did not do so; when he was relying on a document purporting to have been written by Rameshar himself, it is not easy to accept his statement that the omission was inadvertently made after Rameshar had left the Court. He deliberately avoided summoning him when given an opportunity to do so, but endeavoured to substitute other witnesses. So far therefore from their having been any perversity or illegality in the action of the Court below it seems to me that the Court allowed the defendant more indulgence than the circumstances of the case necessitated. That there has not been any miscarriage of justice will be apparent from the facts of the case as set out above and from the fact that, as observed by the Court below, the condition attached to the discount deposed to by the plaintiff is in keeping with the general custom of trade.

I accordingly see no reason for interference and dismiss the application with costs.

K.N./R.K. *Application dismissed.*

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* A. I. R. 1932 Oudh 61

SRIVASTAVA, J.

Har Pershad—Judgment-debtor—Applicant.

v.

Dargahi Lal—Decree-holder—Opposite Party.

Civil Revn. No. 91 of 1931, Decided on 15th October 1931, against order of Dist. Judge, Lucknow, D/- 13th May 1931.

(a) Provincial Insolvency Act (1920), S. 75—Order by Subordinate Judge as insolvency Court—Only one appeal lies against such order and that too with District Judge—Revision and not appeal may lie to High Court.

Section 75 allows only one appeal against the order passed by a Subordinate Court in the exercise of its insolvency jurisdiction. This appeal lies to the District Court and the section expressly provides that the order of the District Court upon such appeal shall be final. However the first proviso to that clause shows that the High Court can exercise its powers of revision in respect of such orders passed by the District Court on appeal. But no appeal lies to the High Court on order in appeal by the District Court. [P 62 C 1, 2]

(b) Provincial Insolvency Act (1920), S. 75—Not only person aggrieved but any creditor can appeal.

Section 75 gives a right of appeal against orders made in the exercise of insolvency jurisdiction by Courts subordinate to a District Court not only to a person aggrieved by the decision but also to any creditor. [P 62 C 2]

*** (c) Provincial Insolvency Act (1920), S. 69 (c) (2)—Gift of immovable property by insolvent is as much punishable as mortgage by him under S. 69 (c) (2).**

On the plain meaning of S. 69 (c) (2) a case of a gift fraudulently made by an insolvent with intent to diminish the sum to be divided among his creditors is as much liable to punishment under the section as a case of charge or mortgage. The words "made away with" are

sufficiently wide to cover cases of gift of immovable property. [P 63 C 1]

Zafar Husain—for Applicant.

Ram Nath and *Makund Behari Lal*—for Opposite Party.

Judgment.—This is an appeal against the order dated 13th May 1931 of the District Judge of Lucknow, setting aside the order, dated 23rd March 1931, of the Judge, Small Cause Court, Lucknow, in the exercise of his insolvency jurisdiction.

The facts are these:

Har Pershad, the appellant, was adjudged insolvent. One of his creditors Dargahi Lal, respondent, made an application to the insolvency Court alleging that Har Prasad, about a month before he made the application for being adjudged an insolvent, had executed a deed of gift in respect of certain immovable properties belonging to him, fraudulently, with the intent to diminish the sum to be divided among his creditors and that he had thereby committed an offence punishable under S. 69, Cl. (c), Provincial Insolvency Act. The Insolvency Judge was of opinion that as the insolvent had not charged or mortgaged his immovable property, but only made a gift in respect of it, therefore, S. 69, Cl. (c), sub-Cl. (ii), Provincial Insolvency Act, did not apply to the case. He accordingly dismissed the application on this preliminary ground. The creditor Dargahi Lal appealed to the Court of the District Judge, Lucknow, under S. 75, Provincial Insolvency Act. The learned District Judge was of opinion that the case was covered by the words "made away with" used in S. 69, Cl. (c), (ii) and that the insolvent Har Pershad was therefore liable to punishment under S. 69 of the Act. He therefore set aside the order of the insolvency Judge and sent the case back for disposal on the merits.

A preliminary objection has been raised against the hearing of this appeal by the insolvent, on the ground that the order passed by the District Court on appeal from a Subordinate Court under S. 75 (1), Provincial Insolvency Act, is not open to appeal to this Court. In my opinion this contention is correct and must succeed. S. 75, Provincial Insolvency Act, allows only one appeal against the order passed by a Subordinate Court in the exercise of insolvency jurisdiction. This appeal lies to the District Court and the section expressly provides that the order of the District Court upon such appeal shall be final. However the first proviso to that clause shows that the High Court can exercise its powers of revision in respect of such orders passed by the District Court on appeal. I would therefore treat this appeal as an application for revision and dispose of it as such.

The first contention urged by the learned counsel for the insolvent is that Dargahi Lal had no right of appeal to the District Judge against the order passed by the insolvency Judge dismissing the application under S. 69, Insolvency Act. It is argued that the applicant Dargahi Lal is merely a creditor and as such he is not a person aggrieved by the order made under S. 69 in the exercise of insolvency jurisdiction, within the meaning of S. 75. The result of the gift in question obviously is to diminish the property available to the creditors for enforcement of their claims. In this sense the respondent has reasonable cause for grievance against the order of the insolvency Court refusing to prosecute the insolvent with regard to the deed of gift which is manifestly prejudicial to the interests of the creditors. But whether this is so or not S. 75, Act 5 of 1920, gives a right of appeal against orders made in the exercise of insolvency jurisdiction by Courts subordinate to a District Court not only to a person aggrieved by the decision, but also to any creditor. The respondent is admittedly a creditor. In my opinion therefore he had a right of appeal under this section and I must overrule the contention.

The next argument is that the words "made away with" used in S. 9, Cl. (c), sub-Cl. (ii) can be applied only to moveable property and have no application to a sale or gift of immovable property. It is argued that the words "charged, mortgaged" which follow the words "made away with" are intended to apply to immovable property, whereas the words "made away with" are applicable only to moveables. The result of this argument would be to confine the application of the section in the case of immovable property, to a charge or mortgage. I regret I find myself wholly unable to accept the construction contended for by the appellant. The relevant portion of the section is as follows:

"If a debtor, whether before or after the making of an order of adjudication.....

(c) fraudulently with intent to diminish the sum to be divided among his creditors. . . . . .

(ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever, he shall be punishable. . . . ."

According to the plain grammatical construction of the clause, the words, "any part of his property of any kind whatsoever" are governed not only by the words, "charged, mortgaged" but also by the words "made away with." It cannot be doubted that the words "any part of his property of any kind whatsoever" would include property both moveable and immovable. The only manner in which immovable property could be made away with would be by means of a gift or sale. It is also difficult to suppose that if the legislature intended to make the act of an insolvent creating a charge or making a mortgage in respect of his immovable property under the circumstances referred to in the section, punishable, why they should have treated the case of a gift or sale of immovable property differently. In my opinion on the plain meaning of the section, a case of a gift fraudulently made by an insolvent with intent to diminish the sum to be divided among his creditors is as much liable to punishment under the section as a case of charge or mortgage. The words "made away with" are sufficiently wide to cover cases of gift of immovable property. I am therefore in agreement with the learned District Judge that S. 69, Cl. (c), sub-Cl. (ii) applies to the case.

I accordingly dismiss the application with costs.

B.V./R.K. *Application dismissed.*

A. I. R. 1932 Oudh 63

RAZA AND SRIVASTAVA, JJ.

Bankey Behari Lal and *another*—Defendants—Appellants.

v.

Abdul Rahman and *others*—Plaintiffs—Respondents.

Misc. Appeal No. 51 of 1930, Decided on 30th September 1931, against order of Sub-Judge, Unao, D/- 25th September 1930.

(a) Civil P. C. (1908), O. 43, R. 1 (w)—Appeal against order granting review must be restricted to grounds set forth in Civil P. C. (1908), O. 47, R. 7.

A Court should try to reconcile any apparent inconsistencies in a statute and should give preference to a construction which avoids making any provision superfluous. When the legislature uses language permitting an appeal on certain specified grounds, it clearly implies that the appeal is limited to the grounds so specified. O. 43, R. 1 (w), gives a right of appeal against orders granting an application for review but does not specify the grounds on which the appeal can lie. Those grounds have been specified in O. 47, R. 7. The general right of appeal given in O. 43, R. 1 (w), must therefore be held to be subject to the specific provisions of O. 47, R. 7, as regards the grounds on which an appeal can lie. The provisions of O. 43, R. 1, Cl. (w) must be read with the provisions of O. 47, R. 7 (1) of the Code. An appeal against an order granting an application for review of judgment must be restricted to one or other of the grounds set forth in O. 47, R. 7 of the Code: *A. I. R.* 1926 *Bom.* 121, *Diss. from.*; 41 *Cal.* 746 ; *A. I. R.* 1925 *All.* 364 ; *A. I. R.* 1927 *Mad.* 641 ; *A. I. R.* 1929 *Rang.* 105 and *A. I. R.* 1927 *Lah.* 435, *Rel. on.* [P 64 C 2 ; P 65 C 1]

(b) Civil P. C. (1908), O. 47, R. 1—Court passing order on certain application in chambers without parties being present—It is sufficient reason for Court to grant review of that order.

Where a Court passes orders on a certain application in chambers and without the parties concerned being present, it is clearly a mistake apparent on the record and at any rate it is a sufficient reason within the meaning of the words as used in O. 47, R. 1, which entitle the Court to grant the review of its order. [P 65 C 2]

(c) Oudh Laws Act (1876), S. 15—Decree means final decree.

The word "decree" as used in S. 15 must be read as meaning the final decree passed in the case. [P 66 C 1]

(d) Civil P. C. (1908), O. 20, R. 14—Plaintiff in pre-emption suit does not lose his right of pre-emption for failure to make deposit within time allowed by decree.

The plaintiffs in a pre-emption suit do not loose their right of pre-emption on account of their failure to make the deposit within the time allowed by the decree. It would be contrary to sound principle to compel a plaintiff to pay the amount decreed by the trial Court and to subject him to the penalty of losing his right of pre-emption if he fails to do so when he has a right to question the correctness of the amount made payable by the trial Court, by means of an appeal against it : *A. I. R.* 1924 *Oudh* 102, *not Foll.* [P 66 C 1]

Radha Krishna—for Appellants.

Zahur Ahmad—for Respondents 1 and 2.

Judgment.—The facts which have led up to this appeal and application for revision may be briefly stated :

On 5th January 1929, two persons, Abdul Rahman and Sabit Ali, instituted a suit for pre-emption in respect of a sale deed for Rs. 75,000. They alleged that the real price paid was only Rupees 58,000 and claimed a decree for pre-emption on payment of that amount. On 4th September 1929, the learned

Subordinate Judge recorded a proceeding to the following effect :

"The parties have agreed to compromise the case in the following way. Defendant 3 is given up. Mr. Maseehuddin states the terms as below: Defendants 1 and 2 agree that if the plaintiffs deposit a sum of Rs. 75,000 on account of the price of the property in dispute and a sum of Rs. 2,000 on account of the cost of the suit and other incidental expenses, that is in all Rs. 77,000 within, he says, by 12th November 1929, a decree for pre-emption be passed in favour of the plaintiffs in respect of the property in dispute. In case of default in the payment of the money, the suit will be dismissed with costs on parties. The plaintiffs have agreed to the above terms. Mr. Bajpai says that this is correct. The parties agree that in case of deposit the plaintiffs will get no costs of the suit."

(Sd.) Shaukat Husain.
4—9—1929.

"The suit for pre-emption is therefore decreed in terms of the above compromise under R. 1, O. 20, R. 3, O. 23 and R. 14, O. 20, Sch. 1, Civil P. C."

The pre-emption money was not deposited by 12th November 1929 as directed by the decree. On 20th November 1929 Abdul Rahman and Sabit Ali filed an application under S. 151, Civil P. C., alleging that they had not agreed to the compromise on the conditions entered in the Court's proceedings dated 4th September 1929, that their counsel Mr. Maseehuddin was not empowered to enter into any compromise on their behalf and that the proceedings relating to the compromise were irregular and contrary to law and prayed that the aforesaid proceedings be cancelled, and that the trial of the suit should be proceeded with in the ordinary course. On the same day the learned Subordinate Judge endorsed on this application an order calling for an office report to be put up "the day after tomorrow." After receipt of the office report he took up the application in his chambers on 22nd November 1929 and dismissed it summarily on the ground that S. 151, Civil P. C., did not apply. Six days later, on 28th November 1929, the plaintiffs made an application for review of the order dated 28th November 1929. In this application they complained against the Court dismissing the application in chambers without giving them a hearing and contended that the Court was wrong in holding that S. 151 was not applicable.

The learned Subordinate Judge issued notice of this application to the opposite party but before it could be taken up for hearing, he was transferred and the application was heard by his successor, Mr. Khurshed Husain who on 25th September 1930 granted the application for review as well as the application under S. 151, Civil P. C., set aside the decree dated 4th September 1929 and ordered the suit to be restored to its original number and to be proceeded with from the same stage at which it was left on the date when the decree was passed on foot of the compromise in question. The defendants aggrieved by this order of Mr. Khurshed Husain have come to this Court. Miscellaneous Appeal No. 51 of 1930 is directed against the order under O. 47, R. 4, granting the application for review and the revision application No. 32 of 1931 has been made against the order granting the application under S. 151, Civil P. C.

The first question which requires determination in the appeal is whether the defendants-appellants have an unrestricted right of appeal against the order granting the application for review or whether the right of appeal must be restricted to the grounds set forth in O. 47, R. 7, Civil P. C. It has been contended on behalf of the appellants that O. 43, R. 1 (w) allows an appeal against "an order under R. 4, O. 47, granting an application for review," and does not impose any restriction as regards the grounds which the appellant is entitled to urge in support of his appeal. We are of opinion that the provisions of O. 43, R. 1, Cl. (w), must be read with the provisions of O. 47, R. 7 (1) of the Code. This rule provides as follows :

"An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was ; (a) in contravention of the provisions of R. 2 ; (b) in contravention of the provisions of R. 4; or, (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

It has been argued that this rule does not lay down any prohibition against the appeal being maintained on grounds other than those specified therein. This is no doubt true. But according to the well recognized canons of interpretation of statutes, we should try to reconcile any apprent inconsistencies and should

give preference to a construction which avoids making any provision superfluous. When the legislature uses language permitting an appeal on certain specified grounds, it clearly implies that the appeal is limited to the grounds so specified. O. 43, R. 1 (w), gives a right of appeal against orders granting an application for review but does not specify the grounds on which the appeal can lie. Those grounds have been specified in O. 47, R. 7. The general right of appeal given in O. 43, R. 1 (w), must therefore be held to be subject to the specific provisions of O. 47, R. 7 as regards the grounds on which an appeal can lie. Reliance has been placed by the learned counsel for the appellants on a decision of the Bombay High Court in *Daso Keshav Panchbhavi* v. *Karbasappa Kariyappa Mudhol* (1) in support of his argument. The decision does support the appellant's contention ; but with all respect we find ourselves unable to agree with that decision. Except for this one solitary ruling of the Bombay High Court, the decisions of all the other High Courts are against the contention of the appellants : vide *Hari Charan Saha* v. *Baran Khan* (2), *Srinivasa Ayyangar* v. *The Official Assignee, Madras* (3), *Narain Das* v. *Chiranji Lal* (4), *Lan Tin Ngan* v. *Ma Mya Kyin* (5) and *Sikandar Khan* v. *Baland Khan* (6). The entire case law on the subject has been reviewed in the last mentioned decision of the Lahore High Court. Thus it will be seen that there is an overwhelming weight of authority in support of the view that an appeal against an order granting an application for review of judgment must be restricted to one or other of the grounds set forth in O. 47, R. 7, Civil P. C. We are in entire agreement with the view taken in these cases.

Next it was contended that even if the appeal must be confined to the grounds specified in O. 47, R. 7, sub-Cl. (1), the case fell within the provisions of sub-Cl. (b) of that rule and that the appellants were therefore entitled to relief on that ground. The argument is that the application made by the plaintiffs was in contravention of the provisions of O. 47, R. 4. In order to support this argument the learned counsel for the appellants wanted to make out that the application for review was based on the ground of discovery of new matter and that there was no strict proof of this allegation as required by O. 47, R. 4, sub-Cl. (b). We are of opinion that this argument is not well founded. The application for review is based mainly on the ground that the learned Subordinate Judge had disposed of it in his chambers without giving the applicants a hearing. This was also the main ground which influenced his successor in granting the application. The application does mention the fact that the learned Subordinate Judge was wrong in observing that S. 151, Civil P. C. did not apply and that this view was contrary to a decision of the Oudh Chief Court. Even assuming that the reference to the decision of the Chief Court constitutes a new matter within the meaning of those words as used in this rule, there is no allegation that the said ruling was not within the knowledge of the applicants when the order was passed. We are therefore satisfied that there is no question of the application being in contravention of R. 4, O. 47 and none of the grounds of appeal specified in O. 47, R. 7 exist in the case.

The learned counsel for the appellants realizing the weakness of his position as regards the maintainability of the appeal requested us to treat the appeal as an application for revision against the order granting the review. In view of the fact that there was no decision of this Court as regards the scope of an appeal under O. 43, R. 1 (w), we thought it fit to grant the request. The learned counsel for the appellants tried to support it as an application for revision on the ground that none of the grounds for review laid down in O. 47, R. 1, were made out in the case and that the learned Subordinate Judge therefore acted without jurisdiction in granting the application. This contention also has no substance. It was the duty of the learned Subordinate Judge to hear the applicants in support of the application before he dismissed it. The order endorsed at the back of the application shows on the face of it that it was

(1) A. I. R. 1926 Bom. 121=94 I. C. 501.
(2) A. I. R. 1915 Cal. 283=25 I. C. 903.
(3) A. I. R. 1927 Mad. 641 =103 I. C. 377=50 Mad. 891.
(4) A. I. R. 1925 All. 364 = 86 I. C. 168 = 47 All. 361.
(5) A. I. R. 1929 Rang. 105 =118 I. C. 120=7 Rang. 187.
(6) A. I. R. 1927 Lah. 435 =103 I. C. 454 = 8 Lah. 617.

passed in chambers and in the absence of the applicants. There is therefore clearly a mistake apparent on the face of the record. At any rate this was a sufficient reason within the meaning of those words as used in O. 47, R. 1 which entitled the Court to grant the review of its order.

Lastly it was contended that the plaintiffs lost their right of pre-emption on account of their failure to make the deposit within the time allowed by the decree and the application for review made after expiry of the period fixed for making the deposit was incompetent. Reliance has been placed upon the provisions of Ss. 14 and 15, Oudh Laws Act (18 of 1876). These sections run as follows:

"14. If the Court find for the plaintiff the decree shall specify a day on or before which the purchase money or the amount to be paid to the mortgagee shall be paid.

15. If such purchase money or amount is not paid into Court before it rises on that day the decree shall become void, and the plaintiff shall so far only as relates to such sale or mortgage, lose his right of pre-emption over the property to which the decree relates."

We are of opinion that the word "decree" as used in S. 15 must be read as meaning the final decree passed in the case. If we accept the contention of the appellants it would lead to absurd results. It would also be contrary to sound principle to compel a plaintiff to pay the amount decreed by the trial Court and to subject him to the penalty of losing his right of pre-emption if he fails to do so when he has a right to question the correctness of the amount made payable by the trial Court by means of an appeal against it. If a plaintiff in a position such as this is unsuccessful in his appeal and the appellate Court refuses to extend the time fixed for payment, the position in that case would be different. One can easily conceive a case in which a plaintiff is prepared to pre-empt the property on payment of what he alleges to be the market value but is not prepared to pay more. If the trial Court requires him to pay more than the amount which he is prepared to pay, then on the construction contended for by the appellants, the plaintiff must perforce pay this amount in order that he may not lose his right of pre-emption, if the period fixed for payment happens to expire before the appeal is filed. If the argument is carried to its logical conclusion then if the plaintiff has failed to appeal before the date fixed for deposit, he should lose his right of pre-emption if he does not make the necessary deposit on the date fixed by the trial Court in spite of his appeal against the decree of the first Court being pending. Even the learned counsel for the appellants is not prepared to press his argument to this length. Furthermore the plaintiffs in the present case attack the validity of the decree and contend that it is null and void against them. In such circumstances it would be most unreasonable to hold that they have lost their right of pre-emption on account of their failure to make the deposit required by the decree in question. The construction contended for by the appellants is supported by a decision of the late Court of the Judicial Commissioner of Oudh in *Imam Din Khan* v. *Abdul Sattar Khan* (7). We regret we cannot see our way to accept this decision as correct and must respectfully dissent from it.

Next as regards the application for revision No. 32 of 1931. The learned counsel frankly conceded that he was not in a position to question the correctness of the order passed under S. 151, the view taken by the learned Subordinate Judge being fully supported by decisions of this Court in *Devendra Nath Sarkar* v. *Ram Rachpal Singh* (8) and *Mahomed Raza* v. *Ram Saroop* (9).

The result therefore is that the order of the lower Court is correct and the appeal and the application for revision must fail and are dismissed with costs.

B.V/R.K. *Appeal* and *Revision dismissed.*

(7) A. I. R. 1924 Oudh 102=74 I. C. 62.
(8) A. I. R. 1926 Oudh 315=93 I. C. 302.
(9) A. I. R. 1929 Oudh 385=118 I. C. 753=4 Luck. 562 (F.B.).

A. I. R 1932 Oudh 66

RAZA AND SMITH, JJ.

Suraj Bakhsh Singh—Defendant—Appellant.

v.

Kedar Nath—Plaintiff—Respondent.

Second Appeal No. 301 of 1930, Decided on 31st August 1931, against decree of Dist. Judge, Hardoi, D/- 31st July 1930.

(a) Limitation Act (1908), Art. 126 — Redemption suit by transferee from surviving members of joint Hindu family—It is not one to set aside alienation — In such suit rate of

interest can be challenged on ground of legal necessity—Interest.

A suit for redemption by transferee of surviving members of a joint Hindu family is not one to set aside an alienation within Art. 126, its object indeed being to obtain relief under the alienation and not in spite of it. The allegation that any term embodied in the deed of mortgage was ultra vires of the manager of the joint family, the mortgagor, will not change the character of the suit. In such suit rate of interest can be challenged on ground of legal necessity: *A. I. R.* 1925 *Oudh* 678, *Rel. on* and *A. I. R.* 1919 *P. C.* 12, *Ref.* [P 68 C 1]

(b) Hindu Law — Debts — Borrowing by karta—Person lending has to show both borrowing and conditions to be within karta's authority—Evidence, Burden of proof.

The authority of kartas to borrow on the security of family property is a limited one and in the case of a loan to them the burden of proof in the first instance rests upon the lender to show that both the borrowing and the terms were within the authority which kartas can exercise: *A. I. R.* 1919 *P. C.* 12, *Ref.* [P 68 C 2]

(c) Interest—Rate of 12 per cent per annum is normal.

In this part of India, viz., Oudh, a rate of 12 p. c. per annum is looked upon as normal rate even in cases where the security is abundant: *A. I. R.* 1922 *P. C.* 347 and 20 *O. C.* 318, *Ref.* [P 68 C 2]

Radha Krishna—for Appellant.

Hyder Husein and *Qutubuddin Ahmad*—for Respondent.

Judgment. — This is a defendant's second appeal arising out of a redemption suit.

The facts relevant to the appeal may be shortly stated:

Jaskaran Singh, father of Radha Din and Harcharan (defendants 2 and 3), mortgaged the property in suit, in village Bhatpur, in the District of Hardoi, to Thakur Jawahir Singh, father of Raja Suraj Bakhsh Singh, (defendant 1), for Rs. 850 on 14th September 1899. Defendants 2 and 3 transferred the property to Pandit Kedar Nath (plaintiff), by a sale deed dated 7th September 1922. Pandit Kedar Nath brought the present suit on 14th August 1929, alleging that he was entitled to redeem the property on payment of Rs. 650.

The claim was resisted by defendant 1 on various grounds. He alleged that the plaintiff was not entitled to redeem unless and until he (plaintiff) paid Rs. 14,649-5-9 due on the mortgage. The first Court decreed the claim on payment of Rs. 2,430. Defendant 1's appeal was dismissed by the learned District Judge of Hardoi, on 31st July 1930 He has now come to this Court in second appeal. In our opinion there is no substance in the appeal.

The mortgage in suit, which was executed on 14th September 1899, was redeemable after 31 years. The mortgagee was to remain in possession of the mortgaged property in suit in lieu of Rs. 425, and the remaining sum of Rs. 425 was to carry interest at Re. 1 per cent per mensem with half-yearly rests. The plaintiff alleged that the mortgage was executed without any necessity and that the terms of the mortgage constituted a clog on redemption. He claimed redemption on payment of Rs. 650 only alleging that defendant 1 (legal representative of the mortgagee) had cut down trees of the value of Rs. 200. The learned Munsif held that the terms of the mortgage deed constituted a clog on redemption, that there was no justifiable necessity for borrowing money on the security of the ancestral property on such onerous terms as were entered in the mortgage deed in question, and that defendant 1 was not entitled to claim interest at the rate entered in the deed. He reduced the rate of interest on Rs. 425 from compound to simple. He found that defendant 1 had not cut any trees as alleged by the plaintiff. The learned District Judge agreed with the findings of the learned Munsif that no necessity was established to borrow money at such a high rate and on such terms as were entered in the deed, and that defendant 1 was entitled to claim interest (simple) at Re. 1 per cent per mensem only, on Rs. 425. He did not think it necessary to decide the question of clog on redemption, as he was of opinion that full operation could be given to the term of the mortgage fixed by the deed by ordering that redemption should not take place before 14th September 1930.

The appellant's learned counsel has not pressed the plea that the suit was premature. He has pressed only the pleas relating to the amount due on the mortgage. These pleas are as follows:

(1) Interest should have been allowed by the lower Courts at the contract rate.

(2) Interest should have been allowed at the rate of 9 per cent per annum compoundable every six months, or at the rate of Rs. 29-6-7 per cent per annum (simple) at least.

It was conceded by defendant 1's learned counsel in the lower Court that

he (defendant) had to prove the necessity for Jaskaran taking the loan at the rate in question if it was found by the Court to be prima facie unduly high. It was further conceded that there was, in fact, no proof of such necessity.

It was admitted by the parties that the profits of the property in suit amount to Rs. 125 per annum, which defendant 1 is receiving in lieu of Rs. 425 for which he is in possession. Calculating the profits of Rs. 125 per annum on Rs. 425 (the amount for which defendant 1 is in possession), the interest works out at the rate of Rs. 29-6-7 per cent per annum. Calculating on the entire principal amount of the mortgage (Rs. 850), it would come to something more than Rs. 14-8. Thus in the latter case also defendant 1 has enjoyed interest on the entire amount of Rs. 850 at more than 1 per cent per mensem. The learned District Judge was of opinion that the necessity for taking the loan at a rate higher than Re. 1 per cent per mensem simple interest not being established, the learned Munsif was right in reducing the interest to that rate on Rs. 425 from the date of the mortgage. In arguing the first plea that the contract rate of interest should not be reduced, the appellant's learned counsel has contended that it was not open to the respondent to challenge the rate of interest in the deed on the ground of want of necessity as that plea was barred by time. He has referred to Art. 126, Lim. Act, in support of his argument. We think this contention is not well founded. The plaintiff who is the transferee from the sons and legal representatives of the mortgagor Jaskaran, has not brought the present suit for setting aside Jaskaran's alienation of ancestral property. As pointed out in the case of *Kaniz Fiza Bibi* v. *Data Din* (1) a suit for redemption by surviving members of a joint Hindu family is not one to set aside an alienation within Art. 126, Sch. 1, Lim. Act, its object indeed being to obtain relief under the alienation and not in spite of it. The allegation that any term embodied in the deed of mortgage was ultra vires of the manager of the joint family, the mortgagor, will not change the character of the suit. The contention therefore fails and must be overruled.

(1) A. I. R. 1925 Oudh 678=90 I. C. 184.

The next question is whether the lower Courts were wrong in awarding interest at Re. 1 per cent per mensem (simple). It is well settled that the authority of kartas to borrow on the security of family property is a limited one and that in the case of a loan to them the burden of proof in the first instance rests upon the lender to show that both the borrowing and the terms were within the authority which kartas can exercise. As pointed out by their Lordships of the Privy Council in the case of *Nazir Begam* v. *Raghunath Singh* (2) it is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand. The question of necessity has been decided against defendant 1 in this case. The finding of the lower Courts on that point must be accepted in second appeal. The lower Courts have fixed the rate of interest at Re. 1 per cent per mensem, having considered the whole evidence on the record. They have come to the conclusion that the rate of Re. 1 per cent per mensem (simple) is the proper rate at which interest should be awarded in this case. We think we should not interfere with the findings of the lower Courts on the point. We would note that the following observations were made by their Lordships of the Privy Council in the case of *Narain Das* v. *Abinash Chandra* (3):

"The rate is 12 per cent. It appears, according to our notions in this country, a high rate of interest, but that has nothing whatever to do with the matter which their Lordships have to consider. It may very well be that, having regard to the local conditions in India, it is a very proper and reasonable rate to impose, and their Lordships see no reason whatever why any alteration should be made as to the amount."

In this part of India a rate of 12 per cent per annum is looked upon as a normal rate even in cases where the security is abundant: see *Chhannu Lal* v. *Mt. Raj Kuar* (4).

(2) A. I. R. 1919 P. C. 13=50 I. C. 434=46 I. A. 145=41 All. 571 (P. C.).
(3) A. I. R. 1922 P. C. 347=69 I. C. 273 (P.C.).
(4) [1918] 20 O. C. 318=43 I. C. 295.

The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal with costs.

B.V./R.K. *Appeal dismissed.*

* A. I. R. 1932 Oudh 69

RAZA AND SRIVASTAVA, JJ.

Nak Ched Shah--Objector—Appellant.

v.

Kashmiri Bank Ltd., Fyzabad—Decree-holder—Respondent.

Appeal No. 86 of 1930, Decided on 28th September 1931.

(a) Provincial Insolvency Act (1920), S. 78 (2)—Period of limitation for execution of decree is suspended so long as insolvency proceedings are pending—Civil P. C. (1908), S. 48.

The period of limitation is suspended so long as the insolvency proceedings are pending, provided the claim is not barred on the date of adjudication and if an order of adjudication is annulled the right to proceed against the insolvent revives and the period during which the insolvency proceedings are pending will be excluded if the person wishes to proceed against the insolvent or his property. S. 78 (2) has been enacted to save an application which would ordinarily be barred if the period of insolvency is not excluded from the bar of limitation.

[P 70 C 2]

*** (b) Civil P. C. (1908), S. 48—Decree-holder prevented from applying for execution due to special provisions of law should be protected—Limitation Act (1908), Art. 182—Provincial Insolvency Act (1920), S. 78 (2).**

The object of the two periods of limitation with regard to execution of decrees laid down by S. 48, Civil P. C., and Art. 182, Lim. Act, respectively is to ensure due diligence by the decree-holder in applying for execution. There is no distinction in principle between the two periods and therefore if under any special provision of law a decree-holder is prevented within these periods of limitation from taking out execution it is reasonable to hold that the decree-holder should be protected in either case : 42 *All.* 118 and 13 *O. C.* 303, *Ref.* [P 70 C 2]

(c) Civil P. C. (1908), S. 48—S. 48 is controlled by S. 78 (2), Provl. Ins. Act (1920).

Section 48, Civil P. C., is controlled by S. 78 (2), Provl. Ins. Act.

Although by S. 48 a period of limitation is not prescribed, the 12 years' period in effect lays down the period of limitation applicable to an application for execution of a decree within the meaning of S. 78 (2). The words "period of limitation prescribed for a suit or application for execution of a decree" are general and comprehensive and refer to the limitation prescribed in any law for the time being in force. [P 71 C 1]

B. P. Misra—for Appellant.

R. D. Sinha—for Respondent.

Judgment.—This is an execution second appeal arising out of a simple money decree. The facts relevant to the appeal may be shortly stated.

The respondent obtained a decree against the appellant for Rs. 470-4-0 and costs on 9th November 1914. The appellant was adjudicated an insolvent on 3rd November 1917. A receiver was appointed in respect of the entire property of the insolvent. The order of adjudication was annulled on 7th July 1928. The respondent took out execution of the decree from time to time, but the decree was not satisfied. The fifth application for execution was made on 21st November 1917. It was consigned to record on 14th May 1918, as the appellant had been adjudicated an insolvent. Rupees 416-8-8 were due from the judgment-debtor (appellant) on that date. The sixth and the last application for execution was made on 28th August 1929, about 13 months after the order of adjudication was annulled by the insolvency Court. This application was opposed by the judgment-debtor (appellant) on the ground of limitation. His objection was dismissed by the learned Munsif of Bahraich on 7th January 1930. His appeal was dismissed by the learned first Subordinate Judge of Bahraich on 16th August 1930. He came to this Court in second appeal on 17th November 1930. He died during the pendency of the appeal and the name of his widow Mt. Dhondhe was brought on record in his place.

The only point which has been argued before us is the point of limitation. The appellant's learned counsel contends that S. 48, Civil P. C., is not controlled by S. 78, Provl. Ins. Act (Act 5 of 1920) and hence the decree-holder's application for execution is barred by time. We have heard the learned counsel on both sides at some length. We have also considered the authorities which have been laid before us in the course of arguments. In our opinion there is no substance in this appeal. The relevant portion of Ss. 28 and 78, Provl. Ins. Act, are as follows :

Section 28 (2) :

" On the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

Section 78 (2) :

"Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-S. (2), S. 28 which might have been brought or made) but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded ; Provided that nothing in this section shall apply to a suit or application in respect of a debt provable, but not proved under this Act."

It is not disputed in this case that the debt for which the respondent had obtained the decree against the appellant was proved under the Act. He was paid along with others rateably before the order of adjudication was annulled by the insolvency Court. He applied for execution of the decree some 13 months after the order of adjudication was annulled, as stated above.

Under S. 48, Civil P C. :

" where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from (a) the date of the decree sought to be executed, or (b) where the decree or any subsequent order directs any payment of money, or the delivery of any property to be made at a certain date or recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree."

The appellant's learned counsel contends that as the period of 12 years has elapsed from the date of the decree sought to be executed, the decree-holder's application must be rejected under S. 48, Civil P. C., which is not controlled by S. 78, Provl. Ins. Act. He relies principally on the case of *Ganeshi Lal* v. *Imtiaz Ali* (1) decided by a Bench of this Court on 24th March 1931, and also on the case of *Subbarayan* v. *Natarajan* (2) referred to and relied on in *Ganeshi Lal's* case (1) It was held in *Ganeshi Lal's* case (1) that :

" Section 48, Civil P. C., contains an unqualified prohibition, subject to exceptions contained in Cl. (2) thereof against execution of certain kinds of decrees more than 12 years old and is not controlled by S. 15 (1), Lim. Act, 1908. Hence an application for execution of such a decree stayed by an injunction or order of the Court filed after 12 years from the date of the decree cannot be saved from the bar under S. 48 of the Code by excluding under S. 15 (1), Lim. Act the time during which execution was stayed. The period mentioned in S. 48, Civil P. C., is not a period of limitation in the strict sense and consequently S. 15 (1) is not applicable to it."

In our opinion the contention of the appellant's learned counsel in this case is not well founded and must be overruled. As pointed out in the case of *Machanjeeri Ahmad* v. *K. Govinda Prabhu* (3) (at p. 865 of 51 *Mad.*), so long as insolvency proceedings are pending the period of limitation is suspended, provided the claim is not barred on the date of adjudication, and if an order of adjudication is annulled, the right to proceed against an insolvent would revive and the period during which the insolvency proceedings are pending will be excluded if the person wishes to proceed against an insolvent or his property. We think S. 78 (2) was enacted to save such an application for execution as we have before us in this case from the bar of limitation. It is clear that the respondent was temporarily prevented from issuing any process for execution against the judgment-debtor (appellant) under S. 28 (2), Insolvency Act. The question arises whether the limitation of 12 years referred to in S. 48, Civil P. C., is such a period of limitation as is referred to in S. 78 (2) of the Act. As pointed out in the case of *Mohammad Abdul Karim* v. *Newaz Singh* (4) (at 306) there are two kinds of limitation with respect to execution of decrees. S. 48, Act 5 of 1908 (Civil P. C.), corresponds to S. 230, Act 14 of 1882 and the apparent object of this section is to put an end to all execution proceedings on the expiration of 12 years from the date of the decree except in certain specified cases. The second kind of limitation is of the nature referred to in Art. 182, Sch. 1, Lim. Act (Act 9 of 1908). The apparent object of this article is to ensure due diligence by the decree-holder in applying for execution The object of these two periods of limitation is to prevent the execution of decrees from going on indefinitely and at the same time to secure to the decree-holders the benefits of their decrees, if they are ordinarily diligent. There is no distinction in principle to be drawn between the two periods laid down and therefore if under any special provision of law a decree-holder is prevented within these periods of limitation from taking out execution it is

(1) A.I.R. 1931 Oudh 351=132 I.C. 257.
(2) A.I.R. 1922 Mad. 268=70 I.C. 396=45 Mad. 785.
(3) A.I.R. 1928 Mad. 977=114 I.C. 227=51 Mad. 862.
(4) [1910] 13 O.C. 303=8 I.C. 377.

reasonable to hold that the decree-holder should be protected in either case. To the same effect is the ruling of their Lordships of the Allahabad High Court in the case of *Sham Karan* v. *The Collector of Benares* (5). The question to be decided in these cases was whether the decree-holder should be protected by the provisions of para. 11 (3), Sch. 3, Act 5 of 1908 : but we think the principle of decision in these cases helps the respondent in this appeal. He is not anyhow at fault. It would be very inequitable if he were prevented from taking out execution when he could not take out execution during the period of the judgment-debtor's insolvency under S. 28 (2), Provl. Ins. Act. No doubt in a strict sense S. 48 does not prescribe a period of limitation, but in a general sense it imposes limitation on the right of the decree-holder to apply for execution after the expiry of 12 years from the date of the decree. In that general sense, although by S. 48 a period of limitation strictly so called is not prescribed, the 12 years period in effect lays down the period of limitation applicable to an application for execution of a decree within the meaning of S. 78 (2), Provl. Ins. Act.

In our opinion S. 48, Civil P. C., is controlled by S. 78 (2), Provl. Ins. Act, 1920. We hold that the words :

" the period of limitation prescribed for a suit or application for the execution of a decree,"

are general and comprehensive and refer to the limitation prescribed in any law for the time being in force. They can control or modify the period of time allowed, not only in the statute of limitation, but also in S. 48, Civil P. C., 1908.

We think no case has been made out to disturb the judg nent of the lower Court. Hence we dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(5) [1920] 42 All. 113=52 I.C. 742.

A. I. R. 1932 Oudh 71

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Sheikh Ramzan—Appellant.

v.

Mt. Rahmani—Respondent.

First Appeal No. 115 of 1930, Decided on 18th September 1931.

(a) Interpretation of Statutes — Previous law how far should be considered.

The proper course in construing the law as codified is to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with the view. If a statute intended to embody in a Code a particular branch of the law, is to be treated in this fashion, its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated: 23 *Cal.* 563 (*P. C.*), *Foll.* [P 72 C 2]

(b) Mussalman Wakf Validating Act (1913), S. 3, proviso—Wakf—Word "wakf" should not only satisfy definition in S. 2 but also satisfy proviso to S. 3.

The definition of "wakf" excludes the view that the mere use of the word "wakf" is enough to create a dedication in favour of the poor as ultimate beneficiaries. The word "wakf" as used in S. 3 should not only satisfy the definition of that word given in S. 2, but should also satisfy the limitation of the proviso before a wakf can be adjudged to be lawful within the meaning of the Act. [P 74 C 1]

The term "wakf" when applied to a settlement of the nature described in Cl. (a) of the section will not make such a settlement valid unless the conditions of the proviso are also fulfilled. [P 74 C 2]

Where the ultimate object of the wakf is clearly stated to be religious and charitable and to be continued permanently and in perpetuity, the wakf in question may be taken to satisfy the requirements of the proviso also. The mere fact that there is no specification in the deed itself of such religious and charitable objects does not render the dedication vague. Such objects can be ascertained by reference to the texts of Mahomedan law and this matter relates to the administration and not to the constitution of wakf. It may be that in the course of administration recourse to the doctrine of cypres is found to be necessary: (*Case law referred*). [P 75 C 1]

(c) Mussalman Wakf Validating Act (1913), S. 3 (a) (b)—Profits of wakf property can be spent for maintenance of muttawalis and their children.

A wakfnama which provides that the profits of the wakf property should be spent by the muttawalis for the maintenance of themselves and their children after deducting the expenses specified in the wakfnama is valid under Cls. (a) and (b), S. 3 of the Act. [P 75 C 1]

(d) Mahomedan Law—Wakf—Some provision invalid—Whole deed is not invalidated.

A wakf which provides for enjoyment of a portion of the profits of the estate, which is the subject of the wakf, by a person who is not a member of the settlor's family cannot be given effect to and is to that extent void; but the fact that a certain portion of the wakfnama cannot be given effect to does not make the whole deed invalid at its inception. [P 75 C 1]

Ali Zaheer and *Ghulam Imam*—for Appellant.

Bhagwati Nath and *M. Wasim*—for Respondent.

Judgment.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Partabgarh dated 25th August 1930. Plaintiff 1, Shaikh Ramzan, claims

a share by right of inheritance under the Hanafi Mahomedan law in the estate of one Fazal Ahmad, who died on 14th February 1928. Plaintiff 2, Bhola Faqir, is a transferee of half-share which is claimed by plaintiff 1. There are three defendants to the suit, out of which this appeal arises. Defendant 1, Mt. Rahmani, alleges to be the widow of Fazal Ahmad; defendant 2, Mt. Laiqunnisa, claims to be the daughter of Mt. Rahmani and Fazal Ahmad and defendant 3, Mt. Zohra Begam is admittedly the daughter of Fazal Ahmad born of a predeceased wife. The property in suit is in the possession of the three defendants mentioned above. It is agreed that Shaikh Ramzan, plaintiff 1, is an heir-at-law to the estate of Fazal Ahmad, deceased, in the right of asbah (collateral), and if the three defendants are also the heirs of Fazal Ahmad in the right of zavil-furuz (sharer) then Ramzan's share comes to 5/24ths and the remaining 19/24ths share belongs to the defendants. The main defence however is that Fazal Ahmad made a wakf of his entire immovable property by executing a wakfnama on 30th April 1927 and that the defendants are in possession of the subject-matter of the wakf by virtue of the terms of the wakfnama. The plaintiffs do not accept the validity of the wakfnama and therefore the primary question for decision in the suit is the question of legality of the wakf as evidenced by the deed of 30th April 1927. For the purpose of this part of the case it is assumed that Mt. Rahmani, defendant 1, is the widow and the other two defendants are the daughters of Fazal Ahmad.

It is common ground that the legality of the wakfnama of 30th April 1927 must be tested with reference to the terms of the enactment called the Mussalman Wakf Validating Act, 1913. Indeed in the wakfnama in question this Act and the Mahomedan law are expressly mentioned as the law under which the wakf was being made. If it is found, as it has been found by the learned Subordinate Judge, that the wakfnama of 30th April 1927 creates a valid wakf within the Act, the plaintiff's suit must fail.

The learned counsel for the plaintiff commenced his arguments against the validity of the wakf with a reference to the series of decisions of their Lordships of the Judicial Committee prior to the passing of the Act of 1913 with a view to show what was the state of law at that period of time and asked us to determine how much of that law has been altered and how much of it has been maintained by the enactment of 1913. Equally the learned counsel for the defendants took us through several texts of Mahomedan law as quoted in the well-known book, Ammer Ali's Mahomedan law, Vol. 1, for the purpose of construing the provisions of the Act of 1913.

We are of opinion that neither method is the proper method of construing the law as codified in the Act of 1913. In *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1), Lord Macnaghten quoted with approval the following observations of Lord Herschell in *Bank of England* v. *Vagliano* (2):

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with the view. If a statute intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions . . . . ."

We will however after having construed the Act by examining its language and giving to it its natural meaning advert to some of the decisions of their Lordships of the Judicial Committee and also to some of the texts of Mahomedan law with a view to discover how far such decisions and such texts support the construction which we might adopt.

On the question of the interpretation of the wakfnama the argument advanced by the learned counsel for the plaintiffs was twofold: (1) that it does not fulfil the requirements of the proviso attached to S. 3 of the Act of 1913 and (2) that if it be held that the wakfnama in question expressly or impliedly reserves the ultimate benefit for a purpose recognized by

(1) [1896] 23 Cal. 563=23 I. A. 18=6 Sar. 663 (P.C.).
(2) [1891] A. C. 107=60 L. J. Q. B. 145=64 L. T. 353=39 W. R. 657=55 J. P. 676.

the Mussalaman law as a religious, pious or charitable purpose of a permanent character such purpose is not definitely stated in the wakfnama and therefore the wakf fails by reason of vagueness in the purpose of the dedication.

We now proceed to examine the argument and with a view to do this it is necessary to refer first to the contents of the wakfnama. It begins as follows:

"I . . . am governed by the Hanafi law . . . With a view to maintain my children enforce religious objects and charitable purposes, I do hereby make wakf of my immovable property mentioned below . . . keeping in view my salvation in the next world, according to the Mahomedan law as also Act 6 of 1913 . . . today, 30th April 1927 by reading the wakf formula in the way of God for the following objects . . ."

Clause 1 is as follows:

"(1). My intention is that my children, shall continue to be maintained by the said properties and the religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul."

In Cl. 2 the three defendants are mentioned by names as the heirs of the wakf and there is a direction that they "shall enter into possession as trustees after my death." In Cl. 3 the wakif creates himself as the first muttawali for his lifetime and thereafter comes the disposition that:

"Mt. Zohra Bibi shall remain inpossession of one-third, Mt. Laiqunnisa of one-third and Mt. Rahmanibibi of one-third out of the said properties as muttawalis."

In Cl. 4 the muttawalis are laid under the obligation:

"to pay Rs. 50 a year for repairs of the house to the person who may live in my house and pay Rs. 50 for upkeep of the mosque situate in village Mouli . . . and to pay Rs. 125 a year to the successor of the said Syed Muhammad Zafar towards the aid of the Islamia school and anniversary of the monastery of Husaina situate in Pura Shah Khalilullah . . . after the deduction of the rent due to the taluqdars and the expenses of religious and charitable objects and the repairs of the house aforesaid each trustee shall continue to spend the profits of his share towards the maintenance of himself and of his children."

Clause 5 contains prohibition against alienation. In Cl. 6 provision is made as to the succession in the office of muttawali after the death of the first three muttawalis. Laiqunnisa is to be succeeded by her husband Iqbal Ahmad, and after the death of Iqbal Ahmad the male heir of Laiqunnisa is to succeed. Mt. Rahmani's interest in the one-third of the estate as a muttawali is to be divided into two halves after her death one-half is to be possessed by Laiqunnisa and the other half by Muhammad Mustafa, son of Rahmani, by a previous husband. The clause winds up:

"Every muttawali shall be entitled to appoint a successor after him and if a muttawali dies without nominating his successor then in that case a competent member of the family of the deceased muttawali shall be appointed muttawali."

There are three more clauses which are of no importance in this connexion.

The learned Subordinate Judge has found and the finding is not disputed before us that the annual profits of the wakf properties are Rs. 700 a year after deducting the expenses specified in the wakfnama the aggregate of which comes to Rs. 225, the balance of Rs. 475 is to be spent by the muttawalis in equal proportion for the maintenance of themselves and their children. Such a wakf is clearly valid by virtue of the enactment contained in Cls. (a) and (b), S. 3, Mussalman Wakf Validating Act, 1913, provided also that the requirements of the proviso attached to that section are fulfilled.

On the side of the defendants their learned advocate frankly stated that there was no express reservation of the ultimate benefit for the poor. He however contended that the preamble and Cl. 1 of the wakfnama show by implication that the ultimate benefit is reserved for the poor or for a purpose recognized by the Mussalman law as a religious or charitable purpose of a permanent character. The learned advocate's first argument is that the use of the word "wakf" is enough to create a valid dedication in favour of the poor as ultimate beneficiaries. His second argument is that the expression:

"religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul,"

amply satisfies the second alternative condition laid down in the proviso.

In Ameer Ali's Mahomedan law, Edn. 4, Vol. 1, a large number of quotations from original text-books on Mahomedan law are given in Ss. 1 and 2, Ch. 8. There is a passage in the Fatawai Alamgiri which seems to us to cover the entire ground and which we reproduce here :

"If the word of Sadkah is not uttered but the word "wakf" is uttered and it is said that my land is "wakf" or that I have made this land wakf or that this land of mine has been made wakf then according to Abu Yusuf the

wakf is complete for the benefit of the poor. Shaikh Sadar Shahid and Shaikhs of Balkh and also we give Fatwas in accordance with the opinion of Abu Yusuf."

(A translation of a portion of this quotation will be found in Amir Ali's book at p. 223). We are satisfied that the view of law for which the learned counsel has contended is the view of Abu Yusuf and we are also satisfied that it is shared by a large number of jurists. But it is equally clear that this is not the view of Abu Hanifa as will appear from a perusal of the chapter relating to wakf in Hedaya—Hamilton's Hedaya, Vol. 2, pp. 234—237.

Be that is it may, we realize that we are constrained to reject this argument on two grounds. S. 3, Mussalman Wakf Validating Act, 1913 is as follows :

" It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated ;

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character."

The definition of " wakf " in the Mussalman Wakf Validating Act excludes in our opinion the view that the mere use of the word " wakf " is enough to create a dedication in favour of the poor as ultimate beneficiaries. As the wakf before us must be adjudged valid for or otherwise by the provisions of this Act this definition should be the test of determining the limits of the meaning of the word " wakf." That a reservation of the ultimate benefit for the poor is not included within the definition is clear from the proviso attached to S. 3, for were it not so the proviso becomes redundant in its entirety. The object of the proviso is that it should appear on the construction of the instrument of wakf that the ultimate benefit is either expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious or charitable purpose of a permanent character. The phraseology employed in S. 3 as well as the preamble and the title of the Act show that a wakf for the maintenance and support wholly or partially of a settlor's family, children or descendants would have been invalid if this Act had not been passed. That this is so is clear from the decisions of their Lordships of the Judicial Committee given before the passing of this Act and also after the passing of the Act of cases to which the provisions of the Act did not apply : *Sheikh Mahomed Ahsanulla* v. *Amarchand Kundu* (3), *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (4), *Majibunnissa* v. *Abur Rahman* (5), *Khajeh Soleman Quadir* v. *Salimullah* (6) and *Balla Mal* v. *Ata Ullah Khan* (7). The object of the Act is to validate such a wakf. The proviso, however places limitations on the general enactment contained in the first portion of S. 3. The word " wakf " therefore used in S. 3 should not only satisfy the definition of that word given in S. 2 but should also satisfy the limitation of the proviso before a wakf can be adjudged to be lawful within the meaning of the Act.

The second ground on which we should reject this part of the learned advocate's argument is that it has been authoritatively decided by their Lordships of the Judicial Committee that the use of the term " wakf " is not enough to create a valid wakf : *Khajeh Solemen Quadir* v. *Salimullah* (6). It is true that this case was decided independently of the Act of 1913. That fact, however does not in our opinion affect the validity of the decision of their Lordships of the Judicial Committee. Indeed it seems to me that when S. 3 of that Act and the proviso to that section are read together we are unavoidably led to the conclusion that the term " wakf " when applied to a settlement of the nature described in Cl. (a) of the section will not make such a settlement valid unless the conditions of the proviso are also fulfilled. The Act is therefore in consonance with and not opposed to the decision.

We now come to the second part of the learned advocate's argument. In this connexion reliance is placed on the

(3) [1890] 17 Cal. 498=17 I. A. 28 (P. C.).
(4) [1895] 22 Cal. 619=22 I. A. 76 (P. C.).
(5) [1901] 23 All. 233 =28 I. A. 15 (P. C.).
(6) A. I. R. 1922 P. C. 107 = 69 I. C. 138 =49 I. A. 153=49 Cal. 820 (P. C.).
(7) A. I. R. 1927 P. C. 191 =103 I. C. 518 =54 I. A. 372 (P. C.).

preamble and Cl. (1) of the deed of wakf and it is contended that the expression

" religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul"

fulfils the requirements of the second alternative of the proviso to S. 3. We have already said that the deed of wakf in question expressly refers to the Act of 1913. The similarity of language employed in the two makes us think that the draftsman of the deed of wakf borrowed the important words of the expression quoted above from the Act itself. In the quotation just now given the ultimate object of the wakf is clearly stated to be religious and charitable and to be continued permanently and in perpetuity. We are therefore of opinion that the wakf in question satisfies the requirements of the proviso also. There is no doubt that there is no specification in the deed itself of such religious and charitable objects. This however in our opinion does not render the dedication vague. Such objects can be ascertained by reference to the texts of Mahomedan law and this matter relates to the administration and not to the constitution of wakf. It may be that in the course of administration recourse to the doctrine of cypres is found to be necessary. We do not agree with the learned advocates for the plaintiffs that the religious and charitable objects mentioned in Cl. (1) of the wakfnama are limited to the objects specified in Cl. (4) of the same. It appears to us that they are general in their nature and are intended to express the ultimate destination of the charity.

The learned counsel for the plaintiffs also argued that that part of the wakf which provides for enjoyment of a portion of the profits of the estate by Muhammad Mustafa after the death of Rahmani Bibi is invalid for the reason that Muhammad Mustafa cannot be treated to be a member of the settlor's family. We agree with the learned counsel that that part of the wakf cannot be given effect to, but this does not invalidate the wakf at its inception. The question will arise after the death of Rahmani Bibi as to whether the benefits allotted to Muhammad Mustafa should go to the heir of the settlor or be captured by the objects immediate and ultimate.

The wakfnama of 30th April 1927 was also attacked by the plaintiffs on the ground that it was executed by Fazal Ahmad under the undue influence of Mt. Rahmani and without understanding its terms. Issue 2 was framed by the Court below to cover this line of attack and was decided against the plaintiffs. The issue was not abandoned by the learned counsel for the plaintiffs before us, but nothing was said against the judgment of the Court below in that behalf. For the reasons given by that Court we are of opinion that issue 2 has been rightly decided.

The plaintiffs further pleaded that Mt. Rahmani, defendant 1, was not the legally married wife of Fazal Ahmad and that Mt. Laiqunnisa, defendant 2' was not the daughter born of their union. This plea was the subject-matter of issue 1 in the Court below. The issue has been decided by that Court against the plaintiffs and in favour of the defendants. Again at the hearing of the appeal before us the finding of the learned Sub-Judge on this issue was not expressly admitted on behalf of the plaintiffs, but no argument was addressed to us against the finding. For the reasons stated by the learned Subordinate Judge we agree with him that it has been proved that Mt. Rahmani was married to Fazal Ahmad and that defendant 2 is their legitimate daughter.

There was one more attack made by the plaintiffs on the status of the two daughters of Fazal Ahmad, defendants 2 and 3, and it was to the effect that they were excluded under a family custom from inheriting any portion of their father's estate. This controversy was the subject-matter of issue 5. The finding of the custom is in the negative and we agree with him that there is no evidence worth the name to prove the alleged custom. The finding of the Court below was not questioned at the hearing of the appeal before us.

The defendants raised the plea of limitation against the plaintiffs' suit, but it seems to have been abandoned in the Court below and was not reiterated in this Court.

The result is that the appeal fails and is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

* A. I. R. 1932 Oudh 76

RAZA AND SRIVASTAVA, JJ.

(*Thakurain*) *Sukhraj Kuer* and *another* —Objectors—Appellants.

v.

Raja Harnam Singh—Decree-holder—Respondent.

Execution of Decree Appeal No. 14 of 1931, Decided on 1st October 1931, against order of Sub Judge, Bahraich, D/- 22nd November 1930.

(a) Civil P. C (1908), O. 21, R 54—In case of resistance to proclamation by beat of drum proclamation in loud voice adjacent to property for attachment is sufficient.

Where resistance is offered on behalf of the judgment-debtor to the proclamation being made by beat of drum and threat is held out to use force if the proclamation is so made, the fact that the order was proclaimed in a loud voice at the time adjacent to the property in dispute must in the circumstances of the case, be regarded as sufficient compliance with the provisions of the rule as the judgment debtor himself was responsible for the resistance and noncompliance in the usual way. He cannot be heard to say that the provisions of R. 54 were not duly complied with. [P 76 C 2]

*** (b) Civil P. C. (1908), S. 60 (c) — One whose sole means of livelihood is gained by by cultivating land is agriculturists — Property when excluded from attachment stated.**

The term" agriculturist" is used in S. 60 (c) of the Code to denote a person making his living by tilling the soil, in other words, one whose sole means of livelihood is gained by cultivating land and does not necessarily mean a person who works with his hands. It includes a small holder of land who tills the soil, but not a large landed proprietor even though his sole income is derived from land. The property of an agriculturist to be exempt under Cl. (c), S. 60, must be shown to have been occupied by him as such for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate the land: *A. I. R.* 1926 *Mad.* 350, *Foll.* [P 76 C 2]

Ghulam Hasan and *Iftikhar Husain*—for Appellants.

Haidar Husain—for Respondent.

Judgment.— This is a judgment-debtors' appeal from an order dismissing the objections filed by them in an execution case.

The facts of the case are sufficiently set out in the judgment of the learned Subordinate Judge and they need not be repeated in this judgment. The appellant's learned counsel has pressed the appeal upon two grounds only:

(1) The judgment-debtors' property was not attached in accordance with the provisions of O. 21, R. 54, Civil P. C., as the order was not proclaimed by beat of drum.

(2) The property in dispute belongs to the judgment-debtors as agriculturists and so it is not liable to attachment and sale.

We think there is no substance in this appeal. It is true that the order was not proclaimed by beat of drum but the judgment-debtors themselves are responsible for this as resistance was offered on their behalf and threat was held out to use force, if the order were proclaimed by beat of drum. When the process-servers could not thus get the order proclaimed by beat of drum they proclaimed it by loud voice. Under O. 21. R. 54 the order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode.

We think the fact that the order was proclaimed in a loud voice at the time adjacant to the property in dispute must in the circumstances of this case be regarded as sufficient complicance with the provisions of O. 21, R. 54, Civil P. C. The learned Subordinate Judge has examined the evidence on this point carefully. We think he came to a correct conclusion upon the evidence and his finding should be accepted.

The next question is whether the property in dispute is not liable to attachment and sale under S. 60 (c), Civil P. C.

The learned Subordinate Judge has found that the judgment-debtors (objectors) are not really agriculturists by profession and do not occupy the building in dispute in that capacity. As pointed out in the case of *Muthuvenkatarama Reddiar* v. *Official Receiver of South Arcot* (1):

"the term 'agriculturist' is used in S. 60 (c) of the Code to denote a person making his living by tilling the soil, in other words one whose sole means of livelihood is gained by cultivating land and does not necessarily means a person who works with his hands. It includes a small holder of land who tills the soil; but not a large landed proprietor, even though his sole income is derived from land. The property of an agriculturist to be exempt under Cl. (c), S. 60, of the Code, must be shown to have been occupied by him as such for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate the land."

We agree with the view taken in that case. The result is that the appeal fails and must be dismissed.

Hence we dismiss the appeal with costs.

K.N./R.K. *Appeal dismissed.*

(1) A. I. R 1926 Mad. 350=92 I. C. 398=49 Mad. 227.

A. I. R. 1932 Oudh 77 (1)

SRIVASTAVA, J.

Abdul Hafiz and *others*—Objectors—Appellants.

v.

Mool Chand and *others*—Insolvent—Respondents.

Misc. Appeal No. 31 of 1931, Decided on 15th October 1931, against order of Dist.Judge, Hardoi, D/- 11th April 1931.

Provincial Insolvency Act (as amended by Act 10 of 1930), S.53—S. 53, as amended by Act 10 of 1930, applies to proceedings pending when the Act came into force.

The amendment made by Act 10 of 1930 has retrospective effect and applies to proceedings pending at the time when the Act came into force.

R made an application for insolvency on 21st November 1928 and was adjudged an insolvent on 8th March 1930. *R* had executed a deed of gift in favour of his son on 17th December 1927. An application for getting the deed of gift annulled under S. 53 was made on 5th September 1930.

Held: that the decision of the case was governed by S. 53 as amended by Act 10 of 1930: *A. I. R.* 1930 *Mad.* 834 (*F.B.*), *Foll.* [P 77 C 2]

Sri Ram—for Appellants.

Mahabir Prasad—for Respondent 1.

Judgment.—This is an appeal against the order, dated 11th April 1931, of the District Judge of Hardoi, cancelling a deed of gift under S. 53, Insolvency Act. This deed of gift was executed on 17th December 1927 by Abdur Rashid in favour of his sons. Abdur Rashid made an application for insolvency on 21st November 1928 and he was adjudged an insolvent on 8th March 1930. The application for getting the deed of gift annulled under S. 53, Provncial Insolvency Act was made on 5th September 1930.

The only contention urged in support of the appeal is that the amendment of S. 53, Insolvency Act, made by Act 10 of 1930 does not apply to the gift in question inasmuch as the gift had been made long before the amendment and the amending Act has not been given retrospective effect. In my opinion the contention has no force. There was a sharp conflict of decisions among the various High Courts as regards the correct interpretation of the terms of S. 53. The words used in the section as it stood before the amendment were:

"if the transferor is adjudged insolvent within two years after the date of the transfer."

Some of the High Courts were of opinion that in order to make the section applicable, the order of adjudication must have been made within two years of the date of the transfer. The other High Courts held that it was enough if the application for adjudication was made within two years of the transfer. The legislature in order to set at rest this controversy as regards the correct interpretation of the section have amended it by adding the words 'on a petition presented' after the words "is adjudged insolvent." The amendment does not impair any vested rights. Its object is merely to clarify the meaning of the section. Act 10 of 1930 received the assent of the Governor-General on 20th March 1930. The application under S. 53 in the present case, as stated before, was made on 5th September 1930, several months after the Act had come into force. The Act therefore was in force at the date of the making of the application under S. 53. I am therefore of opinion that the decision of the application must be based upon the interpretation of the section as approved of by the legislature by means of the amending Act. This view is supported by the Full Bench decision of the Madras High Court in *Taticherla Pichamma* v. *Official Receiver of Cuddapah* (1), in which case it was held that the amendment made by Act 10 of 1930 has retrospective effect and applies to proceedings pending at the time when the act came into force. The appeal therefore fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1930 Mad. 834=128 I. C. 154=54 Mad. 12 (F. B.).

A. I. R. 1932 Oudh 77 (2)

SMITH, J.

Ram Saroop—Plaintiff—Appellant.

v.

Jwala Prasad and *another*—Defendants—Respondents.

Execution of Decree Appeal No. 16 of 1931, Decided on 27th October 1931, against order of Sub-Judge, Malihabad, Lucknow, D/- 24th January 1931.

Decree — Interpretation — Language of decree plain—Court cannot look at its judgment to interpret decree.

A Court cannot look at the judgment to interpret its decree, where the language of the decree is plain and unambiguous. It is only when the terms of a decree are ambiguous that it can be interpreted in the light of the judgment: 5 *O. C.* 35, *Foll.* [P 78 C 2]

Manohar Lal—for Appellant.

Radha Krishna and *Ramapat Ram*—for Respondents.

Judgment.—This is a second appeal in connexion with the execution of a decree of the Court of an Additional Munsif of the Lucknow District. The suit was for possession of a small piece of land, 1 biswansi and 10 kachwansis in extent, which was said by the plaintiff to have been encroached upon by the defendants. The piece of land lies between the houses of the respective parties. The Munsif came to the conclusion that the defendants had only encroached on a triangular piece of land, the area of which was only 4 kachwansis. In giving his finding on issue 4 framed by him: "To what relief is the plaintiff entitled?" the Munsif used the following language:

'The plaintiff is entitled to get the wall of the house of the defendants demolished, but only such portion of it as stands on the triangular piece of the base of 9 inches and 4 kachwansis in area. This is clearly indicated in the Amin-Commissioner's report. But this would entail unnecessary difficulties and therefore it would be better if the plaintiff only tries to get money compensation. The plaintiff alleges that 1 biswansi and 10 kachwansis of his land has been encroached upon. But the amount of encroachment as found by the Amin is 4 kachwansis. The plaintiff values his suit at Rs. 200. The value thus put to the actual encroachment comes to Rs. 13-5-4. I therefore give him a decree for that amount with proportionate costs as against the defendants."

At that point the Munsif wrote his name and the date (17th March 1930). Immediately underneath however he wrote as follows:

"Order—Suit decreed with proportionate costs sa the against defendants. The plaintiff can get an amount of Rs. 13-5-4 as the value put on the land encroached. The Commissioner's report is part of the decree; O. 20, R. 1."

According to the actual wording of the decree however it was ordered:

"That the suit be and is hereby decreed to the extent of 4 kachwansis land encroached, with proportionate costs as against the defendants. The plaintiff can get an amount of Rs. 13-5-4 as the value put on the land encroached. The Commissioner's report and map is made part of the decree: O. 20, R. 1."

There was no appeal from this decision and the plaintiff proceeded to apply for execution. The plaintiff asked for the demolition of that part of the defendants' premises which stands on that part of the land found to have been encroached upon by them. The defendants then objected that the plaintiff had not been given a decree for demolition, but only for compensation. They relied upon the words used in the Munsif's judgment.

"I therefore give him a decree for that amount with proportionate costs as against the defendants."

The learned Munsif however interpreted his own meaning to have been that monetary compensation was only awarded to the plaintiff as an alternative relief, and that he had been decreed, in the alternative, possession of the piece of land in dispute to the extent set forth in the judgment. The objection of the defendants was consequently rejected, and the plaintiff was found entitled to get the defendants' structures demolished.

Against that decision the defendants went in appeal. The Subordinate Judge allowed the appeal, and held that the plaintiff was not entitled to any demolition of the defendants' premises, but only to money compensation amounting to Rs. 13 5-4. That is the decision which is the subject of the second appeal.

It is unfortunate that the Munsif did not express himself clearly in his judgment, portions of which certainly lend colour to the view that was taken by the Subordinate Judge. The decree however undoubtedly was to the effect that the plaintiff's suit was decreed to the extent of 4 kachwansis of land encroached upon, though it contains a provision also that the plaintiff can get an amount of Rs. 13-5-4 as the value put on the land encroached.

The words in the decree, "to the extent of 4 kachwansis land encroached," are written above the line; when precisely this was done does not appear, but they are undoubtedly there, and must be regarded as an integral part ofthe decree.

It has been contended for the defendants that the decree itself is not free from ambiguity, but I do not think that contention has any force. The decree can, in my opinion, only be regarded as awarding the plaintiff 4 kachwansis of the land in suit, or if he preferred to accept monetary compensation, a sum of Rs. 13-5-4. According to a ruling reported in *Kasim Ali* v. *Manik Chand* (1), a Court cannot look at its judgment to interpret its decree, where the language of the decree is plain and unambiguous. It is only when the terms of a decree are ambiguous that it can be interpreted in the light of the judgment. In the present case, as I have said, I do not regard the

(1) [1902] 5 O. C. 35.

decree as being ambiguous, and, in any case, the Munif, who decided the original suit, considered his judgment and said that the decree, as drawn up, properly embodied his intention.

It seems to me to be a somewhat hard case for the defendants. I am given to understand that the defendants, thinking that only monetary compensation had been awarded to the plaintiff, did not appeal from the original decision of the Munsif, and that if they have to vacate even the small area of 4 kachwansis they will be put to a lot of expense and inconvenience. It seems to me however that the plaintiff is entitled under the decree to require, if he so chooses, that the defendants should vacate that area, and I think the appeal must be allowed. I accordingly allow it; and setting aside the decision of the learned Subordinate Judge, restore that of the Munsif. The defendants must pay the plaintiff's cost in respect of the objection in all the three Courts.

P.N./R.K. *Appeal allowed.*

A. I. R. 1932 Oudh 79

WAZIR HASAN, C. J. AND KISCH, J.

Amar Nath Singh—Plaintiff—Appellant.

v.

Har Prasad Singh and *another*—Defendants—Respondents.

Second Appeal No. 261 of 1930, Decided on 28th October 1931, against decision of Sub-Judge, Partabgarh, D/- 17th May 1930.

(a) Oudh Rent Act (1886), Ss. 20 and 52—Relinquishment without surrender of possession is ineffectual.

The relinquishment of a holding merely in writing is ineffectual in law, if there has been no surrender of possession of the holding by the tenant to the landlord, accompanying the relinquishment : *A. I. R.* 1923 *Oudh* 1; *A. I. R.* 1927 *Oudh* 512; *A. I. R.* 1930 *Oudh* 69 and 4 *R. D.* (*Oudh*) 303, *Ref.*; 10 *O. C.* 235, *Expl.* [P 79 C 2]

(b) Oudh Rent Act (1886), S. 4 (1)—Policy of Act stated.

The policy of the Oudh Rent Act is to keep the relationship of landlord aud tenant subsisting in spite of either or both of them and it can be terminated only in the manner provided by that Act. [P 80 C 1]

Radha Krishna Srivastava — for Appellant.

Ali Zaheer—for Respondents.

Judgment.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Partabgarh, dated 17th May 1930, affirming the decree of the Munsif of Kunda, dated 24th March 1930.

The appeal was in the first instance posted for hearing before our learned brother B. N. Srivastava, J. He thought that it involved an important question of law which should be decided by a Bench of two Judges. He accordingly made reference to such a Bench under the provisions of S. 14 (2), Oudh Courts Act, 1925.

The plaintiff's case is that the plots of land Nos. 507, 548, 581 and 576, measuring in area 4 bighas 11 biswas and 10 biswansis, situate in the village of Kathbar, pargana Patti, in the district of Partabgarh, were held of him by the defendants in the right of statutory tenants, that under a registered deed of relinquishment dated 21st October 1924 the defendants relinquished their tenancy rights in the plots in suit in favour of the plaintiff, that on such relinquishment the plaintiff entered into the possession of the plots and that in spite of the relinquishment and the delivery of possession the defendants continued in actual cultivation of the plots of land. Hence this suit with the relief of possession in respect of those plots. It is not necessary for the purposes of this appeal to state in detail the line of defence adopted by the defendants.

The lower appellate Court has found that the deed of relinquishment of 21st October 1924 was executed by the defendants and it has further found that the defendants never surrendered possession of the plots in suit in spite of the deed. The Court held that the relinquishment was ineffectual in law if there was no surrender of possession accompanying it and as there was no such surrender in the present case the plaintiff's suit failed.

In second appeal the only point for decision is as to whether the view of the law taken by the lower appellate Court, that relinquishment in writing without surrender of possession on the part of a tenant does not constitute a sufficient right in the landlord to recover possession of the plots in question by means of a suit in ejectment is correct.

So far as the decisions of the late Court of the Judicial Commissioner and of the Chief Court are concerned they all seem to have gone one way in holding that a relinquishment by a tenant without surrender of possession is ineffectual:

see *Mt. Saidunnisa* v. *Faiyaz Hasan* (1), *Nand Ram* v. *Chhedi Lal* (2) and *Mendai* v. *Sajjad Ali* (3). There is also a decision of the Board of Revenue, *Sristi* v. *Ramdeo Rai* (4) which tends in the same direction. In a case decided by Mr. (afterwards Sir Edward) Chamier, *Binda Prasad* v. *Rajindra Prasad* (5), there is a dictum that a tenant may relinquish his tenancy in favour of the landlord "in any manner and at any time by agreement with him." Mr. Radha Krishen, counsel for the plaintiff, cites this dictum as an authority in support of the view that a bare agreement between the landlord and the tenant suffices to effectuate a valid relinquishment of tenancy.

We are of opinion that that dictum has not this effect. In that case no question arose of the nature which has arisen in the present case and it was found as a matter of fact that the tenant had surrendered possession of his agricultural holding.

It appears to us that it cannot be doubted that the policy of the Oudh Rent Act, 1886, is to keep the relationship of landlord and tenant subsisting in spite of either or both of them and that it can be terminated only in the manner provided by that Act. S. 4 (1) of the Act is as follows:

"Nothing in any contract made between a landlord and a tenant before or after the passing of this Act shall entitle a landlord to eject a tenant or enhance his rent otherwise than in accordance with the provisions of this Act as amended by the Oudh Rent (Amendment) Act, 1921."

Section 52 is as follows:

"No tenant shall be ejected otherwise than in accordance with the provisions of this Act."

These two sections clearly indicate that an effectual ejectment of a tenant can only take place when the procedure with reference thereto as prescribed by the Act has been adopted and this will be so in spite of any agreement between the landlord and the tenant to the contrary. Then the Act proceeds to provide remedies both to the tenant and to the landlord for determining the tenancy. Under S. 20 :

"a tenant shall continue liable for the rent of his holding unless on or before 15th March in any year he gives to the landlord or to the recognized agent of the landlord notice of his desire to relinquish the land and relinquishes it accordingly."

This is the mode of relief granted to the tenant in case he desires to relinquish his holding. It may be emphasized that the section lays down two requisites for such a result to ensue: (1) that the tenant shall give a notice in writing of his desire to relinquish and (2) that he relinquishes it accordingly. It follows that mere expression of the desire to relinquish is not enough even in working out the procedure of relinquishment under the Act. Corresponding to this relief provided in favour of the tenant, S. 53 gives the landlord right to eject a tenant by notice or by suit as the case may be. If such a notice is served the tenant may either contest it by instituting a suit or may not contest it at all. In the latter case under the provisions of S. 59 his tenancy of the land in respect of which the notice has been served shall cease and S. 60 enables a landlord in cases falling under the preceding section to obtain the aasistance of Court to eject a tenant. All the procedure which a landlord may adopt for the purposes of obtaining the ejectment of a tenant is summed up in Cl. (4), S. 108, which provides for a suit by a landlord for the ejectment of a tenant.

It was argued by Mr. Radha Krishen that a relinquishment by a tenant of his agricultural holding is a transfer of his interest in the land and may be enforced under the ordinary procedure of law. There are two answers to this argument. One is that such a transfer is prohibited by S. 6 (i), T. P. Act. This was so held by a Bench of the late Court of the Judicial Commissioner in *Jang Bahadur* v. *Rae Raja* (6) and we think, if we may say so, rightly. The second answer is that the interest of a tenant in the land is no more and no less than a possessory interest and if possession is not delivered it is difficult to characterise such a transfer as a transfer of that interest. We are therefore of opinion that the decision of the Court below is correct.

The appeal fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 Oudh 1=69 I. C. 97.
(2) A. I. R. 1927 Oudh 512=105 I. C. 466.
(3) A. I. R. 1930 Oudh 69=124 I. C. 366.
(4) [1920] 4 R. D. Oudh 203.
(5) [1907] 10 O. C. 235.
(6) [1904] 7 O. C. 265.

A. I. R. 1932 Oudh 81

KISCH, J.

Dip Narayan—Plaintiff—Appellant.

v.

Subedar Singh and *another* — Defendants—Respondents.

Second Appeal No. 88 of 1931, Decided on 11th September 1931, against decree of Addl. Sub-Judge, Hardoi, D/- 1st December 1930.

(a) Cosharer — Exclusive possession — Cosharer in exclusive possession of plot in undivided patti — Other cosharer cannot interfere.

A cosharer in an undivided patti who is in exclusive possession of certain plots of land is entitled to remain in possession of those plots without interference by other cosharers: *A. I. R.* 1921 *Oudh* 146, *Foll.* [P 81 C 2]

(b) Cosharer— Land held in common by cosharers — Each cosharer is entitled on paying compensation to others, to cultivate uncultivated land—Rule should be applied after consideration of circumstances of each particular case.

In application of the general rule that where lands are held in common each cosharer is entitled, subject to paying compensation to other cosharers, to cultivate any part thereof not being cultivated by other cosharers, the circumstances of each particular case have to be considered.

Where after a cosharer had cultivated a plot of land his khudkasht for fifteen or sixteen years and did not cultivate it for one year because it was impossible to cultivate it in that year owing to land having been flooded and in the next year when he wanted to cultivate it he found another cosharer in possession and brought a suit to eject him.

Held: that on the facts it could not be assumed that the plaintiff cosharer intended to give up his exclusive possession of the plot. [P 82 C 1]

H. N. Misra—for Appellant.

Radha Krishna—for Respondents.

Judgment.—In the suit out of which this appeal arises the plaintiff, who is a cosharer in village Chaunsar, District Hardoi, sued the defendants for possession of two plots Nos. 1029 and 1030 on the allegation that these were his khudkasht plots and the defendants, who are also cosharers in the village, had unlawfully taken possession of them in the year 1337 Fasli. The defence was that the plots were lying parti and therefore the defendants as cosharers in the village had the right to take them into their cultivation. The trial Court decreed the plaintiff's suit in respect of both plots and the defendants, who had cultivated plot No. 1029 accepted the decree of the trial Court. The two defendants who had cultivated plot No. 1030 however appealed and the learned Subordinate Judge accepted their appeal and dismissed the plaintiff's suit in respect of this plot.

The lower appellate Court accepted the findings of fact of the trial Court. They are that the plaintiff was in exclusive possession of the plot which he had cultivated himself from the year 1913, when he ejected the former tenants, until 1334 Fasli, that the plot was lying parti in 1335 and 1336 Fasli owing to floods which made it unfit for cultivation in those years and that in 1337 Fasli the defendants-respondents took possession of the plot and cultivated it. The finding of the trial Court with regard to the year 1335 Fasli is not correct. The evidence is that in the year 1336 Fasli the plot was not fit for cultivation on account of floods and that in 1335 Fasli the patwari was unable to do any partal owing to his being engaged in settlement proceedings and therefore had no knowledge of the facts about this plot in that year. The khasra of 1337 Fasli however shows that it had been lying parti for one year, and as admittedly the defendants-respondents have only cultivated it in 1337 Fasli, the presumption is that it was still in the exclusive possession of the plaintiff in the year 1335 Fasli.

The point for determination in this appeal lies within a very narrow compass, namely, whether on the above facts the plaintiff's possession in 1336 Fasli is to be presumed, as was found by the learned Munsif, or whether on finding the land lying parti the defendants-respondents as cosharers in the village had the right to bring it under their own cultivation, as was found by the lower appellate Court.

It is well established law and is conceded by the learned counsel for the defendants-respondents that a cosharer in an undivided patti who is in exclusive possession of certain plots of land is entitled to remain in possession of those plots without interference by other cosharers: *Thakur Singh* v. *Nanhun Singh* (1). The learned Subordinate Judge however relied on the decision of their Lordships of the Judicial Committee in *Midnapore Zamindary Co. Ltd.* v. *Naresh Narayan Roy* (2), in which it was laid down that where lands are held in common each cosharer is entitled, subject to paying compensation to other cosharers, to

(1) A. I. R. 1921 Oudh 146.
(2) A. I. R. 1924 P. C. 144=80 I. C. 827=51 I. A. 293=51 Cal. 631.

cultivate any part thereof not being cultivated by other cosharers. This is no doubt the general law, but in its application the circumstances of each particular case have to be considered. In the present case after the plaintiff had cultivated the plot in question as his khudkasht for fifteen or sixteen years he did not cultivate it for one year because it was impossible to cultivate it in that year owing to the land having been flooded. When he wished to cultivate it in the following year he found that the defendants-respondents had taken possession of it. On these facts it cannot be assumed that the plaintiff ever intended to give up his exclusive possession of the plot. He was only forced by circumstances beyond his control to leave it uncultivated in the year 1336 Fasli. In my opinion therefore the conclusion of the learned Munsif that the plaintiff did not abandon possession of the plot is sound and the decree of the lower appellate Court cannot be supported. The trial Court found that the damages to which the plaintiff is entitled to recover from the defendants in respect of this plot were Rs. 39-8-0.

I accordingly allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court. The appellant will get his costs in this Court and in the lower appellate Court.

R.M./R.K. *Appeal allowed.*

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* A. I. R. 1932 Oudh 82

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Mt. Husaini Bandi Khanam—Plaintiff—Appellant.

v.

Gauhar Begam—Defendant—Respondent.

First Appeal No. 55 of 1930, Decided on 9th September 1931, against decree of Sub-Judge, Sitapur, D/- 24th February 1930.

*** Trusts Act (1882), Ss. 56 & 69—*A* selling his rights under a pro-note executed by *B*—*B* holding decree of sale by assignment — *B* assigning decree to *C* who undertook to satisfy debt due on pro-note—Purchaser of pro-note is entitled to recover amount due on it from *C*.**

Where *A* sells by means of a deed to *D* his rights under a pro-note of a certain date executed in his favour by *B* who held a decree of sale by assignment on the basis of a mortgage-deed and who assigned the decree in favour of *C* laying *C* under the obligation of satisfying the debt due on the pro-note executed by him (*B*) in favour of *A*: out of the consideration of the deed of assignment *D* is entitled to recover from *C* the amount due on the pro-note bought by him from *A*: *Gandy* v. *Gandy*, (1885) 30 *Ch. D.* 57; 41 *Cal.* 137 and 32 *All.* 410 (*P.C.*), *Ref.*; *Tweddle* v. *Atkinson*, (1861) 1 *B. & S.* 393, *not Foll.* [P 84 C 1]

A. P. Sen and *S. C. Das*—for Appellant.
Akhlak Husain—for Respondent.

Judgment.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Sitapur, dated 24th February 1930. The facts are as follows:

One Amir Jahan Begam was indebted to Naqi Ali Khan in the sum of Rupees 8,512-12-0 under a pro-note of February 1923. Amir Jahan Begam also held a decree of sale by assignment (Ex. 4) in respect of certain zamindari property on the basis of a deed of mortgage dated 12th June 1908. The decree was passed by the Court of the Subordinate Judge of Sitapur on 12th June 1918 (Ex. 3). On 4th February 1926 she assigned the decree just now mentioned in favour of one Akhtar Begam for a consideration of Rs. 10,000 (Ex. 1). In the deed of assignment the assignee was laid under the obligation of satisfying the debt due under the pro-note of 28th February 1923 in part consideration of the assignment. On 9th June 1926 Naqi Ali Khan sold his rights under the pro-note of 28th February 1923 to the plaintiff by means of a deed of that date for a sum of Rs. 7,000 (Ex. 2). Akhtar Begam has since died and on her death the name of Gauhar Begam, her daughter and representative-in-interest, was brought on the decree dated 12th June 1918 already referred to. On 12th August 1929 Gauhar Begam obtained a personal decree for a sum of Rs. 30,000 against the judgment-debtors of the decree of 12th June 1918 in place of the decree for sale.

In the suit, out of which this appeal arises, the plaintiff seeks to recover the debt due under the pro-note of 28th February 1923. Gauhar Begam is defendant 9 in the suit. The learned Subordinate Judge decreed the plaintiff's claim as against all the defendants except Gauhar Begam and dismissed it as against her. The latter part of the decree is challenged in appeal. The ground of the learned Subordinate Judge's decision is twofold: (1) that as Naqi Ali Khan was no party to the contract of sale of 4th February

1926 the plaintiff has no right to maintain the suit against Gauhar Begam; and (2) that the consideration which moved from Amir Jahan Begam has not yet been realized by Gauhar Begam inasmuch as she has obtained only a simple money decree against the judgment-debtors of the decree which was the subject-matter of the sale.

We are of opinion that the appeal succeeds. The common law doctrine

"that no stranger to the consideration can take advantage of a contract although made for his benefit"

was laid down in the case of *Tweddle* v. *Atkinson* (1). It was stated in the words quoted above by Wightman, J. Crompton, J., said

"that the plaintiff cannot succeed unless this is an exception to the modern and well-established doctrine of the action of assumpsit."

He further said

"that the promisee cannot bring an action unless the consideration for the promise moved from him."

In the judgment of Blackburn, J., occurs the following:

"Mr. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made."

On a careful consideration of the judgments of the learned Judges who decided the case of *Tweddle* v. *Atkinson* (1) it is clear to our minds that the plaintiff's action in that case was founded on a promise but had failed for the reason that no consideration for the promise moved from the plaintiff. The decision would therefore be applicable to cases in India if it were necessary in this country that the consideration for a contract must move from the plaintiff suing on the contract. As pointed out by Jenkins, C. J., in the case of *Debnarayan Dutt* v. *Ram Sadhan Mandal* (2):

"we have a definition of consideration which is wider than the requirement of the English law: S. 2 (d), Contract Act."

The doctrine enunciated in *Tweddle* v. *Atkinson* (1) does not exhaust the whole law applicable to this class of cases. This was pointed out by their Lordships of the Judicial Committee in the case of *Khwaja Muhammad Khan* v. *Husaini Begam* (3). Another rule of law is the rule acted upon by the Courts of Equity. This rule was stated by Lord Hatherley, L. C., in *Touche* v. *Metropolitan Railway Warehousing Co.* (4), which was referred to by Jenkins, C. J., in the case just now mentioned. In that case one Walker and the Metropolitan Railway Warehousing Co. had entered into an arrangement by means of a deed. Walker was to receive a certain sum of money from the company for the benefit of the plaintiffs. The company not having handed over that sum of money to Walker, the plaintiff sued the company. Lord Hatherley said:

"But I think I am justified in holding that the plaintiffs have a right to come here and obtain the benefit of the arrangement entered into between Walker and the Company. *Davenport* v. *Bishopp* (5) and *Gregory* v. *Williams* (6) are authorities to that effect."

At the end of the judgment his Lordship said:

"The case comes within the authority that where a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself. It is possible that Walker may, as he states in his answer, not be under any personal liability to the plaintiffs, but I think that, on the evidence, the plaintiffs were to be paid when Walker got the money, and they knew that by the articles of the company he was to be paid."

The last part of the above quotation answers the second ground of the learned Subordinate Judge's decision also. Gauhar Begam has already obtained a decree for the sum of Rs. 30,000 and she can be made liable for the plaintiff's claim only to the extent of the assets she may receive or might have received from Akhtar Begam. She is certainly not personally liable.

In *Gandy* v. *Gandy* (7) at p. 67, Cotton, L. J., stated the same rule in the following words:

"If the contract, although in form it is with *A* is intended to secure a benefit to *B* so that *B* is entitled to say he has a beneficial right as cestui que trust under that contract, then *B* would, in a Court of Equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated."

Cotton, L. J., also considered the decision of Lord Hatherley in the case of *Touche* v. *Metropolitan Railway Warehousing Co.* (4), already referred to, and distinguished it on the facts of the case before him. In re *Empress Engineering Co.* (8) Jessel, M. R., dealing with

(1) [1861] 1 B. & S. 393=121 E. R. 762.
(2) A. I. R. 1914 Cal. 129=41 Cal. 137=20 I. C. 630.
(3) [1910] 32 All. 410=37 I. A. 152=7 I. C. 237 (P. C.).
(4) [1871] 6 Ch. 671.
(5) 2 Y. & C. C. C. 451=12 L. J. Ch. 492=7 Jur. 1077.
(6) 3 Mer. 582=17 R. R. 136.
(7) [1885] 30 Ch. D. 57=54 L. J. Ch. 1154=53 L. T. 306=33 W. R. 803.
(8) [1881] 16 Ch. D. 127=43 L. T. 742=29 W. R. 342.

Touche's case (4), said in the course of the argument:

"In that case the Lord Chancellor finds, as a fact, that Walker was to receive the money as a trustee for the plaintiffs. If you can make out that Jones and Pride are cestui que trust that alters the case. It appears to me that they are not. The promoters were liable to Jones and Pride, who are simply their creditors. *A* being liable to *B*, *C* agrees with *A* to pay *B*. That does not make *B* a cestui que trust."

In the deed of sale dated 4th February 1926 the vendee, that is Akhtar Begam, is clearly laid under the obligation of paying the sum of Rs. 8,512-12-0 in discharge of the pro-note dated 28th February 1923. She being a party to this transaction must be taken to have accepted the obligation. She is therefore a trustee for the discharge of the liability of Amir Jahan Begam for the debt due under the pro-note and the holder of the pro-note is the beneficiary. This being our interpretation of the deed of 4th February 1926 it follows that the creditor, that is the beneficiary now represented by the plaintiff, is entitled to call upon the trustee or her representative-in-interest, Gauhar Begam, for the execution of the trust. S. 56, Trust Act, 1882, enacts that

"every beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest."

Section 69 of the same Act is as follows:

"Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer."

In support of his decision the learned Subordinate Judge has referred to a decision of the late Court of the Judicial Commissioner of Oudh in *Kidar Nath* v. *Hira Lal* (9). The judgment in that case clearly proceeded on the sole ground that a person not a party to a contract is not entitled to enforce it. This is merely a statement of the general rule of the Common law; and the application of the rule of law on which we rely in the present case does not appear to have either arisen or considered in that case.

On behalf of the respondent we were also referred to a recent Full Bench decision of the High Court at Madras in *Subbu Chetti* v. *Arunachalam Chettiar* (10). The substance of the judgments delivered by the learned Judges of the Full Bench is correctly, if we may say so, reproduced in the head-note of the report and it is as follows:

"Where on a contract between *A* and *B*, *B* agrees to pay a sum of money to *C* and no more circumstances appear, *C* being a stranger to the contract, cannot sue *B* for the money, though all the parties to the contract are parties to the suit. This is the general rule, though some exceptions to the rule arise under the following circumstances, e.g., (a) where *B* afterwards agrees with *C* to pay him direct or becomes estopped from denying his liability to pay him personally; (b) where the contract between *A* and *B* creates a trust in favour of *C*; (c) where the contract charges the money to be paid out of some immovable property; or (d) where it is due to *C* under a marriage settlement, partition or other family arrangement."

The case before us falls within Exception (b).

The pro-note of 28th February 1923 has not been produced in the case. On the evidence the learned Subordinate Judge held that the loss of the aforementioned pro-note was established. He therefore allowed secondary evidence to be produced in proof of the pro-note. On behalf of the respondent it was contended before us that the learned Subordinate Judge's finding as to the loss of the pro-note was not correct. We reject this contention. It is not the respondent's case that the debt due under the pro-note had ever been repaid by any body. The plaintiff therefore had no motive in putting forward the case of the loss of the pro-note unless it were a true case. The evidence with which the learned Subordinate Judge was satisfied is that on the transfer of the pro-note by Naqi Ali Khan to the plaintiff the pro-note in question was handed over by Naqi Ali Khan to the plaintiff's agent Sardar Husain, at the registration office. Sardar Husain lost it. He was not produced as a witness, because he had left the plaintiff's service. Witnesses Barhma Din and Ahmad Shah support the case of the loss of the pro-note. We have also before us the police report (Ex. 1, P.W. 1) which shows that on 11th June 1926 Sardar Husain reported at the police station of Misrikh that he had lost the pro-note of 28th February 1923.

The plaintiff has claimed a sum of Rs. 12,000 in this suit. This comprises the principal and interest at the rate of 2 per cent per mensem. She has relinquished Rs. 113-5-4 out of the total amount of Rs. 12,113-5-4 due on the pro-note. We are of opinion that the plaintiff cannot get a decree for more than the sum of Rs. 8,512-12-0 as against the respondent Gauhar Begam. It was for this amount of money that the obligation to

(9) [1902] 5 O.C. 235.
(10) A. I. R. 1930 Mad. 382=124 I. C. 55=53 Mad. 270 (F.B.).

repay was imposed upon Akhtar Begam and accepted by her.

We accordingly allow the appeal; and in addition to the decree passed by the lower Court against the other defendants to the suit we pass a decree in favour of the plaintiff against Gauhar Begam also for the sum of Rs. 8,512-12-0 with interest at 6 per cent per annum from the date of the suit to the date of realization. The plaintiff will also be entitled to her costs in both the Courts in proportion to the sum of money hereby decreed. The decree will be executable only against the assets of Akhtar Begam which might have come or may come into the hands of Gauhar Begam.

K.N./R K. *Order accordingly.*

A. I. R. 1932 Oudh 85

RAZA AND SMITH, JJ.

Dwarka Nath Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Raj Rani and *others*—Defendants—Respondents.

First Appeal No. 96 of 1930, Decided on 14th August 1931, against decree of Sub-Judge, Sitapur, D/- 14th July 1930.

(a) Hindu Law—Applicability—Hindu dying as Christian is governed in matter of succession by Succession Act.

A Hindu convert to Christianity who dies a Christian is governed by the Succession Act in the matter of succession and cannot elect to continue to be governed by the Hindu law of inheritance : *A. I. R.* 1922 *P. C.* 14, *Foll.* [P 87 C 1]

(b) Succession Act (1925), S. 213—Person governed by Succession Act executing will—Claim based upon such will—Probate must be obtained before it can be established.

Where a person, who at the time of his death is governed by the Succession Act, 1925, executes a will, a claim based upon such will cannot be established in a Court without obtaining probate of the will under S. 213. [P 87 C 2]

R. B. Lal, R. N. Harkauli, Girja Shankar, P. L. Banerji and *Kismat Rai Jagdhari*—for Appellants.

Chhail Behari Lal, Wasim Ali Zaheer, Bhagwati Nath and *Salig Ram*—for Respondents.

Judgment.—This appeal arises out of a declaratory suit. The dispute in this case relates to the property of Thakur Shankar Bakhsh Singh, who died on 24th July 1922. The property is specified in Lists 1 and 2 attached to the plaint. The Court of Wards had assumed the superintendence of the property of Thakur Shankar Bakhsh Singh on 11th July 1901. After the death of Thakur Shankar Bakhsh Singh, the Court of Wards recognized his widow Mt. Raj Rani (defendant 1), as the absolute owner of the entire property, under the will of Thakur Shankar Bakhsh Singh, dated 19th June 1901 and mutation was duly effected in her favour by an order of the Revenue Court. She executed two deeds of gift in favour of defendants 2 to 10 in respect of certain property out of the property in dispute on 16th August 1927.

Defendant 2 is the daughter of Raj Rani. Defendant 6 is the son of Mt. Raj Rani's daughter, Mt. Parmeshri (since deceased). He is the father of defendants 3 and 10. Defendants 7 and 8 are the sisters of Thakur Shankar Bakhsh Singh, deceased. Defendant 9 (since deceased) was the wife of defendant 3.

The plaintiff, Chaudhri Ganga Bakhsh Singh, was a cousin of Thakur Shankar Bakhsh Singh, deceased. He brought the present suit for a declaration that the transfers made by defendant 1 in favour of the other defendants on 16th August 1927, were not valid and binding on him after the death of defendant 1, and that he was the owner of the property in suit. He based his title on a will alleged to have been executed by Thakur Shankar Bakhsh Singh on 28th July 1904. He alleged that defendant 1 had a mere life-interest in the property under that will. He questioned the genuineness and validity of the will of 19th June 1901, and set up the will of 28th July 1904, as the last will of Thakur Shankar Bakhsh Singh, deceased. He alleged further that should both the wills be held to be invalid and ineffective, Thakur Shankar Bakhsh Singh, who was a Hindu, must be held to have died intestate and he (plaintiff) was entitled to claim the property as the reversionary heir of the deceased under the Hindu law, subject to the life-estate of defendant 1 (the widow of Thakur Shankar Bakhsh Singh).

He alleged also that according to the custom prevailing in the family of Thakur Shankar Bakhsh Singh, daughters and daughters' children were excluded from inheritance, and could claim no right to or interest in the property of the deceased in the presence of the reversionary heirs of the deceased.

The claim was resisted by the defendants on various grounds. They denied the genuineness and validity of the will of 28th July 1904, and set up the will of 19th June 1901, which was executed by Thakur Shankar Bakhsh Singh before the Court of Wards had assumed charge of his estate. They alleged that Thakur Shankar Bakhsh Singh had embraced Christianity in 1887, and was formally baptized on 27th August 1902, that he remained a Christian till his death, and that the succession to his property must be governed by the Succession Act, and not by the Hindu law or custom. They pleaded that the suit was not maintainable as the plaintiff had not obtained probate (or letters of administration) of the alleged will of 28th July 1904, as required by law.

The plaintiff alleged, in reply to these pleadings that though Thakur Shankar Bakhsh Singh had gone through a form of conversion to Christianity, he never professed that faith, nor did he act or conduct himself as such, and even if he be considered to have been a Christian at his death, he was in the matter of succession governed by Hindu law and custom, to which he was subject before his conversion to Christianity. He alleged further that Thakur Shankar Bakhsh Singh died a Hindu, having been reconverted by the Arya Samaj of Lucknow, which performed his Shuddhi (purification) on 7th November 1920.

Chaudhuri Ganga Bakhsh Singh (plaintiff) died during the pendency of the suit and his legal representatives and transferee were then brought on the record in his place.

The pleadings gave rise to the following issues :

1. (a) Did Thakur Shankar Bakhsh Singh embrace Christianity, as alleged in para. 41 (of the written statement of defendants 1 and 5) ?

(b) Did he reconvert to Hinduism and was his Suddhi performed on 7th November 1920, as alleged by the plaintiffs ?

(c) Did Thakur Shankar Bakhsh Singh continue to be governed by Hindu law and family custom even after his conversion (to Christianity)?

2. Is the suit not maintainable as the plaintiff has not obtained probate or letters of administration to the will of 28th July 1904 as alleged in para. 42 of the written statement ? or time should be granted to the plaintiff, as alleged in para 53 of the replication ?

3. (a) Did Thakur Shankar Bakhsh Singh execute a will on 28th July 1904 with the consent of the Court of Wards, as alleged by the plaintiffs?

(b) Did the Court of Wards withhold its consent, as alleged by the defendants ? If so, what was its effect ?

(c) Was its execution obtained by undue influence and is the same invalid, as alleged by the defendants ?

(d) Was it unreal and not intended to be given effect to, as alleged by the defendants?

(e) Was it subsequently revoked, as alleged by the defendants in paras. 37 and 38 ?

4. (a) Is the will dated 19th June 1901, the only operative and valid will, as alleged by defendants ? Was it executed by Thakur Shankar Bakhsh Singh ?

(b) Has this will been revoked, as alleged by the plaintiffs ?

(c) What estate did defendant 1 take under this will, if it stands unrevoked ?

5. Are daughters and their children excluded by custom obtaining in the family of Thakur Shankar Bakhsh Singh ?

6. Are Dwarka Nath, Ajudhia Nath and Tribhawan Nath (sons of the plaintiff) necessary parties, as alleged in para. 48 ?

7. Is the court-fee paid insufficient ?

8. Was Nihal Chand adopted by Indrajit ? If so, was it valid ?

It should be noted that the suit was filed in September 1928. The principal contesting defendants filed their written statements in March 1929, and the plaintiff filed his replications in April 1929. The issues were framed on 4th May 1929. The plaintiffs examined some witnesses, and then they made an application on 27th May 1930. The application is in the following terms :

"(1) That the plaintiffs have closed their evidence except in rebuttal.

(2) That the plaintiffs have failed to secure evidence much less prove that Thakur Shankar Bakhsh Singh was reconverted into Hinduism.

(3) That the plaintiffs have therefore to admit and do hereby admit that Thakur Shankar Bakhsh Singh was a Christian at his death.

(4) That issues (1) (a) and (1) (b) be decided against the plaintiffs and in favour of the defendants.

The trial Court accordingly decided issues (1) (a) and (1) (b) against the plaintiffs on 27th May 1930. The defendants then made an application on 31st May 1930, stating that the two issues (1) (a) and (1) (b) having been decided against the plaintiffs, the suit was not maintainable, as they had not obtained probate or letters of administration, and, that issues (1) (c) and (2) might be decided first. They intimated also that by reason of the plaintiff's admission mentioned above, they did not propose to produce any oral evidence on any of the issues except to prove the revocation of the will of 28th July 1904, and to prove the will of 1901, and to establish the plea of undue influence regarding the will of 1904. They stated further in their application that all the questions relating to the execution, validity and revocation of the alleged will

of 1904 could be decided only by the Court granting probate.

Notices were accordingly issued to the opposite party requiring them to appear and argue issues (1) (c) and (2) on 12th July 1930. The trial Judge heard the arguments advanced by the parties on both points and then recorded his findings on issues (1) (c) and (2). He found issue (1) (c) against the plaintiffs following the ruling of their Lordships of the Judicial Committee in the case of *Kamawati* v. *Digbijai Singh* (1). That case is an authority for the proposition that a Hindu convert to Christianity, who dies a Christian, is governed by the Succession Act in matters of succession; and cannot elect to continue to be governed by the Hindu law of inheritance. He decided issue 2 also against the plaintiffs. The result was that the suit was dismissed with costs on 14th July 1930.

This appeal was filed in this Court on 13th October 1930.

The appellants' learned counsel has not questioned the correctness of the finding of the learned trial Judge on issue (1) (c) in the course of arguments before us. He has addressed no arguments to us on that point, but has confined his arguments to the finding on issue 2. He contends that the suit should not have been dismissed, but that time should have been given to the plaintiffs to produce the probate. We understand that the plaintiffs applied to this Court for probate on 25th/28th October 1930 more than three months after the dismissal of their suit. That case is still pending in this Court. The appellants' learned counsel has referred to the following authorities: *Chandra Kishore Ray* v. *Prasanna Kumari Dasi* (2) and *Charu Chandra Pramanik* v. *Nihush Chandra Kundu* (3).

These cases are authorities for the proposition that S. 213, Succession Act (Act 39 of 1925), lays down that an executor or legatee cannot establish his claim before obtaining probate or letters of administration, as the case may be, and so this section is no bar to his bringing a suit before obtaining probate (or letters of administration with will annexed), provided that it is obtained before the hearing, or at any rate before the decree. The relevant portion of S. 213 is as follows:

> "No right as executor or legatee can be established in any Court of justice unless a Court of competent jurisdiction in British India has granted probates of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed."

The question is: Should the trial Court have stayed proceedings to enable the plaintiffs to obtain probate of the will in question from the Court of competent jurisdiction? We think this question should be decided against the plaintiffs. It has not been contended before us that the learned trial Judge was bound to grant time to the plaintiffs for the purpose of obtaining probate of the will and producing the same in Court. We have not been referred to any authority on that point. It is true that it is not a condition precedent to the filing of the suit that probate should be obtained. The plaintiffs could commence the action before probate. However having regard to the circumstances of the case, we are of opinion that the learned trial Judge was not wrong in dismissing the suit after the application dated 27th May 1930, mentioned above, was made to him by or on behalf of the plaintiffs. It appears that the plaintiffs were aware of the fact that Thakur Shankar Bakhsh Singh had really embraced Christianity and that he died a Christian. However they contended that he died a Hindu having been re-converted by the Arya Samaj of Lucknow in November 1920. This statement does not appear to have been made in good faith. This is clear from their own admissions in their application of 27th May 1930, mentioned above. They made the application admitting the true facts and asking the Court to decide issues (1) (a) and (1) (b) against them and in favour of the defendants. They closed their evidence at the same time. The case was thus ripe for a decree. As Thakur Shankar Bakhsh Singh had admittedly embraced Christianity and was a Christian at the time of his death, succession to his estate was governed by the Succession Act, and as the plaintiffs based their title on the will alleged to have been executed by him they could not establish their claim before obtaining probate of the alleged will under S. 213, Succession Act. The trial Judge had no jurisdiction to try other issues relating to the will or wills of

(1) A. I. R. 1922 P. C. 14=64 I. C. 559=48 I. A. 381=43 All. 525 (P.C.).
(2) [1911] 38 Cal. 327=38 I. A. 7=9 I. C. 122 (P.C.).
(3) A. I. R. 1923 Cal. 1=74 I. C. 630=50 Cal. 49.

Thakur Shankar Bakhsh Singh after the admission mentioned above had been made by the plaintiffs. It is true that the original plaintiff had asked the trial Court to give him time to obtain probate, but the present plaintiffs made no such prayer after they made the application dated 27th May 1930. Para. 53 of the replication of the original plaintiff runs thus:

"That if the Court should find in favour of the will set up by the plaintiff, but considers probate necessary, it should grant time to the plaintiff for the purpose and no suit can be dismissed merely on such ground."

It is clear that the trial Court could not try the issue or issues relating to the will in question. It could not therefore grant time to the plaintiffs for obtaining probate of the will after giving its findings in favour of the will set up by the plaintiffs, as prayed in para. 53 of the replication mentioned above. The plaintiffs made no attempt to obtain probate of the will in question even after filing the present suit. They made no such attempt for some months even after they decided to make the application dated 27th May 1930 to the trial Court. They made no request for grant of time to the Court even after they made the application to the Court and the Court fixed 12th July 1930, for arguments. The learned trial Judge has made the following observation in his judgment:

"Again as noted above the plaintiffs have closed evidence thinking that the production of the probate or letters of administration is useless, and they cannot now request, neither in fact they have made any request, for grant of time to enable to secure the same from some competent Court."

It is noticeable that the plaintiffs made the application for probate to the Court of competent jurisdiction more than three months after the dismissal of their suit. It should also be borne in mind that the evidence produced by the plaintiffs was quite insufficient to prove the alleged title. They could not establish their claim legally in the trial Court before obtaining probate from the Court of competent jurisdiction. The plaintiffs do not suffer in any way by the dismissal of their suit. They can again sue for the same declaration on payment of a court-fee of Rs. 10 only, if they succeed in obtaining the probate of the will in question from the Court of competent jurisdiction.

In our opinion the learned trial Judge was not wrong in dismissing the suit in the circumstances mentioned above. We can find no ground for interference and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 88

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Sheo Dulare and *another*—Plaintiffs—Appellants.

v.

Jagannath and *others* — Defendants—Respondents.

Second Appeal No. 237 of 1930, Decided on 13th October 1931, against decree of Dist. Judge, Unao, D/- 5th May 1930.

Transfer of Property Act (1882), S. 55 (4) —Lien of purchaser of immovable property on property purchased is ineffectual against transferee for value without notice.

It is a well-established principle of equity that a purchaser of immovable property has a lien on the property purchased. This principle is recognized in S. 55 (4) of the Act. The lien will however be ineffectual as against a transferee for value without notice. But where a purchase is made at an auction sale with complete notice of a previous mortgage deed containing all the facts giving rise to the equities claimed the lien will not be ineffectual: *A. I. R.* 1930 *Oudh* 178; *Rose* v. *Wasten*, (1864) 10 *H. L. C.* 672; *Whitebread & Co. Ltd.* v. *Watt*, (1902) 1 *Ch.* 835; 22 *Cal.* 909 (*P.C.*) and *A.I.R.* 1924 *P. C.* 133, *Ref.* [P 90 C 1]

M. Wasim, Khaliquzzaman and *Ali Zaheer*—for Appellants.

A.P. Sen, Zahur Ahmad, H. Husain and *Bhagwati Nath*—for Respondents 1 and 2.

Judgment.—This is the plaintiffs' appeal from the decree of the District Judge of Unao, dated 5th May 1930, reversing the decree of the Additional Subordinate Judge of the same place, dated 30th August 1929.

The facts of this case are somewhat complicated and the points of law raised on behalf of the plaintiffs at the hearing of the appeal were several. We have taken time to consider our judgment and having regard to the opinion which we have formed on one of these questions of law, it is not necessary either to state all the facts or all the questions of law.

The necessary facts bearing on the decision of this appeal may thus be stated chronologically.

17*th April* 1914—Sheo Dulare, the father of the defendants Kedar, Mahipat, Bishnunath and Gauri Shankar executed a deed of mortgage in respect of 1 biswa 5 biswansis share out of 16 annas share situate in the village of Makoor, parganna Jhalotar Ajgain, in the district of Unao, in favour of Jagannath who is the chief

defendant in the suit, out of which this appeal arises.

20th June 1917.—It appears that one Sri Krishna had obtained a simple money decree against Sheo Dulare and in execution of that decree he had attached and put up to sale the 1 biswa 5 biswansis share already specified. To this attachment and proposed sale the four sons of Sheo Dulare raised objections on the ground that their 1 biswa share was not liable to be sold in execution of a decree obtained against Sheo Dulare alone who was separate from them. The Court rejected the objection and held that the sons' share was also liable for the legitimate debts of the father. The result was that the sale was allowed to proceed and the entire share of the 1 biswa 5 biswansis was purchased at a public auction by one Ram Charan for a sum of Rs. 700 on 20th June 1917.

18th July 1917.—Sheo Dulare executed the deed of mortgage in favour of the plaintiffs for a sum of Rs. 850 in respect of the entire share of 1 biswa 5 biswansis carrying interest at the rate of 12 per cent per annum. In default of payment within ten years the mortgagees were entitled to the relief of foreclosure.

25th July 1917,—Out of the mortgage money advanced by the plaintiffs under the deed of 18th July 1917 a sum of Rs. 700 was paid to Ram Charan and the sale of 20th June 1917 was set aside before Ram Charan could enter into the possession of the share purchased by him.

6th May 1918.—As a result of the claim made by Sheo Dulare's sons the mortgage of 17th April 1914 was declared to be inoperative in respect of the sons' share of 1 biswa.

19th March 1919.—Jagannath enforced his mortgage of 17th April 1914 by means of an action against Sheo Dulare and the plaintiffs and obtained a decree for foreclosure in respect of the 5 biswansis share on 19th March 1919. This share is now held by Jagannath in indisputable right and is no longer subject to any controversy.

20th August 1923.—The 1 biswa share was again attached and put to sale in execution of a money decree held by Beni Madho and Dwarka against Sheo Dulare and his sons and at Court auction Jagannath, the defendant, purchased it on 20th August 1923. The sale and the purchase were expressly made subject to the mortgage of 18th July 1917. It is against this 1 biswa share that the plaintiffs of the present suit ask for the relief of foreclosure. For the purposes of the decision of this appeal we accept the finding of the learned District Judge that previous to the date of the mortgage in suit the family of Sheo Dulare and his sons had ceased to be a joint Hindu family and that a separation in status had taken place.

The mortgage of 18th July 1917 was executed by Sheo Dulare for the express purpose of raising money to recover the 1 biswa 5 biswansis share from the hands of Ram Charan, and it is now agreed that out of the mortgage money a sum of Rs. 700 was paid to Ram Charan by the plaintiffs and in consequence thereof the 1 biswa 5 biswansis share was again restored to Sheo Dulare and his four sons in equal shares. On these facts the plaintiffs' contention is that they have acquired a charge by operation of law on the 1 biswa share and are therefore entitled to recover the sum of Rs. 700 by sale of that share.

We are of opinion that the contention is well founded. The mortgage of 18th July 1917 was a perfectly valid mortgage, though a second mortgage, in respect of Sheo Dulare's share, that is 5 biswansis, and it is also clear that Ram Charan had acquired proprietary title to the entire 1 biswa 5 biswansis share which he had purchased on 20th June 1917 at a Court auction. Within this purchase must fall the 5 biswansis share in respect of which we have said that the mortgage of 18th July 1917 was a valid mortgage. It follows that the act of the plaintiffs in making the payment to Ram Charan and in recovering from his hands the 1 biswa 5 biswansis share was not an officious act. The plaintiffs for the purpose of protecting the 5 biswansis share mortgaged to them, had to pay the entire sale price which Ram Charan had paid to purchase the whole share. It follows that by the effect of the rule of subrogation the plaintiffs acquired all the rights which Ram Charan, the purchaser, had acquired over the 1 biswa 5 biswanis share by reason of the sale of 20th June 1917 in his favour. They lost this right in the 5 biswansis share as a result of the decree dated 19th March 1919 in favour of Jagannath; but we are of opinion that they still retain it in the rest of 1 biswa share. One of us had occasion to consider this question in

the case of *Mato Din* v. *Iftikhar Husain* (1). In the judgment of that case reference is made to several decisions of their Lordships of the Judicial Committee and also to cases decided in England. It seems to us that the present case entirely falls within the principle of the decision of their Lordships of the Judicial Committee in the case of *Mahomed Rahimtulla* v. *Esmail Allarkhia* (2).

What were then the rights of Ram Charan? It is a well established principle of equity that a purchaser of immovable property has a lien on the property purchased: *Rose* v. *Watson* (3) and *Whitebread & Co., Limited* v. *Watt* (4). This principle is recognised in Cl. (b), sub-S. 4, S. 55, T. P. Act. The lien will however be ineffectual as against a transferee for value and without notice. In the present case, as we have already stated, the defendant Jagannath bought the 1 biswa share at the auction sale of 20th August 1923 with complete notice of the mortgage in suit. The deed of mortgage states all the facts giving rise to the equities to which the plaintiffs now contend they are entitled. We are not unmindful of the fact that Ram Charan had purchased the 1 biswa share at an auction sale and not by means of a private contract. This fact however does not appear to us to have the effect of killing the equitable lien which accrued in favour of Ram Charan on 20th June 1917 when he purchased the share in question. In the case of *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (5) their Lordships of the Judicial Committee applied a principle of equitable estoppel in favour of one auction-purchaser against another auction-purchaser of the same estate.

We accordingly allow this appeal, set aside the decrees of the Courts below and decree the plaintiffs' suit for a sum of Rs. 700 and interest at the rate of 6 per cent per annum from 18th July 1917 till realization. If the sum hereby decreed is not paid within three months of today, the 1 biswa zamindari share out of 20 biswas of village Makoor, which now under partition amounts to 6 biswas out of 20 biswas in mahal Sitla Din situate in the same village shall be sold for the satisfaction of the decree. As to the costs we order that the plaintiffs shall be entitled to their costs in proportion to their success in all the three Courts. Except Jagannath defendant no other defendant has contested this suit. The costs will therefore be paid by Jagannath alone.

B.V./R.K. *Appeal allowed.*

(1) A. I. R. 1930 Oudh. 178=118 I. C. 835=5 Luck. 53.
(2) A. I. R. 1924 P. C. 133=80 I. C. 411=51 I. A. 236=48 Bom. 404 (P. C.).
(3) [1864] 10 H. L. C. 672=33 L. J. Ch. 385 =3 N. R. 673=10 Jur. (n. s.) 297=10 L. T. 106=12 W. R. 585.
(4) [1902] 1 Ch. 835.
(5) [1895] 22 Cal. 909=22 I. A. 129 (P. C.).

A. I. R. 1932 Oudh 90

RAZA AND SMITH, JJ.

Babu Singh and *others*—Plaintiffs—Appellants.

v.

Rameshwar Bakhsh Singh and *another*—Defendants—Respondents.

First Appeal No. 72 of 1930, Decided on 30th September 1931, against decree of Addl. Sub-Judge, Lucknow, D/- 28th May 1930.

(a) Hindu Law—Alienation— Widow—Gift by widow of property forming part of her husband's estate—Next presumptive male reversioner consenting—Such reversioner or person claiming through him cannot challenge validity of alienation on death of widow.

Where an alienation by way of gift by a Hindu widow of property forming part of her husband's estate is consented to by the next presumptive male reversioner who receives consideration on giving such consent or has benefited by the transaction, the transaction is binding on the consenting reversioner and persons claiming through him, if he succeeds to the estate after the death of the widow : *A. I. R.* 1927 *P.C.* 227 and *A. I. R.* 1918 *P. C.* 196, *Rel. on* ; 34 *Cal.* 329 (*P. C.*) ; *A. I. R.* 1927 *Oudh* 469 and 558 ; *A. I. R.* 1928 *All.* 387 (*F.B.*) ; *A. I. R.* 1927 *Bom.* 260 (*F.B.*) and *A. I. R.* 1929 *Mad.* 502 (*F.B.*), *Ref.* ; *A.I.R.* 1929 *Oudh* 185, *Dist.* and 30 *All.* 1 (*P.C.*), *Expl.*

[P 96 C 1]

(b) Precedent—Principle stated.

To understand and apply a decision of any Court it is necessary to see what were the facts of the case in which the decision was given, and what was the point which had to be decided.

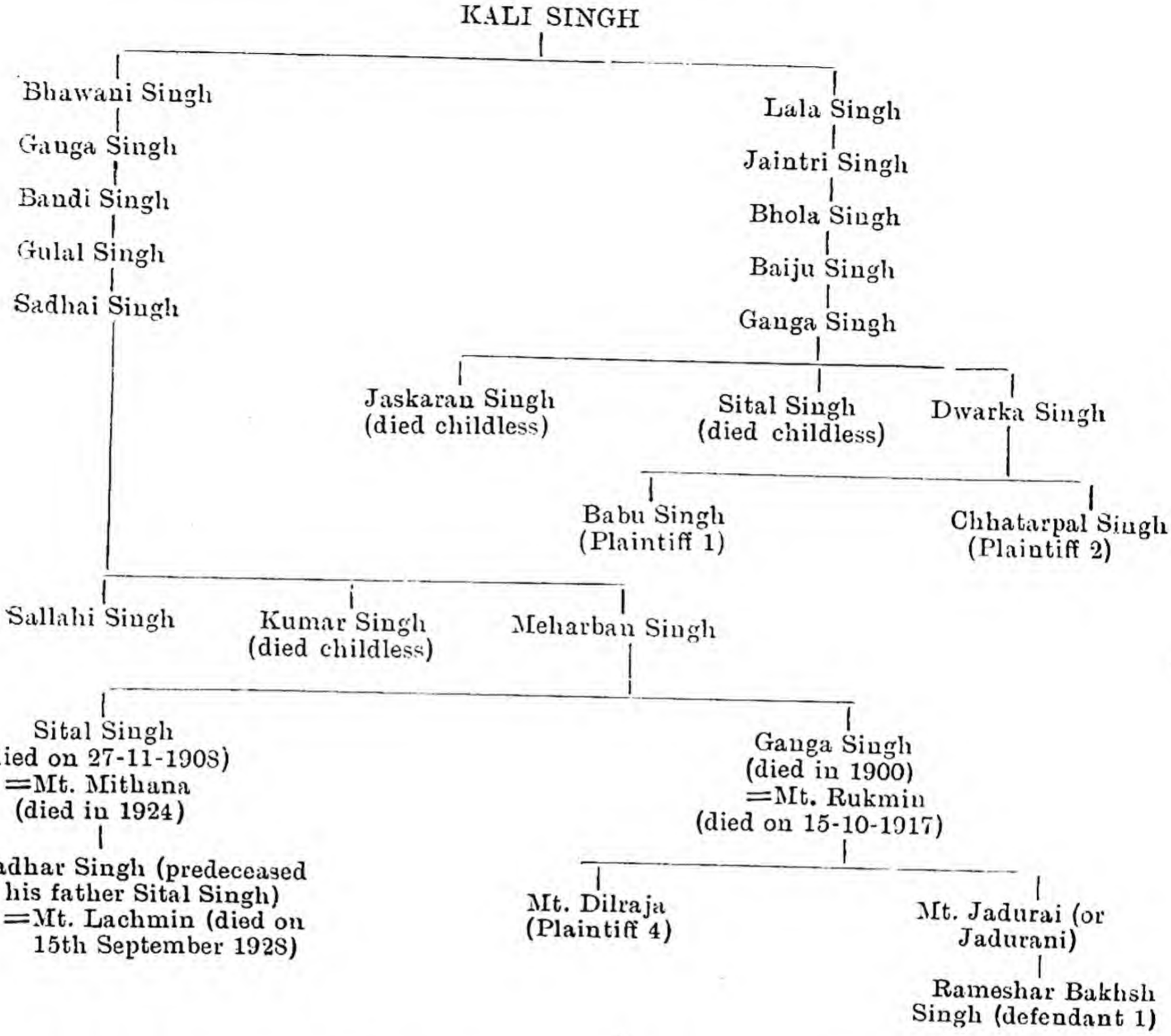
M. Wasim and *Lachhman Prasad*—for Appellants.

Haider Husain, *Makund Behari Lal* and *Kashi Prasad Srivastava*—for Respondent 1.

Judgment.—This is an appeal from a decree of the learned Additional Subordinate Judge, Lucknow, dated 28th May 1930, dismissing the plaintiffs' suit for

possession of a 5 annas 6 pies share in village Sailhumau in the district of Lucknow, and for Rs. 500 mesne profits.

The relative position of the principal parties to the suit will appear from the following short pedigree :



The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal are as follows :

Sadhai Singh was owner of a 4 annas share in village Sailhumau, which was called thok Sadhi Singh. His son Sallani Singh, and his grandson Sital Singh purchased a 2 annas share more in the village in patti Harbaksh Singh some time after his death. The descendants of Sadhai Singh were all living jointly as members of a joint Hindu family. Sadhai Singh died long ago leaving him surviving his sons Meharban Singh, Kumar Singh and Sallahi Singh. Meharban Singh died first and then died Sallahi Singh and then Kumar Singh. Sital Singh and Ganga Singh, sons of Meharban Singh, were the surviving members of the joint family after the death of Kumar Singh, who died childless. They were joint owners of the 6 annas share mentioned above ; but they were recorded sharers of the following shares in the village papers :

		a.	p.
1. Thok Sadhai Singh :			
(a) Sital Singh	...	2	0
(b) Ganga Singh	...	2	0
2. Patti Harbakhsh Singh :			
(a) Sital Singh	...	1	6
(b) Ganga Singh	...	0	6

Thus, according to the entries in the village papers a 3 annas 6 pies share belonged to Sital Singh and a 2 annas 6 pies share to his brother Ganga Singh. Though the shares were thus recorded in their names in the village papers, the whole property was joint family property and belonged to them jointly. Ganga Singh died in 1900, and, on his death, Sital Singh became the owner of the entire 6 annas share as the surviving member of the joint family. However he got a 2 annas 6 pies share recorded in the name

of his sister-in-law, Mt. Rukmin (widow of Ganga Singh) for her consolation. Sital Singh died on 27th November 1908, and then mutation was effected in favour of his widow, Mt. Mithana, in respect of the remaining 3 annas 6 pies share. Gajadhar Singh had predeceased his father, Sital Singh. He (Gajadhar Singh) died childless, leaving his widow, Mt. Lachmin. Thus the two widows Mt. Mithana and Mt. Rukmin, came to possess the entire 6 annas share in the village. They were in possession of the property as Hindu widows, and the prospective reversioners were Jaskaran Singh, Sital Singh and Dwarka Singh, sons of Ganga Singh, who belonged to the other line shown in the pedigree given above. The two widows executed three deeds by which they gave away their entire property to the following persons, on 28th June 1910 :

(1) Mt. Mithana, widow of Sital Singh, gave her 3 annas 6 pies share to her daughter-in-law, Mt. Lachmin for life, and to Rameshar Bakhsh Singh (defendant 1), son of Mt. Rukmin's daughter Mt. Jadurai (or Jadurani) in equal shares. The share of Mt. Lachmin was to go to Rameshar Bakhsh (defendant 1) on her death : see Ex. 3).

(2) Mt. Rukmin, widow of Ganga Singh gave her 2 annas 6 pies share to the following persons :

(a) One anna to Mt. Lachmin for life and on her death to Rameshar Bakhsh Singh, and one anna to Rameshar Bakhsh Singh (defendant 1) : see Ex. 4.

(b) Six pies to the prospective reversioners, namely, Jaskaran Singh, Dwarka Singh and Sital Singh : see Ex. A-2.

These three deeds were executed on one and the same date and were then duly registered. Jaskaran Singh, Dwarka Singh and Sital Singh had joined the widows, Mt. Mithana and Mt. Rukmin, in executing the deeds of gift Exs. 3 and 4 in favour of Mt. Lachmin and Rameshar Bakhsh Singh (defendant 1). They had signed the deeds as consenting parties. Mt. Rukmin died on 15th October 1917, and Mt. Mithana, in 1924. Mt. Lachmin died on 15th September 1928. She (Mt. Lachmin) was the lambardar of the shares comprised in the deeds of gift Exs. 3 and 4 : On her death the entire 5 annas 6 pies share came into the hands of Rameshar Bakhsh Singh (defendant 1). The dispute in this case relates to this share.

Plaintiffs 1 and 2 are the heirs of Jaskaran Singh, Dwarka Singh and Sital Singh. Plaintiffs 3 to 5 have obtained transfers in respect of certain shares out of the property in suit to finance the litigation. They have therefore joined plaintiffs 1 and 2 in bringing the suit. A 2 pies share was transferred to Sarju Singh (defendant 2) also; but it is alleged that the deed in his favour is without consideration and it is therefore void. He refused to join plaintiffs 1 and 2 in bringing the suit and he was therefore added as a defendant. These are the relevant facts of the case, which are no longer in controversy. The plaintiffs brought the present suit, claiming the property from Rameshar Bakhsh Singh (defendant 1), on the ground that the transfers made by the two widows, Mt. Mithana and Mt. Rukmin, in his favour are invalid and of no force and effect after the death of the widows.

The suit was contested by Rameshar Bakhsh Singh (defendant 1). Sarju Singh (defendant 2) failed to appear and the case proceeded ex parte against him.

Rameshar Bakhsh Singh (defendant 1) resisted the plaintiffs' claim on various grounds. The defence so far as it is material for the purpose of this appeal was that the deeds of 28th June 1910 were the outcome of a family settlement by which the next reversioners (Jaskaran Singh, Dwarka Singh and Sital Singh) agreed to the transfer in favour of Mt. Lachmin and Rameshar Bakhsh Singh (defendant 1), and in lieu of their consent they got a 6 pies share immediately. It was therefore pleaded, on the strength of the doctrines of consent and surrender, that the plaintiffs are precluded from challenging the transfers mentioned above.

The trial Court dismissed the suit, holding that the plaintiffs cannot be allowed to question the validity of the deeds by virtue of which the defendant 1 holds the property and they are estopped from denying the deeds.

The plaintiffs have filed this appeal, contending that the lower Court has erred in holding that Exs. 3 and 4 dated 28th June 1910, evidenced a family settlement and that at any rate the lower Court should have held that the reversioners obtained no benefit under the deed of gift executed by Mt. Mithana (Mt. Rukmin more correctly). The plea that the consent of the reversioners was obtained by undue influence was not pressed in the

course of arguments. It is not a plea of any substance and must be dismissed from consideration at once.

The learned trial Judge has found that the following facts are established in this case :

(1) Jaskaran Singh, Dwarka Singh and Sital Singh were the only and the nearest reversioners at the time of the execution of the deeds in question (Exs. 3 and 4).

(2) Jaskaran Singh, Dwarka Singh and Sital Singh gave their unequivocal consent to the transfers made by the two widows by executing the deeds of gift jointly with them.

(3) The deeds of gift in favour of Jaskaran Singh, Dwarka Singh and Sital Singh (Ex. A-2) formed part of one transaction of settlement. Jaskaran Singh and Sital Singh agreed to take a 6 pies share, and relinquished their right to the rest of the property which was thus made over to defendant 1 by the two deeds in question: Exs. 3 and 4.

(4) Jaskaran Singh, Dwarka Singh and Sital Singh were the nearest and only reversioners on the death of the two widows (Mt. Mithana and Mt. Rukmin). The plaintiffs are claiming the property through them (Jaskaran Singh, Dwarka Singh and Sital Singh).

The appellants' learned counsel has admitted the correctness of facts Nos. 1, 2 and 4, as found by the learned trial Judge. He has questioned the correctness of fact No. 3 in the course of arguments. (Their Lordships then discussed the evidence regarding the finding of fact No. 3 above, upheld the same, and proceeded as follows): Now the question of law to be decided in this case is as follows:

Where an alienation by way of gift by a Hindu widow of property forming part of her husband's estate is consented to by the next presumptive male reversioner, who receives consideration for giving such consent or has benefited by the transaction is the transaction binding on the consenting reversioner and persons claiming through him, if he succeeds to the estate after the death of the widow?

It is settled law that an alienation by a widow in excess of her powers is not altogether void, but only voidable by the reversioners, who may, either singly or as a body, be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid and binding: see *Ramgouda Annagouda Patil* v. *Bhausaheb* (1): see also *Bijoygopal Mukerji* v. *Srimati Krishna Maheshi Devi* (2).

The view taken by this Court in the cases of *Jumna Kuar* v. *Madari Singh* (3) and *Gaya Din Singh* v. *Madho Singh* (4) is in accord with the settled principle of law mentioned above. It was held in *Jumna Kuar's* case (3) that where a gift is made by a Hindu widow of her husband's property in 1904 and she died in 1907 when there are persons entitled to succeed to her husband's estate who could challenge her alienation by gift, but no attempt is made to challenge it until no right of challenge legally remains, the gift must be considered as a valid alienation from the date of the deed of transfer, and the transferee must be considered as holding the property not as a trespasser but as a transferee with good title. It was held in *Gaya Din's* case (4) that where not only does the nearest reversioner consent to the alienation by a Hindu widow, but he actually joins in the execution of a deed of gift, the validity of the gift cannot subsequently be disputed by the nearest reversioner and his transferees.

There are two important decisions of their Lordships of the Privy Council: *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (5) and *Rangasami Gounden* v. *Nachiappa Gounden* (6). In the former case it was attempted to contest an alienation which had been made by a Hindu widow with the express concurrence of practically the entire body of reversioners living at that time. Their Lordships repelled this attempt; but used some expression in their judgment about which considerable controversy arose in the Courts in India. In the latter case, their Lordships entered upon an elaborate review of the entire question of the legal effect upon the validity of transfers made by a Hindu widow of her deceased husband's estate held by her as such widow of the concurrence, consent or ratification of the nearest reversioners living at the

(1) A. I. R. 1927 P. C. 227=105 I. C. 708=54 I. A. 396=52 Bom. 1 (P.C.).
(2) [1907] 34 Cal. 329=34 I. A. 87=5 C. L. J. 334 (P.C.)
(3) A. I. R. 1927 Oudh 469=106 I. C. 328.
(4) A. I. R. 1927 Oudh 558=107 I. C. 180.
(5) [1908] 30 All. 1=35 I. A. 1=11 O. C. 78=5 A. L. J. 1 (P.C.).
(6) A. I. R. 1918 P. C. 196=50 I. C. 493=46 I. A. 72=42 Mad. 523 (P.C.).

time of the transfer. The following illustration will explain *Rangasami Gounden's* case (6), which was decided by their Lordships of the Privy Council in December 1918:

X died leaving a mother *M*, a paternal cousin *R* and a remoter paternal cousin *P*. On *X's* death, *M* succeeds to the estate of her son. *M* executes a deed of gift of a portion of her son's property to *R* who was then the nearest reversioner. *R* then dies and his estate vests in *A*. *A* mortgages to *P* the property given by *M* to *R*. Then *M* dies. After *M's* death, *P* who is then the actual reversioner sues *A* for possession of the property given by *M* to *R* and mortgaged by *A* to *P*. *P* is entitled to the property. The fact that he took a mortgage of the property does not preclude him from claiming it as a reversioner.

It was held by their Lordships of the Privy Council in that case that, as to the power of a Hindu widow to deal with the property of her husband to which she has succeeded for a life estate on his death, there is a distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes such as necessity, which is the second. The result of the consideration of the decided cases may be summarized as follows: (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bonafide surrender, and not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved "aliunde," and the alienee does not prove inquiry on his part, and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to dispute the transaction, will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. Where property was transferred by the widow to an alienee from whom a prospective reversioner takes a mortgage of a portion of it, he is not estopped on the death of the widow, from disputing the validity of the alienation. All this was held by their Lordships after they had examined *Bajrangi Singh's* case (5), and stated what in their view was the true import of the judgment in that case. It was observed by their Lordships with reference to *Bajrangi Singh's* case (5) that in that case all the reversioners in being had consented to the alienations and they (the reversioners) were bound by their own consent and the post nati were held to claim through those that were bound. The plaintiff in *Rangasami Gounden's* case (6) had never consented to the deed. It was towards the close of their judgment in *Rangasami Gounden's* case (6), that their Lordships laid down the principle upon which the controversy now before us ought to be determined. Their Lordships observed as follows :

"No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this : An alienation by a widow is not a void contract; it is only voidable : *Bijoy Gopal Mukerji* v. *Krishna Mahishi Devi* (2). Now in all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If therefore a reversioner, after he became in titulo to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good, he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good: *Raja Madhu Sudan Singh* v. *Rooka* (7). But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. Of course something might be done even before that time which amounted to an actual election to hold the deed good."

Thus their Lordships point out that an alienation of this nature by a widow is not void, but only a voidable contract, and that it can be affirmed expressly or impliedly, by the conduct of those whose interest it is to have it avoided. If these words, "of course something might be done even before that time which amounted to an actual election to hold the deed good," are carefully considered with reference to their context, it seems to us

(7) [1898] 25 Cal. 1=24 I. C. 164=1 C. W. N. 433.

that they refer to something done by the reversioner before the death of the widow. Their Lordships, of course, do not specify what class of cases they had in contemplation ; however one would obviously be where a presumptive reversioner had brought himself either within the doctrine of estoppel, or had taken a benefit and thereby fallen within the doctrine of election.

We find that such a case came before their Lordships of the Privy Council in July 1927. It was the case of *Ramgouda Annagouda Patil* v. *Bhausaheb* (1). In that case a Hindu widow (Tayava) had executed three deeds on the same date, by one of which she gifted certain properties to her brother (Basappa), by another she sold half of certain other lands to one Annagouda who was then her next reversioner, the other half of these lands being sold to her own son-in-law (Shivgouda). On her death Annagouda was her next reversioner and survived her by six years. On his death his son and grandson sued to dispossess the alienees, but both the High Court and their Lordships of the Privy Council rejected the claim, holding that the three transactions must be treated as part of the same arrangement, and the two transfers must therefore be presumed to have been made with the consent of Annagouda, by which his heirs were bound. The following observations were made by their Lordships of the Privy Council in that case :

"The three deeds appear thus to be inseparably connected together and in that view Annagouda, not only consented to the sale to Shivgouda and the gift to Basappa, but these dispositions formed parts of the same transaction by which he himself acquired a part of the estate. It was argued that Annagouda's contiugent interest as a remote reversioner could not be validly sold by him as it was spes successionis and an agreement to sell such interests would also be void in law. It is not necessary to consider that question, because he did not in fact either sell or agree to sell his reversionary interest. It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding. If some person other than Annagouda had been at the death of Tayava the nearest heir of her husband it might have been open to him to question all or any of the three deeds; but Annagouda himself being a party to and benefiting by the transaction evidenced thereby was precluded from questioning any part of it."

It was held by a Full Bench of the Allahabad High Court in the case of *Fateh Singh* v. *Thakur Rukminiji Makaraj* (8) that a reversioner to the estate of a deceased separated Hindu who had expressly assented to an alienation of the property forming part of the estate made by the widow in possession cannot, on succeeding to the estate after the widow's death, repudiate his action and sue for possession of the property alienated by the widow.

It was held by a Full Bench of the Bombay High Court in the case of *Akkawa* v. *Sayed Khan* (9) that where a widow sells a part of her husband's property without legal necessity, but with the consent of the next presumptive reversioner as evidenced by his joining in the deed, the reversioner cannot, having regard to his election, impugn the validity of the sale. The following observations were made by Marten, C. J., in his judgment in that case :

"In the present case the plaintiff actually joined in the deed by which the property in question was alienated. That is I think a clear election to hold the transaction as valid. That being so in my judgment it makes no difference whether in such a case of election the party electing was a male or was a female. A reversioner, whether male or female, could bring an action in the lifetime of the widow to set aside an alienation alleged to be invalid. If that is so, and he or she can thus elect to challenge a transaction as invalid, then surely it follows that he or she may also elect to hold that deed as valid. I think it must also be conceded that an election testified by actual joinder in a deed of alienation must be at least as good as any act or ratification or sanction given after that deed of alienation."

It was held by a Full Bench of the Madras High Court in the case of *Ramakottayya* v. *Viraraghavayya* (10) that if the next presumptive male reversioner consents, though for no consideration, to an alienation without necessity by a Hindu widow (e.g., a gift), the transaction will be binding on him when he actually succeeds to the estate.

It is noticeable that *Rangasami Goundan's* case (6) was considered in all the three Full Bench cases mentioned above.

The appellant's learned counsel relies on *Rangasami Gounden's* case (6), but in our opinion that case does not help the plaintiffs. We think that case and the subsequent case of *Ramagouda* (1) help Rameshar Bakhsh Singh (defendant 1) in the present case. A person cannot approbate and reprobate the same transac-

(8) A. I. R. 1923 All. 387=72 I. C. 8=45 All. 339 (F.B.).
(9) A. I. R. 1927 Bom. 260=102 I. C. 232=51 Bom. 475 (F.B.).
(10) A. I. R. 1929 Mad. 502=119 I. C. 156=52 Mad. 556 (F.B.).

tion. Though the doctrine of estoppel may not be applied in the case of the gift where no detriment is caused to the donee, the doctrine of election can be invoked in the case of a reversioner who has benefited by the transaction. In our opinion it is now settled that where a reversioner has unequivocably manifested his intention to abide by the act of the widow e. g., by joining in the deed of the widow during her life time and has benefited by the transaction he is personally debarred from resiling from it and impugning its validity. Those who claim under or through him have no better title to succeed in a suit brought by them after his death than he himself had.

The appellants' learned counsel relies also on the case of *Bindeshuri Singh* v. *Har Narain Singh* (11) decided by a Bench of this Court on 24th January 1929. In that case a certain zemindari share had devolved on one Mt. Lakhpati in the character of the mother of her deceased son, Mendai Singh, in 1908. On 14th February 1917, one Ramlagan sold certain specified plots to one Bindeshuri Singh under a sale deed of that date. Mt. Lakhpati made a gift of the said share on 15th May 1918, in favour of Bindeshuri Singh with the exception of certain *sir* lands. On 28th May 1922, Ramlagan relinquished a certain other zamindari share to which he had become entitled (not the share comprised in the deed of gift of 15th May 1918, in favour of Bindeshuri Singh. In this deed he referred to the gift made by Mt. Lakhpati on 15th May 1918, and it was this reference which gave rise to a ground of contest on the part of Bindeshuri Singh. Mt. Lakhpati died in April 1925. On her death the share in dispute (that is the share comprised in the deed of gift mentioned above) devolved by right of succession on Ramlagan and one Gopi in equal moities. Ramlagan and Gopi sold that very share to one Harnarain Singh on 16th September 1926. Harnarain Singh then sued Bindeshuri Singh to recover possession of the share comprised in the deed of gift mentioned above. Several pleas were taken in defence, but only two pleas were argued in the second appeal:

(1) That Harnarain Singh was not entitled to a decree in respect of the specified plots which were sold to Bindeshuri Singh by Ramlagan under the deed of the 14th February 1917, by reason of the estoppel arising out of the provisions of S. 43, T. P. Act. (2) That the reference to the deed of gift of the 15th May 1918, made by Ramlagan in the deed of relinquishment of 28th May 1928, by way of approval thereof, disentitled the plaintiff (Harnarain) from claiming his share in the property in suit. The plea of estoppel under S. 43 was taken for the first time in second appeal. It was rejected on two grounds. The first ground was that the deed of sale which Ramlagan executed in favour of Bindeshuri Singh expressly stated that the property sold thereby was the property in which Ramlagan had a title in presaenti and was in actual possession thereof as an owner. This description of the interest transferred was clearly applicable to Ramlagan's interest as a cosharer of the village in his own right. The fact that some portions of the land sold were actually situated in Mt. Lakhpati's patti after the partition did not lead to the inference that Ramlagan considered himself to be the owner of anything which lay within that patti. When Ramlagan lost at the partition some of the lands of the village which he held in severalty before the partition, he must have received other lands in lieu thereof, and the sale, if otherwise valid, must fasten on the land so received. The second ground was that the provisions of S. 43, T. P. Act, could not be given effect to so as to override the provisions of S. 6 (a) of the Act. A transfer by a Hindu of immovable property to which he on the date of the transfer is the reversionary heir expectant on the death of a widow to come into possession, is forbidden by S. 6 (a), T. P. Act. The second plea was rejected on the following grounds:

The subject-matter of the relinquishment evidenced by the deed of 28th May 1922 was not the share for which Harnarain had brought the suit as transferee from Ramlagan and Gopi. It was a different share in the village. In the deed of relinquishment dated 28th May 1922, Ramlagan had made a reference to the deed of gift dated 15th May 1918. The reference was to the effect that Mangal Singh, husband of Mt. Lakhpati was uncle of Bindeshuri Singh and he Mangal Singh died after having made in his lifetime a gift of all his property in favour of Bindeshuri Singh, and Bindeshuri Singh had out of his

(11) A. I. R. 1929 Oudh 185=127 I. C. 20=4 Luck. 622.

goodwill got the name of Mt. Lakhpati, his aunt, entered in the revenue papers, and who was accordingly in possession of the estate. It was further stated in the deed that she had consequently executed the deed of gift in favour of Bindeshari Singh, nephew of Mangal Singh, and having done that she had made him malik and put him in possession of the property to which Ramlagan had no objection. It was contended that the expression "to this I have no objection" used by Ramlagan in the deed of relinquishment established a case of consent on the part of the reversioner, Ramlagan, to the gift made by Mt. Lakhpati in favour of Bindeshuri Singh, and such a consent validated the alienation. This contention was overruled on the ground that Ramlagan's acquiescence to the gift made by Mt. Lakhpati was based on assumptions which had no foundation in facts. Mangal Singh was not really the uncle of Bindeshuri Singh. The alleged consent rested on the assumption that title to the estate of Mangal Singh had already vested in Bindeshuri Singh by virtue of a gift from the former to the latter, and therefore it was a consent to an act which the widow did not do in her right of a female heiress but by virtue of her bare possession which she held under the goodwill of the donee of the estate, that is Bindeshuri Singh. It was therefore held that the recital in question contained in the deed of relinquishment dated 28th May 1922 did not evidence a consent by a reversioner to an act of transfer of the estate by the female heir.

We think the finding that Ramlagan's acquiescence to the deed in question was based on assumptions which had no foundation in facts was quite sufficient to reject the second plea mentioned above. However propositions of law were also discussed in that case with reference to *Rangasami Gounden's* case and some other cases. For the purpose of disposing of this appeal, we do not think it necessary to refer to that discussion, as in our opinion the question of law which we have to decide in this case did not really arise in that case. That case differs materially from the present case in its facts and the decision itself is not applicable. To understand and apply a decision of any Court it is necessary to see what were the facts of the case in which the decision was given, and what was the point which had to be decided: see *Hari Bakhsh* v. *Babu Lal* (12). In our opinion the case reported in *Bindeshuri Singh* v. *Har Narain Singh* (11) is no authority for the proposition that where an alienation by way of gift by a Hindu widow of property forming part of her husband's estate is consented to by the next presumptive male reversioner, who receives consideration for giving such consent or has benefited by the transaction, the transaction is not binding on the consenting reversioner and persons claiming through him if he succeeds to the estate after the death of the widow.

We are of opinion that the recent decision of their Lordships of the Privy Council in *Ramgouda's* case (1) helps Rameshar Bakhsh Singh (defendant 1 in the present case) to the full extent. Hence we answer the question mentioned above in the affirmative and hold that where an alienation by way of gift by a Hindu widow of property forming part of her husband's estate is consented to by the next presumptive male reversioner who receives consideration for giving such consent or has benefited by the transaction the transaction is binding on the consenting reversioner and persons claiming through him, if he succeeds to the estate after the death of the widow.

We agree with the learned trial Judge that Jaskaran Singh, Sital Singh and Dwarka Singh were precluded from disputing the validity of the deeds of gift by virtue of which Rameshar Bakhsh Singh (defendant 1) holds the property in suit. They were personally debarred from resiling from the transactions of 28th June 1910, and impugning their validity. The plaintiffs, who admittedly claim the property in suit under or through them, cannot be in a better position. The claim was properly rejected by the learned trial Judge. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(12) A. I. R. 1924 P. C. 176=80 I. C. 841=51 I. A. 208=3 Pat. 625 (P.C.).

A. I. R. 1932 Oudh 98

SRIVASTAVA, J.

Ahmad Jan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 119 of 1931, Decided on 5th November 1931, against order of Sess. Judge, Lucknow, D/- 12th September 1931.

(a) Criminal P. C. (1898), S. 263 (h)—Magistrate must record reasons for conviction.

When a Magistrate tries a case summarily he is bound to record his reasons for the conviction and to state them in such a manner that a superior Court, acting in revision, may be in a position to judge whether there was sufficient material before the Magistrate to support the conviction: 16 *O. C.* 357, *Foll.* [P 98 C 2]

(b) U. P. Municipalities Act (2 of 1916), S. 298-H (e)—Rules framed under by-law rule 2—*E* living in house of accused—Son of accused bringing *H* to that house—One woman asking *H* to pay Rs. 10 for sexual intercourse with *E*—*H* paying—Money handed to son of accused—Evidence held insufficient to prove that accused kept brothal.

Where the only evidence is that Miss *E* lived in the house of the accused, that a man identified as the son of the accused met sergeant *H* and brought him to the house, that a woman, not identified, asked the sergeant to pay Rs. 10 to have sexual intercourse with her, which he did, and the woman handed the sum to the son of the accused, it may only show that the son of the accused kept a brothel, but cannot prove that the accused kept a brothel when there is not even a suggestion that the accused had any share in the earnings of Miss *E*; nor can the accused be convicted of having let the house to *E* for prostitution when there is no evidence to show that when he let the house to her he knew that she was a public prostitute. [P 99 C 1]

S. S. Chaudhuri and *H. D. Chandra*—for Applicant.

Ali Muhammad—for the Crown.

Judgment.—The applicant was tried summarily by a Magistrate, 1st Class, of the Lucknow District for the offence of keeping a brothel in his house in breach of R. 2 of the by-laws framed under S. 298-H (e), Act 2 of 1916, prohibiting the residence of prostitutes and the keeping of brothels in specified areas of the Lucknow Municipality. He found the accused guilty and imposed on him a fine of Rs. 30; in default one month's simple imprisonment. The accused made an application for revision to the learned Sessions Judge, but he saw no reason to interfere and dismissed the application.

Unfortunately the learned Magistrate did not make any record of the statements of witnesses examined before him. Of course, when a Magistrate tries a case summarily, he is not bound to record evidence; but, as observed by Mr. (afterwards Sir Benjamin) Lindsay in *Jagannath* v. *Emperor* (1), the Magistrate is bound to record his reasons for the conviction and to state them in such a manner that a superior Court acting in revision may be in a position to judge whether there was sufficient material before the Magistrate to support the conviction. The opening words of the judgment of the Magistrate show that the accused Ahmad Jan was prosecuted on the allegation that he kept a brothel in his house and had engaged one Miss Edna for prostitution. So far as I can see from the judgment of the learned Magistrate, and the reference to the prosecution evidence contained therein, there is no evidence at all to show that the applicant kept a brothel in his house.

All that the evidence shows is that Miss Edna was living in the house of the accused, that on one occasion, namely, on the 17th April 1931, a man identified as Khurshed Ahmad, son of the accused, met one Sergeant Harrison at Valerios and brought him from there to the house in which Miss Edna was living. A woman in the house, whom Sergeant Harrison was not in a position to identify, asked him to pay Rs. 10 in order to have sexual intercourse with her, which he did. This money was handed by the woman to Khurshed Ahmad. This evidence might at best show that Khurshed Ahmad was keeping a brothel, but cannot prove that the accused Ahmad Jan was the person who kept a brothel. There is absolutely no evidence of the house having been used for the purposes of prostitution on any other occasion. Even on the occasion in question there is nothing in the evidence to connect Ahmad Jan, accused, with the transaction between the woman alleged to be Miss Edna and Sergeant Harrison. It has not even been suggested that the accused Ahmad Jan received any share in the earnings of Miss Edna. In my opinion therefore the charge laid against the accused of his keeping a brothel was not justified and his conviction for that offence cannot be upheld. The learned Assistant Government Advocate, realizing this difficulty, wanted to bring the case under another part of R. 2, which provides that no person shall let or other-

(1) [1913] 16 O. C. 357=14 Cr. L. J. 594=21 I. C. 466.

wise grant the use or occupation of any building to a public prostitute. In the first place the judgment of the Magistrate does not show that the accused was charged with this offence. The only charge against him, so far as I can see, was that he himself kept a brothel. In the second place though it is admitted by the accused that he had let the house for residential purposes to Miss Edna, there is no evidence that when he let the house to her he knew her to be a public prostitute. In this connexion it may be pointed out that Miss Edna was prosecuted simultaneously with the accused Ahmad Jan in respect of the offence which took place on the night of the 17th April 1931. This offence led to two prosecutions: one against Miss Edna under rule 1 of the aforesaid by-laws for her being a public prostitute and residing within one of the prohibited areas; and the other against Ahmad Jan for keeping a brothel. The charge against Miss Edna failed and she was acquitted by the learned City Magistrate. The accused Ahmad Jan was tried by another Magistrate and convicted as stated above. Under these circumstances the charge against Miss Edna herself having failed, and in the absence of any evidence to prove that she was a public prostitute, it is hardly possible to say that the accused was guilty of letting the house to a public prostitute.

I therefore allow the application, set aside the conviction and sentence and direct that the fine if paid be refunded.

K.N./R.K. *Application allowed.*

A. I. R. 1932 Oudh 99

RAZA AND KISCH, JJ.

Gajadhar and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 358 of 1931, Decided on 14th December 1931, against order of Addl. Sess. Judge, Kheri, D/- 5th November 1931.

(a) Criminal Trial—First information—First information report is not substantive piece of evidence—It can be used merely by way of corroboration or contradiction—It is inadmissible for proving that facts stated are correct.

The first information report is not substantive piece of evidence. It can be used merely by way of corroboration or contradiction and not any further. It is inadmissible for the purpose of proving that the facts stated in it are correct. It cannot be used to contradict other witnesses who are unanimous on a particular fact. It is never per se the statement of the case for the prosecution and the absence of any accused's name in the first information report is not by itself a sufficient proof of his innocence : *A. I. R.* 1925 *All.* 303 ; *A. I. R.* 1930 *Mad.* 632 ; *A.I.R.* 1928 *Lah.* 507 and *A. I. R.* 1928 *Lah.* 880, *Foll.* [P 102 C 1, 2]

(b) Criminal Trial—Evidence—Evidence of identity should be approached with caution.

Evidence of identity based on personal impression should be approached with considerable caution, specially where much depends upon such evidence. [P 102 C 2]

H. A. Walford and *Ram Swarup Pande*—for Appellants.

H. K. Ghose—for the Crown.

Judgment.—(1) Gajadhar Brahman, aged 45, (2) Mula Brahman, aged 65, (3) Hargobind Brahman, aged 50, (4) Atma Brahman, aged 50 and (5) Munshi Brahman, aged 56, of Baraincha (District Kheri) have been convicted by the learned Additional Sessions Judge of Kheri of an offence of murder under Ss. 302/149, I. P. C., and sentenced to death subject to confirmation by this Court. They have also been convicted and sentenced to two years' rigorous imprisonment, each, under S. 147, I. P. C. The sentences of imprisonment were not to be given effect to if the sentences of death were to be confirmed by this Court. They appeal. The reference in confirmation is also before us. The charge against all the accused persons named above was that they committed riot and murdered Mohammad Ali, ziladar, on the night of 31st May/1st June 1931, at about 2 a. m. at a place near a dilapidated building at some distance from the Khandaura abadi. That building was formerly used as a place for pressing sugar-cane and making treacle, etc. The building is called "Bel." The abadi of village Khandaura is some five furlongs from the "Bel." The abadi of village Baraincha where the accused reside is some seven furlongs from the Sahjana abadi. The "Bel" is some three furlongs from the abadi of village Neoli and some seven furlongs from the abadi of village Harnia. There is a public way leading from Sahjana and passing through Khandaura and Neoli to Pasgawan.

The case for the prosecution may be summed up as follows :

Mir Zahid Ali of Pihani (District Hardoi) has zamindari property in villages Sahjana, Baraincha and some other villages in the District of Kheri. He has his "zila" or "kothar" at Sahjana. Mohammad Ali, who was in the service of Mir Zahid Ali, was the Ziladar of Sahjana

and some other villages including Braincha. As ziladar he had to take proceedings against one or other accused persons in the Civil, Revenue and Criminal Courts. He was very zealous in the discharge of his duties as a ziladar. His actions resulted in loss and hardships to the accused, who are members of one and the same family, and hence they had a grudge against him. Gajadhar accused filed an application under S. 107, Criminal P. C., against Mohammad Ali and others in the Court of the Subdivisional Magistrate, Mohamdi. That application was dismissed on 27th October 1930. On 31st May 1931, Mohammad Ali came from Pihani to Sahjana and then went to the Mohamdi Tahsil on a bullock-cart driven by Khimma (cart-driver) in the afternoon. He had to see B. Ram Sarup Singh, Naib Tahsildar, in connexion with the remission of revenue. Gajadhar and Munshi, accused, and also Ajudhi a Prasad, patwari, and Bhup were present in the compound of the Tahsil and in reply to Bhup's question Khimma said in the presence of Gajadhar and Munshi, accused, that Mohammad Ali had come from Pihani that very day and that he would go back to Pihani the same night after spending some hours at Sahjana. Mohammad Ali saw the Naib Tahsildar and then left Mohamdi for Sahjana on the bullock-cart. He sent two bullock-carts loaded with grain to Pihani at about midnight and shortly after that he himself started from Sahjana on a bullock-cart (called addha) which was driven by Khimma.

When the cart reached the "Bel" in Khandaura, Khimma saw seven men coming out of the 'Bel.' He at once aroused Mohammad Ali who was sleeping in the cart and gave two cartriges to him as desired by the latter. Before Mohammad Ali could get sufficient time to load his gun the seven men rushed up and began to beat him with lathis. Khimma also received one or two lathi blows and fell down from the cart. He ran away and concealed himself in the grass growing at a distance of some 145 yards from the public way by which the cart was passing at the time of occurrence. It was a moonlight night. Khimma recognized five men, namely, Gajadhar, Mula, Hargobind, Atma Ram and Munshi (all the five accused) out of the assailants. It was Gajadhar who attacked Khimma first of all with his lathi. All the seven assailants showered lathi blows on Mohammad Ali. They continued to beat him until he died. The bullocks turned the cart towards Sahjana and the dead body of Mohammad Ali fell down together with certain things at a distance of some yards from the public way. Some one of the assailants took away Mohammad Ali's gun and then they departed leaving his corpse on the ground. The bullocks ran off with the empty addha and reached the kothar at Sahjana shortly after the occurrence. Likkha, Punai, Ghasi and Bhikari awoke and started from the kothar shouting that the addha had returned without the ziladar (Mohammad Ali) and the cart-driver, Khimma. Puttu and Baldu joined them on the way. They proceeded on the way by which the ziladar's cart had left Sahjana by following the cart-tracks, shouting to know where Khimma and the ziladar were. When they reached near the "Bel" in Khandaura, Khimma answered their call and came to them. He informed Punai and others of the occurrence, saying that he had recognized the five accused out of the seven assailants of Mohammad Ali ziladar. Punai told Khimma not to take the name of the accused openly before the dawn of the day as they were desperate and dangerous men. Then they searched for the corpse of Mohammad Ali and found it at some distance from the way and the "Bel." Shortly after that, Piare, chaukidar of Sahjana came there and Likkha informed him of the occurrence naming the assailants who had been recognized (that is the accused). Piare then went to the Pasgawan police station and made the report Ex. 1 there between 6 and 7 a. m. on the 1st June.

The Pasgawan police station is some eight miles from Khandaura. The village Sahjana is within the circle of the police station Pasgawan, but the village Khandaura, where the offence was committed is within the circle of the Mohamdi police station. Kesri, chaukidar of Khandaura, also heard the news of the ziladar's murder and came to the place of occurrence at about 8 a. m. He then proceeded to the Mohamdi police station and made the report Ex. 3 there. Khandaura is some six miles from the Mohamdi police station. The Sub-Inspector of Pasgawan police station proceeded to the place of occurrence and reached there at

about 11 or 12 a. m. When he was preparing the report of inquest the second officer of the Mohamdi police station also reached there. The corpse of Mohammad Ali was sent to Shahjahanpur for post mortem examination and then the second officer of the Mohamdi police station began to investigate the case. He prepared the site plan and examined almost all the witnesses on that very date up to 11 p. m. The station officer of the Mohamdi police station reached the place at 11 p. m. and then he took the investigation in his hands. All the accused except Gajadhar were arrested on 2nd June 1931. Gajadhar accused appeared in Court after the other accused had been sent up for trial.

All the accused persons pleaded not guilty. They denied that they killed Mohammad Ali. Their defence was that Ajudhia Prasad Patwari was on inimical terms with them. They alleged that Ajudhia Prasad, his uncle Ram Adhin and Mohammad Beg, assistant ziladar of Sahjana, had got them falsely implicated in this case instigating the prosecution witnesses to name them as the assailants of Mohammad Ali, deceased.

The accused have produced no evidence in defence. They had summoned 22 witnesses, including six men of Khandaura and two of Harnia, but none of them was examined. There is no evidence on the record to show that Ajudhia Prasad or his uncle have helped the prosecution in any way. There is nothing to show that they have taken any interest in this case on behalf of the prosecution. It may be that Ajudhia Prasad is on inimical terms with the accused, but it is clear that that fact cannot help the defence unless and until it is proved that he or his relations have taken any interest in the matter. The allegation that the prosecution witnesses have named the accused at the instigation of Ajudhia, Ram Adhin, Mohammad Beg or Baijnath, is made without a scrap of evidence to support it.

Now we have to find on the evidence of the prosecution witnesses if the charge is satisfactorily made out against the accused. (Their Lordships then discussed the evidence and proceeded as follows:) The appellants' learned counsel has laid stress on the fact that the names of the accused persons were not mentioned in the first information reports (Exs. 1 and 3). The report Ex. 1 was made by Piare chaukidar and the report Ex. 3 by Kesri chaukidar. It is true that the names of the accused were not mentioned in these reports but having considered the whole evidence on the record and all the facts and circumstances of the case we are of opinion that this omission does not affect the case for the prosecution. The evidence on the record shows that Piare reached the place of occurrence about one hour after Punai, Likha and others reached there. It was Likha who related the story of the occurrence to Piare naming all the five accused who had been recognized by Khimma. Khimma was present there of course, but he was weeping at that time. The evidence given by Likha and Khimma shows that Piare chaukidar had no talk with Khimma before he left the place for the thana, having received information about the occurrence from Likha. Piare (P. W. 15) admits in his examination-in-chief that he had no talk with Khimma and that he had received the information about the occurrence from Likha and others. He admits also that Khimma was weeping and saying that the Mian (Mohammad Ali ziladar) had been killed. Khimma says that he

"was perplexed, confused and weeping and did not know whether Piare chaukidar or any chaukidar came there or not."

Piare admits that he had come to know the names of the accused as the murderers of Mohammad Ali before he had left the place of occurrence for the thana but did not give their names in his report out of fear. He says that he apprehended that the accused would kill him. Piare makes inconsistent statements on some points and we are not altogether satisfied with his evidence, but the fact remains that the evidence on the record shows that he had come to know the names of the accused as the murderers of Mohammad Ali before he had left the place for the thana. If he did not name the accused in his report for some reason or other this omission cannot affect the case for the prosecution when there is convincing evidence on the record to show that some of the accused persons, at least were concerned in the crime. Khimma had already named the accused persons at the first opportunity. Punai had advised him not to give out the names of the assailants recognized by him at that time of

the night as they were desperate and dangerous persons. It is not strange if Khimma was quite upset with grief and fear having witnessed such a brutal murder. We attach no importance to the fact that Khimma himself did not relate the story of the occurrence to Piare chaukidar on that occasion, even granting that he knew that the chaukidar had come there and was going to the thana to make the report. We also attach no importance to the fact that Kesri chaukidar (P. W. 9) had not named the accused in his report (Ex. 3). It is a brief report and is based on the information which Kesri had received (as stated by him) from a certain person whose name was not mentioned in the report. He states in his evidence that Baldeo, brother of Khimma, had come to him at his place at about 8 a. m. and told him that Mohammad Ali ziladar had been killed. He admits that he had made no further inquiries from Baldeo or any other person before he had started for the thana. There is nothing to show that Khimma or any person of Sahjana to whom Khimma had related the story of the occurrence just after the occurrence had said to any chaukidar that the assailants were not or could not be recognized at the time of occurrence. It is in evidence that the names of the persons who had been recognized were known to all the persons who were present there at the time the police officers reached there fore noon on 1st June 1931. Thakur Chet Ram Singh (P. W. 17), second officer of the Mohamdi thana, swears that when he reached the place of occurrence at about noon

"it was generally talked there that the five persons (the accused in this case) were murderers of Mohammad Ali out of seven persons."

We see no reason to reject his evidence on this point. We are satisfied that Khimma had told Punai, Likkha and others on the first occasion the names of the assailants recognized by him. His evidence on this point must be accepted as true. It should be borne in mind that the first information report is not a substantive piece of evidence. It can be used merely by way of corroboration or contradiction and not any further. It is inadmissible for the purpose of proving that the facts stated in it are correct: see *Chittar Singh* v. *Emperor* (1): see also *Sarkarlinga Tevan* v. *Emperor*, *A. I. R.* 1930 *Mad.* 632. It cannot be used to contradict other witnesses who are unanimous on a particular fact. It is not substantive evidence and can only be properly used to corroborate or contradict the maker thereof: see *Dharam Singh* v. *Emperor*, *A. I. R.* 1928 *Lah.* 507. It is never per se the statement of the case for the prosecution and the absence of any accused's name in the first information report is not by itself a sufficient proof of his innocence: see *Ram Kishan* v. *Emperor*, *A. I. R.* 1928 *Lah.* 880.

We have to see now if we should confirm the sentence of death passed on all the five accused persons named above. In our opinion the charge is satisfactorily made out against three persons, namely, Gajadhar, Mula and Munshi, accused. It is satisfactorily proved that they were present near the place of occurrence shortly before the occurrence. They were seen there in very suspicious circumstances. It is also satisfactorily proved that they had actually participated in the commission of the crime. There is reliable circumstantial and also direct evidence against these men.

We are satisfied that they are guilty and have been rightly convicted and punished. As to the remaining two persons, namely, Hargobind and Atma Ram we do not think it safe to find them guilty on the evidence of identification of Khimma alone. Evidence of identity based on personal impression should be approached with considerable caution specially where much depends upon such evidence. We have found that Khimma is an honest witness, but the testimony of sense cannot be implicitly relied upon even when the veracity of the witness is above all suspicion. Chances of error in identification become greatly increased when the identification is based upon a momentary glimpse in the confusion and excitement of the moment at night even though it is a moonlit night. There is no reliable circumstantial evidence against these two men. While we appreciate the care and intelligence with which the learned Additional Sessions Judge has tried this case we consider that in the case of these two men the conviction on the charge of murder should not be upheld. We feel that we shall be on safer ground in acquitting these two men. They may be given the benefit of the doubt.

(1) A. I. R. 1925 All. 30: =85 I. C. 650=26 Cr. L. J. 554=47 All. 280.

It is a case of brutal and cold-blooded murder in which there are no extenuating circumstances.

Hence we dismiss the appeal of Gajadhar, Mula and Munshi, accused, uphold their convictions, confirm their sentences and direct that they be hanged by the neck till they are dead. The sentences of imprisonment will not of course be carried out when the capital sentences are inflicted. We allow the appeal of Hargobind and Atma Ram accused, set aside their convictions and sentences and direct that they be acquitted and released.

R.M./R.K. *Order accordingly.*

* A. I. R. 1932 Oudh 103

SRIVASTAVA, J.

Chandra Nath—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 309 of 1931, Decided on 1st December 1931, against order of Sess. Judge, Rae Bareilli, D/- 18th September 1931.

*** (a) Penal Code (1860), S. 397 — Words "uses any deadly weapon" include case where person only levels revolver against another—Firing is not necessary.**

The words "uses any deadly weapon" are wide enough to include a case in which a person levels his revolver against another person in order to over-awe him. It is not necessary that the person using a revolver must fire it. [P 105 C 1]

*** (b) Penal Code (1860), S. 398 — S. 398 does not apply to case in which robbery has been actually committed.**

Section 398 is applicable only to a case of an attempt to commit robbery and has no application to a case in which the robbery has actually been committed. S. 398 can regulate the punishment only in cases of an attempt to commit robbery as distinguished from a case in which the offender has already accomplished his purpose and robbery has been actually committed.

[P 105 C 2 ; P 106 C 1]

But as in cases where the offender is armed with a deadly weapon the legislature has prescribed the minimum sentence of 7 years for an attempt to commit robbery, it would not be proper exercise of discretion to inflict a lesser punishment if the offender is found guilty of robbery.

[P 106 C 1]

J. N. Misra and *Kanhaiya Lal*—for Appellant.

Ali Muhammad for *G. H. Thomas*—for the Crown.

Judgment. — These are appeals by Chandra Nath and Bansidhar against the order, dated 18th September 1931, of the learned Sessions Judge of Rae Bareilli, convicting Chandra Nath under S. 398 and Bansidhar under S. 397, I. P. C., and sentencing them to seven and ten years rigorous imprisonment respectively.

The case for the prosecution which has been accepted by the learned Sessions Judge is that on 15th July 1931 Suraj Prasad, mail runner, was carrying the mail from Malikamu Chaubara to Gurbux Ganj, when in the dhak jungle, near a culvert on the public road, he saw the two accused standing, one on each side of the road. Bansidhar at the point of a revolver asked Suraj Prasad to give up the mail bag and in the meantime Chandra Nath tripped him from behind. Bansidhar then took up the mail bag and spear from Suraj Prasad and made away with them followed by Chandra Nath. Suraj Prasad chased both the accused shouting that they had robbed him of his mail bag and spear. Two persons Durga Darzi and Bulaki Pasi, on hearing the shouts of Suraj Prasad, joined him in the chase. At a place near the east of village Korihar, Ghani and Sattar, chaukidars, on hearing the alarm came up from the opposite direction and brought the accused to bay. Ghani and Durga caught hold of Bansidhar, while Chandra Nath was secured by Sattar and Bulaki. As Bansidhar had thrown away the mail bag and spear on the way, Suraj Prasad, accompanied by Ghani chaukidar and some of the other pursuers, went out in search of them. They found both these articles lying in the drain of a field at a distance of about half a mile from Korihar. Then they came back to the place where the accused had been left in the custody of Sattar and the other villagers and made a search of the persons of the accused. It may be noted that Bansidhar was wearing a shirt and shorts and Chandranath a red shirt and a dhoti. They recovered a mask from the pocket of Bansidhar's shirt and underneath the shirt they found a dagger attached to a leather strap slung around the accused's shoulder. In the right pocket of the shorts was found a country revolver and in the left pocket a small bundle containing three packets of gunpowder, one packet of crushed chillies and a little tin-box full of shots and percussion caps. They also found another mask in the pocket of Chandrnath's shirt and recovered a dagger which was concealed in the folds of his dhoti under his shirt. The two chaukidars took the accused and the articles recovered from them, including the mail bag and the spear, to the police station at Gur-

bux Ganj. Suraj Prasad lodged the first information report which was recorded at about 6 p. m. It should be mentioned that when the mail bag was recovered from the drain of the field, as stated above, its seals were found broken and the mouth open. The Police Sub-Inspector on making inquiries from the Sub-Postmaster of Gurbux Ganj found that the contents of the bag were intact and nothing was found missing.

The defence of Bansidhar was that he was on his way to Rae Bareilli when he came across Suraj Prasad whom he found opening the mail bag near the culvert. He took Suraj Prasad to task and was therefore chased by him with a spear and got arrested near village Korihar. He alleged that the mail bag and the spear had been thrown somewhere on the way by Suraj Prasad himself. He denied that the mask, dagger and revolver and the ammunition were his or recovered from his person. He did not produce any evidence in his defence.

The other accused Chandranath pleaded that he had gone to village Korihar on the morning of 15th July to demand price of cloth sold by him to Sheo Kumar and Gur Prasad and that he was arrested simply because he told the chaukidars that he knew Bansidhar. He also denied that he had anything to do with the mask and dagger or that they were found on his person. He examined two witnesses in support of his defence.

The learned Sessions Judge, relying on the evidence of P. W. 1, Gajadhar, P. W. 2, Sheo Prasad, P. W. 3, Abdul Qadir, Sub-Inspector, P. W. 5, Suraj Prasad, P. W. 6, Durga, P. W. 7, Bulaki and P. W. 8, Ghani, held that the prosecution story had been amply proved by the evidence of these witnesses. He was convinced that the incriminating articles of which mention has been made above were recovered from the possession of both the accused. He rejected the evidence of the two witnesses produced by Chandra Nath in his defence as unworthy of credit. The conclusion reached by him was that as Bansidhar had levelled his revolver against the mail runner in order to frighten him to deliver up the mail bag he was guilty of an offence under S. 397, I. P. C. As regards Chandranath he held that as this accused kept his dagger concealed and did not make any display of it to overawe the mail runner, his case was covered by S. 398, I. P. C. He accordingly convicted Bansidhar under S. 397 and Chandra Nath under S. 398, I. P. C., and sentenced them as stated above.

The learned counsel for Bansidhar contended in the first place that the case for the prosecution was false and the evidence produced in support of it was unreliable. The main ground urged in support of this contention was that the plan of the locality, Ex. 1, prepared by the Sub-Inspector shows that Durga, P. W. 6, and Bulaki, P. W. 7, joined the chase at spots between the drain where the mail bag and the spear were found lying and the place where the appellants were arrested by Ghani and Sattar, chaukidars, and therefore it was impossible for Durga and Bulaki to have seen Bansidhar running with the mail bag as deposed by them. The learned Sessions Judge was of opinion that the sketch map did not correctly mark the spots at which these witnesses joined the chase and that it could not be relied on as against the sworn testimony of witnesses whom there is no reason to discredit. It might also be observed that the mail bag was recovered after a lapse of some time since its being thrown away by Bansidhar. One cannot therefore be sure that it had not been handled by some unknown person or persons during this interval and was recovered at the very spot at which it had been thrown. Another point sought to be made on behalf of the appellant was that the seals of the mail bag were found broken when it was recovered lying in the drain. It was argued that Bansidhar had no time to break open the seals and that this fact supported Bansidhar's version that Suraj Prasad himself had opened the mail bag. I agree with the learned Sessions Judge that no importance can be attached to this circumstance as we do not know who had access to the bag during the interval when it remained lying in the field.

I have carefully examined the prosecution evidence. The accused have absolutely failed to suggest any motive for the prosecution witnesses to falsely implicate them. Beyond a mere denial the accused have given no explanation of the incriminating articles, the marks, the daggers and revolver found on their person. I have no hesitation in agreeing with the learned Sessions Judge that no

ground has been made out for discrediting the testimony of the prosecution witnesses.

It was also contended that Bansidhar did not use any deadly weapon at the time of committing the robbery and therefore his conviction under S. 397, I. P. C., is not correct. The statement of Suraj Prasad, which I can see no reason to disbelieve, is that the accused Bansidhar demanded the surrender of the mail bag at the point of the revolver. The words used in S. 397 are "uses any deadly weapon." It would be putting a much too narrow interpretation upon these words to say that a person does not use a revolver unless he fires it. I am inclined to say that the words are wide enough to include a case like the present in which a person levels his revolver against another person in order to overawe him. I must therefore reject this contention.

Lastly, I was asked to reduce the sentence of ten years' rigorous imprisonment passed against Bansidhar on the ground of its being excessive. It was pointed out that no hurt was caused to any person and nothing was found missing from the mail bag. In my opinion the accused can hardly claim any credit for the contents of the mail bag not having been tampered with. They only seek to make a virtue of necessity. The case is one of a daring daylight robbery on the highway. The accused were fortunately baulked in their design on account of being pursued by Suraj Prasad who happened to be reinforced by the other persons who joined him in the chase. He was admittedly a teacher in a District Board school and appears to have been the evil genius of the other accused Chandra Nath who is a mere lad of fifteen and is responsible for ruining the life of this youth. I do not think his appeal for reduction of sentence is entitled to any consideration. I accordingly uphold his conviction and sentence.

Next as regards Chandra Nath. It was contended that the chaukidars Ghani and Sattar tied all the incriminating articles said to have been recovered from both the accused in one bundle and that they took the accused to the thana. It was suggested that all the articles were recovered from the possession of Bansidhar and that nothing incriminating was found in the possession of Chandra Nath. I find myself wholly unable to accept this suggestion. The evidence of the prosecution witnesses who were present at the time when the accused were searched is quite clear and definite on this point, and as I have said I can see no reason to discredit this evidence.

Reliance was also placed on the evidence of the two defence witnesses who deposed to the presence of Chandra Nath in village Korihar since the morning of the date of the occurrence. Both of them were unsummoned witnesses and one has only to read their evidence to reject it as untrustworthy. The two persons Sheo Kumar and Gur Prasad to whom Chandra Nath is said to have gone in order to demand price of the cloth have not been examined. I agree with the learned Sessions Judge that no reliance can be placed on the evidence of these witnesses for the defence.

Lastly, it was argued with great force that even if it is held that Chandra Nath was armed with a deadly weapon, his conviction under S. 398 was bad in law and that he could be convicted only under S. 392. It was further urged that as S. 392 does not prescribe any minimum sentence, in view of his youth and the minor part played by him in the commission of the offence he should be dealt with leniently. S. 392, I. P. C., prescribes the punishment in a case of simple robbery and S. 393 prescribes the punishment for a case of attempt to commit robbery. Ss. 397 and 398 deal with the same offences when their commission has been attended with certain aggravating circumstances. In such cases these sections prescribe the minimum punishment which can be imposed on the offender.

Section 398 runs as follows :

"If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less then seven years."

The argument for the appellant is that this section is applicable only to a case of an attempt to commit robbery and has no application to a case like the present in which the robbery has actually been committed. In my opinion the argument is correct. The opening words of S. 392 are "whoever commits robbery." S. 397 opens with the words "if at the time of committing robbery or dacoity." When we compare these words with the opening words of S. 398, there can be no doubt that this section can regulate the punish-

ment only in cases of an attempt to commit robbery as distinguished from a case in which the offender has accomplished his purpose and robbery has actually been committed. This construction no doubt leads to this anomaly that whereas the legislature has prescribed a minimum punishment of seven years in cases of an attempt to commit robbery by an offender who is armed with a deadly weapon, yet there is no such minimum punishment prescribed when the offence has been completed by the same offender. In the latter case where the offender is armed with a deadly weapon but has not used it, he can be dealt with only under S. 392 and it is possible for him to get off with a smaller punishment than if he had stopped short of an attempt to commit the offence. I can only make note of this anomaly. It is for the legislature to remove it. But the fact that such an anamoly arises cannot justify my interpreting S. 398 against the clear language of the section so as to make it applicable to a case in which an offence of robbery or dacoity is an accomplished fact. However I am of opinion that as in cases where the offender is armed with a deadly weapon, the legislature has prescribed the minmum sentence of seven years for an offence of an attempt to commit robbery, it would not be proper to inflict a lesser punishment if the offender is found guilty of robbery. S. 392 provides that in cases of simple robbery the punishment may be for a term which may extend to ten years. It no doubt allows the Court discretion as regards the minimum punishment to be awarded but when the offence is attended with circumstances which would make the attempt to commit it punishable with the minimum sentence of seven years, it would not be a proper exercise of discretion to award a lesser sentence when the offence has been accomplished. As the offences under Ss. 398 and 392 are cognate offences therefore S. 237 read with S. 236, Criminal P.C., justifies the conviction under S. 398 being altered to one under S. 392. I accordingly set aside the conviction under S. 398 and convict Chandra Nath accused under S. 392, I. P. C. and sentence him to seven years' rigorous imprisonment under that section.

The result is that I dismiss the appeal of Bansidhar and uphold his conviction and sentence. In the case of Chandra Nath, his conviction is altered into one under S. 392 and he is sentenced to seven years' rigorous imprisonment under that section.

R.M./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 106

SMITH, J.

Thakur Prasad and *others*—Plaintiffs—Applicants.

v.

Sita Ram and *another*—Defendants—Opposite Parties.

Civil Revn. Appln. No. 19 of 1931, Decided on 14th September 1931, against order of Munsif, Small Cause Court, North Hardoi, D/- 17th November 1930.

Provincial Small Cause Courts Act (1887), S. 25—Action can be taken under S. 25 even if other remedy is open—Civil P. C. (1908), S. 115.

Section 25, Small Cause Courts Act, is of wider scope than S. 115, Civil P. C., and even if another remedy is open to party applying under S. 25 action can be taken under S. 25. [P 107 C 1]

In a suit by *A* against *B* and *C*, owing to *A* paying the process fees late and then too insufficient the summons was issued to only one defendant, who could not be served owing to the process-server falling ill; no summons was sent to the other defendant. When the case came for hearing the Court refused to grant further time and dismissed the suit under O. 9, R. 2, *A* made an application to the High Court under S. 25, Provincial Small Cause Courts Act.

Held: that under the circumstances it was doubtful whether the Court was justified in dismissing the suit as a whole and that having regard to the circumstances it was not a fit case for interference of the High Court under S. 25, Provincial Small Causes Courts Act and exceptional action could not be taken when remedy by way of fresh suit was open: *A. I. R.* 1924 *Rang.* 54; 18 *All.* 163 and *A. I. R.* 1922 *Lah.* 63, *Ref.* [P 107 C 1]

S. D. Misra—for Applicant.

Order.—This is an application under S. 25, Provincial Small Causes Courts Act.

The suit concerned was by one Thakur Prasad against two defendants, Sita Ram and Bharat Prasad. It was based on a promissory note and was instituted on 2nd August 1930. On 18th September 1930 it was dismissed for default, but it was restored on the plaintiff's application on 25th October 1930. The date then fixed for disposal was 17th November 1930, and the plaintiff was directed to pay the necessary process-fees within three days. He did not pay any process fees however until 10th November and even then the fees paid were insufficient, the result being that a summons could only be issued to

one of the two defendants. That summons, owing to the process-server falling ill, was not served so that when the suit came up for hearing on 17th November the situation was that a summons had been sent to one of the defendants but had not been served, while no summons at all had been sent to the other defendant. The plaintiff applied for further time, explaining that his daughter had been ill, and has subsequently died on 30th or 31st October. The Munsif took the view that the plaintiff could have taken steps earlier than he did, and refusing to grant any further time, he dismissed the suit under O. 9, R. 2. The plaintiff Thakur Prasad afterwards made an application to this Court under S. 25, Provincial Small Causes Courts Act. He has since died, and his sons have been substituted as applicants.

There can be no doubt that the plaintiff Thakur Prasad was both late in paying the process-fees, and was to blame for not paying them in full. The Munsif was justified, at least as regards one of the defendants in dismissing the suit under O. 9, R. 2. As regards the other defendant the process-fee was paid though it was paid late, and the summons to that defendant was actually issued, though owing to the process-server falling ill it was not served. In the circumstances it is at least doubtful whether the Munsif was justified in dismissing the suit as a whole. The question remains however, whether I ought to interfere under S. 25, Provincial Small Causes Courts Act, having regard to the fact that there is a remedy still open to the plaintiff's present representatives under O. 9, R. 4, in the shape of a fresh suit.

For the applicants, I am referred to a ruling reported in *Valab Das* v *Maung Ba Than* (1), following *Poona City Muncipality* v. *Ramji* (2) in support of the proposition that S. 25, Provincial Small Causes Courts Act, is of wider scope than S. 115, Civil P. C. I am also referred to rulings reported in *Ghulam* v. *Dwarka* (3), and *Srikrishna Das* v. *Chanduk Chand* (4) and *A. I. R.* 1922 *Lah.* 63. It is contended on the authority of those rulings that even if another remedy is open to the applicants, action can be taken in revision and by analogy under S. 25, Provincial Small Causes Courts Act.

I am willing to hold that it is not beyond my competence to interfere in the present matter under S. 25, Provincial Small Causes Courts Act, but having regard to all the circumstances of the case I do not see fit to do so. The oringinal plaintiff, whether by his fault or his misfortune, failed in the proper prosecution of his suit on two separate occasions, and it does not seem to me that exceptional action ought, in those circumstances, to be taken in the interests of his respresentatives, when there is a remedy open to them in the shape of a fresh suit.

This application is accordingly rejected. No question of costs arises, the opposite parties not having appeared.

R.M./R.K. *Application rejected.*

(1) A. I. R. 1924 Rang. 54=85 I. C.362=26 Cr. L. J. 523.
(2) [1897] 21 Bom. 250.
(3) [1896] 18 All. 163=(1896) A. W. N. 15.
(4) [1909] 32 Mad. 334=4 I. C. 509.

A. I. R. 1932 Oudh 107

RAZA AND SRIVASTAVA, JJ.

L. Raja Ram—Appellant.

v.

Chandi Prasad—Respondent.

Misc. Appeal No. 40 of 1931, Decided on 2nd December 1931, from order of Dist. Judge, Rae-Bareli, D/- 29th August 1931.

Provincial Insolvency Act (1920), S. 9—Application to adjudge person, formerly in service of applicant, insolvent on ground of having embezzled money collected from debtors is not competent.

A applied that *B* who was formerly in his service be adjudged insolvent on the ground that while in service *B* had realized certain debts from *A's* debtors during his illness and had embezzled the amount so realized; *B* was never charged with the offence of embezzlement in proper Court nor was a suit instituted against him to recover the amount in dispute.

Held: that the application did not lie as the amount in question was not "debt" within the meaning of S. 9 and there was no relation of debtor and creditor between the parties.

[P 108 C 1]

P. D. Rastogi—for Appellant.

Ram Prasad Varma and *N. Banerji* —for Respondent.

Judgment.—This is an appeal from on order passed by the learned District Judge, Rae Bareli, in an insolvency case on 29th August 1931. The appellant Raja Ram applied that Chandi Prasad, who was formerly in his service, be adjudged insolvent. Chandi Prasad contested the application alleging that he was never indebted to the appellant. The appellant's case was that Chandi Prasad, who was in

his service, realized certain debts from his debtors during his illness and then embezzled the amount so realized. Chandi Prasad was never charged with the offence of embezzlement by the appellant in the proper Court. The appellant did not even sue him in the civil Court to recover the amount in dispute. The appellant asks the lower Court to take the evidence of embezzlement by Chandi Prasad of sums aggregating Rs 2,495. The learned Judge refused to do so and held that that question could not be gone into in the insolvency proceedings. Under S. 9, Prov. Ins. Act of 1920

"a creditor shall not be entitled to present an insolvency petition against a debtor unless the debt is a liquidated sum payable either immediately or at some certain future time."

In the first place the amount in question is not a "debt" within the meaning of S. 9, Insolvency Act. In the second place there is no relation of debtor and creditor between the parties. Under these circumstances we think the learned District Judge was perfectly right in dismissing the appellant's petition. We can find no ground for interference and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 108

RAZA AND SMITH, JJ.

Mt. Latafatunnisa—Defendant 1—Appellant.

v.

Mt. Shaharbanu Begam and *others* — Plaintiff and Defendants—Respondents.

First Appeal No. 93 of 1930, Decided on 30th September 1931, from decree of Addl. Sub-Judge, Hardoi, D/- 1st September 1930.

(a) Mahomedan Law—Wakf— Delivery of possession — Mere absence of mutation does not show that there was no delivery of possession to muttawali.

Where the deed of wakf contains the clear admission of the wakif that he had put the muttawali in possession of the wakf property from the date of the execution of the deed, the mere fact that mutation was not effected in favour of the muttawali does not by itself establish that he has not got possession of the property as muttawali of the wakf under the deed. [P 110 C 1]

(b) Mahomedan Law - Wakf— Delivery of Possession to muttawali—Views of Abu Usuf and Imam Muhammad stated.

The wakf inter vivos is complete according to Abu Usuf, by a mere declaration of endowment by the owner. But according to Imam Muhammad, a wakf is not complete unless, besides the declaration of wakf, a muttawali is appointed by the owner and possession of the endowed property is delivered to him: (1838) *Fulton* 345; *A. I. R.* 1922 *Cal.* 429; *A. I. R.* 1925 *Rang.* 71; 14 *I. C.* 988; 15 *All.* 321; *A.I.R.* 1921 *All.* 103 and *A. I. R.* 1927 *All.* 255, *Ref.* [P 111 C 2]

(c) Mahomedan Law — Wakf —Condition imposing restraint on remarriage is valid — Contract Act (1872), S. 26.

Restraint on absolute marriage is different from restraint on remarriage. A condition in a wakf that if the widow of a cosharer remarried, she would forfeit her right to the profits under the wakf is valid. [P 112 C 1]

(d) Mahomedan Law—Wakf — Muttawali spending money for repairs — Presumption is that he spent out of profits of wakf property.

In the absence of reliable evidence to show that in making repairs or improvements in the wakf property, the muttawali spent money out of his own pockets, the presumption must be that the repairs or improvements were made by the muttawali out of the profits of the wakf property. [P 112 C 2]

Ali Zaheer and *Naziruddin* — for Appellant.

Ghulam Husan, *M. H. Qidwai* and *Iftikhar Hasain*—for Respondent 1.

Judgment.—This is an appeal from a decree of the learned Additional Subordinate Judge, Hardoi, dated 1st September 1930.

The dispute in this case relates to a wakf created by Hakim Mahomed Ali Khan of Hardoi. He made a wakf of his entire property, valued at Rs. 20,000. (zamindari property, houses etc.), by a registered deed dated 21st December 1917, under the Mussalman Wakf Validating Act 6 of 1913. He died in October 1918, some nine months after the execution of the deed, leaving him surviving his widow Mushtari Khatun (defendant 2), his sons, Mustafa Ali Khan and Mujtaba Ali Khan, and his daughters Sughra Begam (defendant 3) and Shaharbanu Begam (plaintiff). These were his heirs under the Mahomedan law and also beneficiaries under the deed of wakf. Mushtari Khatun was his second wife. Mustafa Ali Khan, Mujtaba Ali Khan, Sughra Begam and Shaharbanu Begam were his children by his first wife, who died long ago. Mujtaba Ali Khan died unmarried in August 1922. Mustafa Ali Khan died childless in November 1924. Mt. Latafatunnisa (defendant 1) survived her husband, Mustafa Ali Khan, but she contracted a second marriage in August 1928. The present suit was brought by Shaharbanu Begam in October 1929, against Mt. Latafatunnisa and Mt. Mushtari Khatun. Mt. Sughra Begam was also impleaded as a defendant.

The plaintiff's case was that the deed of wakf dated 21st December 1917, was duly given effect to and Mustafa Ali Khan remained in possession of the entire wakf property as muttawali, till his death. However, defendants 1 and 2 took possession of the wakf property as muttawalis after the death of Mustafa Ali Khan, though they had no right to assume that position under the deed. They did not carry out the conditions of the wakf and were not fit to manage the wakf property. Defendant 1 has forfeited her rights to the profits by remarriage. Defendants 1 and 2 were not paying to the plaintiff her share of profits and had denied her rights. The plaintiff had therefore to bring the present suit for declaration of her right to and share in the property comprised in the wakf, and also for her share of the profits of the property. She claimed Rs. 1,309 as profits of the share from defendants 1 and 2. She prayed also for a declaration that defendants 1 and 2 were not fit to be muttawalis under the wakf, and should therefore be removed by the Court. She prayed in the alternative, in case the wakf was held to be invalid, for possession of her legal share in the estate under the Mahomedan law, and for mesne profits amounting to Rs. 2,500.

Defendant 1, Mt. Latafatunnisa, is the principal contesting defendant in this suit. She resisted the plaintiff's claim on various grounds. She pleaded that the wakf deed in suit was invalid, as her husband, who was appointed muttawali under the deed, never got possession of the property during the lifetime of the wakf. She admitted her remarriage, but pleaded that it did not deprive her of any rights even under the wakf deed in suit. She alleged further that she was in possession of a seven annas share in the property in suit as the widow of her first husband, Mustafa Ali Khan, in lieu of her dower, and her possession could not be disturbed until the dower debt was paid off. She pleaded also that the plaintiff was liable to pay (in proportion to her share) the amount paid by her (defendant 1) on account of debts of Mustafa Ali Khan, deceased, and the amount spent by Mustafa Ali Khan in the improvement of the house called Mustafa Manzil.

Defendant 2, Mt. Mushtari Khatun, practically admitted the material part of the plaintiff's claim, but denied her liability, alleging that though she and defendant 1 were jointly in possession of the property the entire management was in the hands of defendant 1 alone.

Defendant 3, Mt. Sughra Begam, admitted the plaintiff's claim.

The learned Subordinate Judge framed several issues and found as follows :

(1) Mustafa Ali Khan got possession of the property in suit as muttawali in the lifetime of Hakim Mahomed Ali Khan. (2) The wakf created by Hakim Mahomed Ali Khan is not invalid. It was duly given effect to. (3) Defendant 1 lost her right to the property in suit by remarriage under the terms of the wakf. (4) The condition in the deed which deprives a widow of her right on remarriage is not illegal and against public policy. (5) The shares of the parties in different properties under the terms of the wakf, are given in the finding on issue 5. (6) Defendant 1 is not in possession of the share of her husband in lieu of her dower debt. (7) Mustafa Ali Khan made no improvements in Mustafa Manzil at his expense. (8) Defendant 1 paid no debts of Mustafa Ali Khan deceased. (9) The plaintiff is entitled to a decree for Rs. 1,?09 as profits of her share in the wakf property against defendants 1 and 2. (10) The plaintiff is entitled to a declaration of her share in properties Nos. 1 to 8, 11 and 12 and Muhammad Bagh only, as claimed. She is also entitled to a decree for Rs. 1,?09 on account of the profits of her shares. Defendants 1 and 2 are unfit to be muttawalis under the wakf. Muhammad Naim, husband of the plaintiff, is declared to be a fit person to be muttawali of the wakf.

The claim was accordingly decreed in the following terms :

"The plaintiff's claim is decreed for Rs. 1,?09 for her profits against defendants 1 and 2, with the declaration that she is entitled under the wakf to 7/16ths share in properties Nos. 1 to 7 and to a half-share in properties Nos. 8, 11, 12 and one-third share in Muhammad Bagh property. It is further declared that Muhammad Naim, husband of the plaintiff, is a fit person to be a muttawali while defendants 1 and 2 are unfit to act as such under the wakf. The plaintiff shall get costs of the suit as well from the contesting defendant 1 only."

Mt. Latafatunnisa (defendant 1) has appealed to this Court on various grounds. The appellant's learned counsel has however confined his arguments to the following points :

(1) The wakf deed is invalid as possession of the property was not given by the wakif (Hakim Muhammad Ali Khan) to the muttawali (Mustafa Ali Khan).

(2) Mt. Latafatunnisa, appellant, did not forfeit her rights under the wakf deed by remarriage. If there is any condition in the deed depriving a widow of her right on remarriage it is illegal and against public policy, and should not be enforced.

(3) The plaintiff's husband should not have been appointed muttawali, because the appellant has the right to hold the

property as muttawali under the wakf deed.

(4) The appellant's liability extends to Rs. 978 only instead of Rs. 1,309.

(5) If the wakf fails, the appellant is entitled to retain possession of her husband's share in the property in suit until her dower is paid.

(6) If the wakf fails, the debts contracted by Mustafa Ali Khan which have been paid by the appellant should be allowed to her. These debts amount to Rs. 1,000.

Point No. 1.—Hakim Muhammad Ali Khan had appointed his son Mustafa Ali Khan as the first muttawali under the deed of wakf dated 21st December 1917 (Ex. 1). The learned trial Judge has found that Mustafa Ali Khan had got possession of the property in the lifetime of his father Hakim Muhammad Ali Khan as the first muttawali under the wakf deed.

Under the terms of the deed, the wakif (settlor) (or dedicator) had declared in unequivocal terms that he had relinquished his proprietary interest in the property, had transferred it to the ownership of the Almighty God and had removed his possession and put the entire wakf property in possession of Mustafa Ali Khan as the first muttawali. Thus the deed of wakf contains the clear admission of the wakif that he had put the muttawali in possession of the wakf property from the date of the execution of the deed. Hakim Muhammad Ali Khan (wakif) died only some nine months after the execution of the deed. It is in evidence that he was not in good health at the time he executed the deed and that he remained ill for some four or five months before his death. It is true that mutation was not effected in favour of the muttawali in respect of the zamindari property in suit, but the mere fact that mutation was not effected in his favour does not establish that he had not got possession of the property as muttawali of the wakf under the deed. It is quite possible that Hakim Muhammad Ali Khan, having entrusted the management of the property to his son Mustafa Ali Khan as muttawali, might have been waiting for his recovery, to apply for mutation of names. The plaintiff's witnesses 1 to 4 have given evidence about delivery of possession. Wali Ullah Khan (P.W. 1) is the son-in-law of Hakim Muhammad Ali Khan, being the husband of Sughra Begam (defendant 3). He was also the general agent of Hakim Muhammad Ali Khan. He swears that Hakim Muhammad Ali Khan had delivered possession of the wakf property to Mustafa Ali Khan. The defendant's witnesses 5 to 7 wish it to be believed that possession was not delivered to Mustafa Ali Khan as muttawali under the deed. It is said that Mushtari Khatun (defendant 2) had resented the execution of the wakf deed and had gone on hunger strike until she was assured by her husband Hakim Muhammad Ali Khan that he would not deliver possession of the property to his son and would also get the deed cancelled. This story is surely untrue. Mushtari Khatun was the best witness on this point but she has not been examined. She herself has not said so in her written statement. On the contrary, she has admitted the deed and has also admitted the fact that the wakf has all along been duly given effect to. We have carefully examined the evidence given by all these witnesses. In our opinion it is satisfactorily established that Mustafa Ali Khan really got possession of the wakf property in suit as muttawali under the deed, in the lifetime of Hakim Muhammad Ali Khan. Having regard to all the facts and circumstances of the case, we prefer the evidence given by the plaintiffs' witnesses to that of the defendants' witnesses.

We have already referred to the wakif's own clear admission in the deed of wakf. We find that Mustafa Ali Khan applied for mutation as muttawali under the deed soon after the death of his father Hakim Muhammad Ali Khan. Mustafa Ali Khan was a legal practitioner in the Hardoi District. He applied for mutation, stating that he had got possession of the wakf property as muttawali under the registered deed of wakf dated 21st December 1917: see Exs. 4 to 6 and 8. There is no doubt that he was holding the property as muttawali. He executed two documents, at least, in that capacity. Ex. 2 is a sale deed of certain property and Ex. 3, a lease of certain other property, executed by him in his capacity as muttawali. These documents show that he had been in possession of the property as muttawali under the wakf deed. He never questioned the validity of the wakf; on the contrary, he admitted the wakf and got mutation effected in his favour in respect of the wakf property, stating

that he had been in possession thereof as muttawali under the deed. On his death, his widow, defendant 1 herself, and his stepmother, Mushtari Khatun (defendant 2), also raised no objection to the validity of the wakf. They admitted the wakf and made an application to the District Judge, Hardoi, praying for the appointment of a muttawali in place of Mustafa Ali Khan deceased. It was clearly stated in that application that the wakf property had been under the muttawaliship of Mustafa Ali Khan. This application was dismissed for default: see Exs. 14 and 15. They then applied for mutation in their favour as muttawalis of the wakf property in 1925: see Ex. 7. Their application was granted and mutation was effected in their favour as muttawalis. Defendant 1 and Mushtari Khatun then executed a lease in respect of village Chanda, in 1926, as muttawali of the wakf property. It was clearly stated in the deed that they held the property as 'muttawalis': see Ex.17. The documentary evidence on the record shows clearly that the validity of the wakf was never questioned by defendant 1 or her husband Mustafa Ali Khan, before the institution of the present suit. It shows, on the contrary, that they admitted the validity of the wakf all along and that the wakf was duly given effect to. Mustafa Ali Khan, as well as his widow (defendant 1), and the widow of Hakim Muhammad Ali Khan, have all along admitted the wakf and the fact that the property has been held by the muttawali under the deed of wakf. Defendant 1 cannot get over her own admissions and the admissions of her husband, Mustafa Ali Khan, through or under whom she claims title to the property in suit.

We think the learned trial Judge was perfectly right, in the circumstances of the case, in believing the oral evidence given by the plaintiff's witnesses to the effect that possession was delivered to Mustafa Ali Khan by Hakim Muhammad Ali Khan, and the wakf was duly given effect to. The appellant's contention that the wakf is invalid as possession was not delivered to the muttawali must therefore be overruled.

It has been argued before us, with reference to the following authorities, that under the Sunni law transmutation of possession, or consignment of the property dedicated, to a curator or a muttawali is not necessary for the validation or the completion of the wakf:

(1) Ameer Ali's Muhammadan Law, Vol. 1, pp. 237, 238, 279 and 280, 4th Edn. (1912).

(2) Mulla's Principles of Muhammadan Law, Edn. 9, (1929) pp. 134 and 135.

The wakf "inter vivos" is complete according to Imam Abu Usuf, by a mere declaration of endowment by the owner. This view has been adopted by the High Courts of Calcutta: *Doedem Jan Bibi* v. *Abdulla Barber* (1); *Janjira* v. *Muhammad* (2); Rangoon *Ma E Khin* v. *Maung Sein* (3); and Bombay *Abdul Rajak* v. v. *Jimbabai* (4). According to Imam Muhammad, a wakf is not complete unless, besides the declaration of wakf, a muttawali is appointed by the owner and possession of the endowed property is delivered to him. This view has been adopted by the Allahabad High Court: *Muhammad Azizuddin* v. *The Legal Remembrancer* (5), *Muhammad Unus* v. *Muhammad Ishq Khan* (6) and *Muhammad Shafi* v. *Muhammad Abdul Aziz* (7). Mr. Ameer Ali in his Students' Handbook of Mahomedan Law 1925, which is later than the last published edition of his larger edition of Mahomedan law, expresses the opinion that Imam Muhammad's view has never been acted upon or recognized by the Sunni sect although by a strange chance some of the British Indian Courts in recent years have chosen to adopt it: see p. 152. This opinion of the learned author would require to be given due weight. However, it is not necessary for us to express any definite opinion on the point under consideration as we have found, agreeing with the learned trial Judge, that possession was delivered by the "wakif" to the muttawali under the wakf deed of 1917. The first point is therefore decided against the appellant.

Point No. 2.—Clause 5 of the wakf deed (Ex. 1) deals with the question of the forfeiture of the rights of widows in

(1) [1838] Fulton 345.
(2) A. I. R. 1922 Cal. 429=67 I. C. 77=49 Cal. 477.
(3) A. I. R. 1925 Rang. 71=88 I. C. 167=2 Rang. 495.
(4) [1912] 14 I.C. 988.
(5) [1893] 15 All. 321=(1893) A. W. N. 109.
(6) A. I. R. 1921 All. 103=62 I. C. 896=43 All. 487.
(7) A. I. R. 1927 All. 255=99 I. C. 1052=49 All. 391.

consequence of remarriage. The learned trial Judge has held that under that clause the widow of a sharer was entitled to the profits under the wakf only so long as she did not remarry. We have examined Cl. 5 of the deed carefully. We are not prepared to disagree with the interpretation of the learned trial Judge. In our opinion, the wakif meant that if the widow of a sharer remarried, she would forfeit her right to the profits under the wakf. It has been laid down in Tyabji's Mahomedan law, Edn. 2, pp. 571 and 572 that:

"according to Hanafi law a wakf may be dedicated for the benefit of a person on condition that if the said person marries, the benefit of the wakf property is to be given to another person, The Contract Act, S.26, apparently does not affect this rule of law."

As pointed out by the learned trial Judge, restraint on absolute marriage is different from restraint on remarriage. It was open to defendant 1 to remarry if she liked, but in that case she was only to be deprived of the allowance she would have got if she had not remarried. The wakif intended to provide for those widows only who did not remarry and had to be maintained out of his estate. The condition in question does not appear to be illegal or improper. We hold therefore agreeing with the learned trial Judge, that Latafatunnisa (defendant 1), forfeited her rights under the wakf deed by remarriage and that the condition in question is not open to any objection.

Point No. 3. — In arguing the third point the appellant's learned counsel has contended that Mushtari Khatun (defendant 2) is more closely related to the wakif than the plaintiff's husband, and she has therefore preference as against him and should not be removed from the muttawaliship. He has thus taken objection to the appointment of the plaintiff's husband as muttawali of the wakf property. We think the learned trial Judge has not really appointed Muhammad Naim, husband of the plaintiff, muttawali of the wakf property. He has simply declared that Muhammad Naim, husband of the plaintiff, is the fit person to be muttawali, while defendants 1 and 2 are unfit to act as such under the wakf. Cl. 1 of the wakf deed relates to appointment of muttawalis. We agree with the learned trial Judge that the wakif meant that the muttawali should be a male and not a female. It is also noticeable that Mt. Mushtari Khatun has submitted to the decision of the trial Court and has filed no appeal. We agree with the learned trial Judge that defendants 1 and 2 are unfit to be muttawalis under the wakf. Defendant 1 has remarried and thus severed her connexion with the wakif's family. Defendant 2 has not, admittedly, managed the property as she ought to have done after she had obtained mutation in her favour.

The declaration made by the learned trial Judge in this connexion is not therefore open to any objection.

Point No. 4.—This point also must be decided against the appellant. We have examined the accounts which were referred to in the course of arguments. We are not satisfied that the learned trial Judge was wrong in fixing the amount due to the plaintiff at Rs. 1,309. There is no reliable evidence to show that Mustafa Ali Khan or defendant 1 really spent money out of their own pockets in making repairs or improvements in Mustafa Manzil, and if they did so what was the amount thus spent by them. The presumption must be that the improvements or repairs were made by the muttawalis out of the profits of the wakf property. It is also not satisfactorily proved that Mustafa Ali Khan had contracted debts in managing the property as muttawali. The plaintiff or other beneficiaries cannot be held liable for the personal debts of Mustafa Ali Khan, deceased, or any other person who managed the property after his death. Those debts cannot be paid out of the wakf property. We are not therefore prepared to disagree with the finding of the learned trial Judge on this point also.

Points Nos. 5 and 6.—These questions need not be discussed now as the wakf has been upheld and has not been held to be invalid.

The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal with costs.

K.N./R.K. ***Appeal dismissed.***

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* A. I. R. 1932 Oudh 113

RAZA, J.

Pitam and *others* — Accused — Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 102 of 1931, Decided on 19th December 1931, against order of Sess. Judge, Hardoi, D/- 27th June 1931.

*** (a) Criminal P. C. (1898), S. 342—Non-compliance of S. 342—Absence of prejudice—High Court will not interfere in revision unless accused is prejudiced—Criminal P. C. (1898), S. 439—Exercise of discretion.**

The High Court does not interfere with an error or omission or irregularity unless the same has caused a failure of justice ; and as regards questions of fact, though the Court's jurisdiction to interfere in respect of the correctness of the findings of fact, even when findings are concurrent, is unquestionable, it will not as a rule go into the evidence save in exceptional cases as where the judgment of the facts is manifestly wrong and grossly and palpably unjust ; otherwise, though there is no right of appeal, an appeal might in effect be admitted in every case in the guise of an application for revision : *A. I. R.* 1928 *Lah.* 230, *Appr.* [P 114 C 1]

The omission to make the further examination of the accused after the evidence of the last witness for the prosecution as is required by S. 342, Criminal P. C., held not to cause such a failure of justice : *A. I. R.* 1923 *All.* 81 and *A. I. R.* 1925 *Oudh* 422, *Appr.* [P 113 C 2]

(b) Criminal Trial—Revision—Application for withdrawal of case by complainant is inadmissible in revision against conviction under S. 379, I. P. C.

The complainant filed an application to the High Court while dealing with a case under S. 379, I. P. C., in revision by the accused, that the complaint was false and groundless and that it was filed under the influence of others ending with a prayer that the case be withdrawn.

Held : that there was no provision in the Criminal Procedure Code, for such an application and that it could not help the accused in revision. [P 114 C 1]

K. N. Tandon—for Applicants.

Order.—This is an application in criminal revision under S. 435, Criminal P. C. The applicants were convicted by the Tahsildar of Bilgram under S. 379, I. P. C., on 27th April 1931 and sentenced to a fine of Rs. 40 each (or in default, one month's rigorous imprisonment each.) Their appeal was dismissed by the District Magistrate, Hardoi, on 21st May 1931. Their application for revision was dismissed by the Sessions Judge of Hardoi on 27th June 1931. Their present application for revision was filed in this Court on 25th August 1931. I have examined the record. In my opinion there is no substance in this revision. I refuse to consider questions of fact in disposing of this revision. I am satisfied on reading the careful and detailed judgment of the Tahsildar Magistrate that the charge is satisfactorily made out against the applicants and they have been rightly convicted and punished. The applicants' learned counsel has contended that the omission to make the further examination of the accused after the evidence of Kuar, the last witness for the prosecution, had been recorded by the Magistrate on 8th April 1931, vitiates the trial under S. 342, Criminal P. C. It appears that there is some conflict of decisions on this point, but I am not prepared to interfere in revision when I find that the applicants have not been prejudiced by the omission in question.

In the case of *Emperor* v. *Bechu Chaube* (1), after the statements of the accused had been recorded a witness for the prosecution was examined. The witness however did not add materially to the evidence which had been already given for the prosecution and which the accused had had an opportunity of explaining. It was held that, although the examination of the witness out of order was an error, it did not in the circumstances vitiate the proceedings. In the case of a revision the Court of revision is not bound to interfere specially when no prejudice is caused to the accused : see *Emperor* v. *Gian Singh*, *A. I. R.* 1928 *Lah.* 230. It was held by the late Court of the Judicial Commissioner of Oudh in the case of *Emperor* v. *Brij Behari* (2), that under S. 342, Criminal P. C., a further examination of the accused is not absolutely necessary after the charge has been framed and after the prosecution witnesses have been recalled and cross-examined. The omission to make this further examination vitiates the trial only if the accused has been prejudiced thereby. If the said cross-examination of the prosecution witnesses is found to have added nothing to the allegations against the accused already on the record on which it was necessary to fur-

(1) A. I. R. 1923 All. 81=71 I. C. 115=24 Cr. L. J. 67=45 All. 124.
(2) A. I. R. 1925 Oudh 422=89 I. C. 245=26 Cr. L. J. 1301.

ther examine him, the said omission does not vitiate the trial.

In regard to the grounds of law it is to be remembered that the High Court does not interfere with an error or omission or irregularity unless the same has caused a failure of justice, and as regards questions of fact, though the Court's jurisdiction to interfere in respect of the correctness of the finding of fact, even when findings are concurrent, is unquestionable, it will not as a rule go into the evidence save in exceptional cases as where the judgment of the facts is manifestly wrong and grossly and palpably unjust ; otherwise, though there is no right of appeal, an appeal might in effect be admitted in every case in the guise of an application for revision.

This revision must therefore fail.

It should be noted that Gaya Din, complainant, has filed an application in this Court stating that the complaint which he had filed in the Tahsildar's Court was false and groundless and that he had done so at the instigation and under the influence of Banarsi Das and Prag Das of Bilgram. He prays that the case may be withdrawn and consigned to the records. This is an extraoridinary application which has been introduced into the matter before the Court. However this application cannot anyhow help the applicants in this Court in revision. I am afraid Gaya Din has made this application at the instigation of certain interested persons. Be it as it may. I need not and should not express any opinion on this point definitely in disposing of the case before me. I refuse to take any action on this application. It is difficult to understand under what section of the Criminal Procedure Code has this application been made to this Court. The application must therefore be rejected.

I can find no ground for interference in revision and dismiss the application.

W.D./R.K. *Revision rejected.*

A. I. R. 1932 Oudh 114

SRIVASTAVA, J.

Ramanand and *others*—Applicants.

v.

Emperor — Opposite Party.

Criminal Revn. No. 129 of 1931, Decided on 17th December 1931, against order of Dist. Magistrate, Partabgarh, D/- 28th September 1931.

Criminal P. C. (1898), S. 436—Accused discharged by trying Magistrate—Two views of case possible—Magistrate's order not perverse—Court of revision should not interfere.

Where an accused person has been discharged by the trying Magistrate and where two views are possible regarding the guilt of the accused, but where the decision of the Magistrate is not perverse or prima facie incorrect, the Court of revision should not interfere with the order of discharge: 59 *I. C.* 193; 9 *All.* 52; *A. I. R.* 1927 *All.* 804; 10 *P. R.* 1911; 57 *I. C.* 91 and *A.I.R.* 1924 *Oudh* 368, *Rel. on.* [P 115 C 1, 2]

Radha Krishna—for Applicants.

H. K. Ghose, Asst. Govt. Advocate—for the Crown.

Judgment.—Nine persons were prosecuted for an offence of rioting under S. 147, I. P. C.

The trying Magistrate was of opinion that all that the prosecution evidence had been able to make out was a case under S. 323, I. P. C. against two of the accused. He accordingly proceeded against them under that section and ordered the discharge of the remaining seven accused under S. 253, Criminal P. C.

The District Magistrate issued notice to the seven accused just mentioned why the order of discharge passed by the Magistrate in their favour should not be set aside and ultimately in the exercise of his powers under S. 436, Criminal P. C., directed a fresh inquiry in the case.

This is an application for revision against the order of the learned District Magistrate. The trying Magistrate had reviewed the entire evidence for the prosecution and in view of some defects in that evidence pointed out by him, came to the conclusion that the prosecution had failed to establish a case under S. 147, I. P. C. The learned District Magistrate has criticized the grounds relied on by the trying Magistrate for discrediting the prosecution evidence. It is not that the grounds relied on by the learned trying Magistrate as the basis of his criticizm have no existence but the learned District Magistrate is of opinion that they are not of much consequence. It is not suggested that the trying Magistrate had overlooked or ignored any evidence. The most that can be said is that two views were possible in respect of the evidence led for the prosecution. The trying Magistrate laid emphasis on certain discrepancies and other defects in that evidence while the learned District Magistrate thinks that the discrepancies are capable of some explanation and that the

defects are of small moment. It is not possible to say that the view taken by the learned trying Magistrate was palpably unreasonable or by any means perverse. The question therefore arises whether under the circumstances the learned District Magistrate was justified in setting aside the order of discharge, under S. 436, Criminal P. C. The principle which should govern the exercise of powers of revision under that section have been the subject of consideration in a number of decided cases.

In *Queen-Empress* v. *Chotu* (1) the Full Bench of the Allahabad High Court held that in exercising the powers conferred by S. 437 (corresponding with the present S. 436), Sessions Judges and Magistrates should, in the first place, always allow the person who has been discharged an opportunity of showing cause why there should not be further inquiry before an order to that effect is made, and next they should use them sparingly and with great circumspection, especially in cases where the questions involved are mere matters of fact. In *Bindeshri Dube* v. *Emperor* (2) it was held that where an accused person has been discharged if the circumstances and the evidence are such that two different Courts might take two different views of the evidence and the order of discharge is one which cannot be said to be either perverse or prima facie incorrect and there is no suggestion that any further evidence is forthcoming, no further inquiry should be directed under S. 437, Criminal P. C. The two cases just stated were followed in a recent case in *Emperor* v. *Alam* (3). A similar view was taken by a Full Bench of the Punjab Chief Court in *Emperor* v. *Kiru* (4) and by the Punjab High Court in *Kishan Chand* v. *Emperor* (5). The Hon'ble Chief Judge of this Court sitting as a Judge of the late Court of the Judicial Commissioner of Oudh in *Emperor* v. *Jagdamba Singh* (6) following the abovementioned Punjab cases held that the principle upon which the Court of revision should invariably act in such cases is that further inquiry after discharge was improper unless the order of discharge was manifestly perverse or foolish or was based on a record of evidence which was obviously incomplete. None of these grounds exist in the present case. The fact that the learned District Magistrate was inclined to take a different view of the evidence from that of the trying Magistrate cannot therefore be regarded as a sufficient ground justifying his interference with the order of discharge.

I accordingly allow the application and set aside the order of the District Magistrate.

B.V./R.K. *Application allowed.*

(1) [1886] 9 All. 52=(1886) A.W.N. 281 (F.B.).
(2) [1920] 59 I.C. 193.
(3) A. I. R. 1927 All. 804=102 I. C. 777=28 Cr. L. J. 601=49 All. 879.
(4) [1911] 10 P. R. 1911=12 Cr. L. J. 364=11 I.C. 132.
(5) [1920] 21 Cr. L. J. 571=57 I.C. 91.
(6) A. I. R. 1924 Oudh 368=81 I. C. 802=25 Cr. L. J. 1026.

A. I. R. 1932 Oudh 115

RAZA AND KISCH, JJ.

Emperor

v.

Ram Sahai—Opposite Party.

Criminal Appeal No. 362 of 1931, Decided on 12th January 1932.

(a) Criminal P. C. (1898), S. 164—Confession properly recorded is admissible even if retracted.

In a case under S. 302, Penal Code, before recording the confession, the recording Magistrate took every precaution to protect the accused's interests ; this confession was corroborated by the production of a blood-stained rope by the accused from its place of concealment in the deceased man's house. However the accused retracted the confession before the committing Magistrate.

Held : that the confession was voluntary and true and can be acted upon : *A. I. R.* 1927 *Oudh* 17 and *A. I. R.* 1929 *Oudh* 167, *Foll.* [P 118 C 2]

(b) Penal Code (1860), S. 302—Extenuating circumstances illustrated—Accused sentenced to transportation for life.

On the afternoon before the murder, the sister of the accused who was also the mistress of the deceased, had taken refuge with the accused fearing that the deceased would cut off her nose ; the accused was besides not the leader of the party which went to murder, and where the accused was instigated by others while he was naturally angry.

Held : that the lesser penalty of transportation for life was sufficient. [P 118 C 2]

H. K. Ghose—for the Crown.

Moti Lal Saksena—for Opposite Party.

Judgment.—On 7th May 1931 the dead and considerably decomposed body of Ram Asrey Lodh of village Kotwa was found lying in a kothri of his house covered up with two mats, and it appeared that the death of Ram Asrey had taken place two or three days previously. A report wss immediately made at the

police station by the village chaukidar at the instance of Ram Asrey's mother who was the first to discover the dead body. In the course of the investigation Ram Sahai Lodh of the same village made a statement and his confession was recorded by a First Class Magistrate on 11th May 1931. In this confession he stated that three other persons and himself had murdered Ram Asrey by strangling him with a rope. All four persons were accordingly placed on their trial for an offence under S. 302, I. P. C.

The material evidence produced by the prosecution consisted of the confession of Ram Sahai which he subsequently retracted in the Court of the committing Magistrate; the evidence that a rope stained with blood, with which he alleged the murder had been committed, was made over to the police by Ram Sahai from inside a heap of arhar sticks in the deceased man's house, and the evidence of Mt. Bhagwanti, the kept mistress of the deceased and the sister of Ram Sahai, in the committing Magistrate's Court, corroborating the confession of Ram Sahai in many particulars with regard to the incidents immediately before and after the murder, and in the course of which she stated that she had seen all four accused persons leaving Ram Asrey's house and one of them, Man Lodh, had told her that they had killed Ram Asrey. Mt. Bhagwanti resiled from this statement in the Court of the Sessions Judge and made a totally different statement which did not support the prosecution in any manner.

The learned Sessions Judge acquitted all of the accused including Ram Sahai the accused who made a confession. The Local Government has appealed against the acquittal of Ram Sahai.

We are not concerned in this appeal with the cases of the other three accused, but it may be observed that there can be no doubt that the learned Sessions Judge was right in acquitting them as the only evidence against these persons, besides the retracted confession of their co-accused Ram Sahai, was the statement of Mt. Bhagwanti before the committing Magistrate which in the peculiar circumstances of the case stood on a footing very little higher than that of Ram Sahai himself.

The case of Ram Sahai however stood on a very different footing in view of his confession of participation in the murder and of the recovery of the blood-stained rope from its place of concealment at his indication. We have to see whether the Court below was justified in acquitting this accused in the face of this evidence.

A number of decisions of this Court have laid down the principles on which a case of this nature should be approached. In *Raj Bahadur Singh* v. *Emperor* (1) it was held that where a Magistrate, before recording the confession of an accused, takes every precaution to protect his interests namely gives him an hour and a half to think over what he was going to do, warns him against the risk that he was going to incur in making a confession and obtains from him a clear statement that he had not been put in fear or received any inducement, and then the accused makes a deliberate confession of the crime, the confession, though subsequently retracted is, in the absence of proof that it was forced out of the accused by torture or of a satisfactory explanation as to how he came to make it if he was not guilty, admissible in evidence. In *Sheo Ratan* v. *Emperor* (2) it was laid down that the retracted confession of an accused person, if true, is sufficient for the conviction of the accused, even if there is no corroborative evidence, and when in a murder case the confession made by an accused is not one of those which can be considered to have been tutored or made under the influence of drugs or fear and is a confession which adds to the knowledge which is available as to the cause of death in many particulars and has not been contradicted by anything which is shown in the evidence, the Court is justified in convicting the accused on the basis of his own confession alone.

Both these are decisions of a Bench of this Court of which one of us was a member. It does not seem to us that in rejecting the confession of Ram Sahai as evidence of his guilt the learned Sessions Judge has paid sufficient attention to these principles. To our minds there is nothing in this case to raise a reasonable suspicion that Ram Sahai's confession is other than a voluntary one or a true one. The internal evidence of the confession

(1) A. I. R. 1927 Oudh 17 = 98 I. C. 106 = 27 Cr. L. J. 1258.
(2) A. I. R. 1929 Oudh 167=114 I. C. 771 = 30 Cr. L. J. 360.

itself gives rise to no such suspicion. The confession added greatly to the knowledge which was then available as to the cause of Ram Asrey's death. In fact prior to Ram Sahai's statement to the police the whole circumstances surrounding Ram Asrey's death remained in the region of conjecture. Owing to the advanced stage of decomposition of the body when it was found, nothing could be ascertained by the post-mortem examination as to the cause of death, and Mt. Bhagwanti did not make a statement to the police until after Ram Sahai had made his statement to them. From the confession it became known that the death was caused by strangulation and the rope with which the deceased was strangled was produced by Ram Sahai. Before Ram Sahai's statement to the police they had no knowledge as to who had been concerned in the murder. Before recording the confession the learned Magistrate, who recorded it, took every precaution to protect the accused's interests. He gave him two or three hours to think over what he was going to do, pointed out that no policeman was present, warned him against the risk that he was going to incur in making the confession and obtained from him a clear statement that he had not been put into fear or received any inducement.

It was after all this that he recorded the confession and he has deposed in Court on oath that he believed that the confession was voluntarily made. The medical evidence is not inconsistent with the confession. It was supported by the statement of Mt. Bhagwanti before the committing Magistrate, and it has not been contradicted by anything in the evidence other than the attempt on the part of this witness, Ram Sahai's own sister, to displace this damaging evidence against her brother by her statement in the Sessions Court. In retracting his confession in the Court of the committing Magistrate Ram Sahai alleged that he made it because he had been beaten. Such a question was not even put to the investigating Sub-Inspector or the Circle Inspector, who were associated in the investigation, when they were in the witness box, and there is not a shadow of evidence to support it. In the Sessions Court Ram Sahai attempted for the first time to explain away the production of the rope by alleging that the Circle Inspector and the Sub-Inspector led him by the ears to the house of Ram Asrey deceased where a constable produced the rope from a drain near a heap of arhar stalks and placed it in his hands. The production of the rope by Ram Sahai from inside the heap of arhar stalks is deposed to by an independent witness Gur Din and the Court below has rightly rejected Ram Sahai's attempt to explain this way.

The learned Sessions Judge has stated in his judgment that the production of the rope by Ram Sahai only shows that he was aware of the place where the rope was kept with which, it might be assumed, the murder was committed. He however held that the voluntary nature of the confession was not free from doubt and therefore the evidence of the production of the rope was not sufficient evidence to convict him of participation in the crime. To our minds it is clear that the reasons for which the learned Sessions Judge has come to the conclusion that the voluntary nature of the confession is not free from doubt will not bear examination. In the first place he has stated that the very murder of Ram Asrey is denied. We have been taken through the whole record and we cannot find anything to support this assertion. Not one of the four accused suggested that Ram Asrey had come by a natural death. There is evidence that he was seen alive the afternoon before his disappearance and that he had an altercation with Mt. Bhagwanti on that day, and there was nothing in the medical evidence to suggest death from natural causes. Secondly the learned Sessions Judge regarded with suspicion the fact that Ram Sahai made his statement to the police when previously there was no evidence against him.

We are unable to see anything suspicious in the circumstances, in which Ram Sahai made his statement to the police. He was the brother of the deceased's mistress and a resident of the village and would naturally be closely questioned by the investigating police officer. Thirdly, he appears to have accepted Ram Sahai's statement that his confession was made by the exercise of threats although as we have already pointed out there is nothing whatever in the record to substantiate this. Fourthly, he is not prepared to believe that Mt. Bhagwanti's own brother Ram Sahai would be prepared to murder

the man who had befriended his sister. In this he overlooks the statement in the confession and Mt. Bhagwanti's evidence that on the day before the disappearance of Ram Asrey, the latter in the course of an altercation with Mt. Bhagwanti, who herself appears to be a woman of loose character, who wanted to cut off her nose and she had fled from the house and had taken refuge with her brother Ram Sahai. He has also overlooked the still more important evidence in the same statements that Ram Asrey was carrying on an intrigue with the wife of Man Lodh who was a co-accused in the case and that it was the latter who is alleged to have been the prime mover in the murder. He has allowed himself to be unduly impressed by the fact that no reason has been suggested by the prosecution why the two other persons, Dargahi and Sanwale, named by Ram Sahai as having joined Man Lodh and himself in the murder, should have wanted to get rid of Ram Asrey; but it is not obligatory on the prosecution to prove motive, and even if the absence of motive on the part of Dargahi and Sanwale were considered to make their part in the murder doubtful, it does not materially affect the self-inculpatory portion of the confession.

Lastly he remarks that Ram Sahai assigns to himself a very minor part, namely the holding of the legs of Ram Asrey while Dargahi sat on his chest and Man and Sanwale strangled him with the rope. Such considerations appear to us wholly insufficient, either individually or in their cumulative effect, to throw any doubt either on the voluntary nature or the truth of Ram Sahai's confession as far as his own part in the murder is concerned. The confession which satisfies all the tests laid down in the earlier portion of this judgment is strongly corroborated by the production of a blood-stained rope by Ram Sahai from its place of concealment in the deceased man's house.

In our opinion the prosecution, after the Chemical Examiner had reported that stains on the rope were stains of blood, should have required the stains to be examined by the Government Serologist in order to ascertain whether the blood was human blood. They did not do this, but in the face of the confession it may safely be presumed that the stains were of human blood. The confession is further corroborated by the statement of Mt. Bhagwanti before the committing Magistrate, and in the circumstances of the case we do not think the learned Sessions Judge was justified in accepting her statement made before him and rejecting her former statement. Even leaving Mt. Bhagwanti's evidence out of question, in our opinion the confession of Ram Sahai as far his own guilt was concerned was a voluntary and true confession and as such the Court ought to have acted upon it. We are satisfied that Ram Sahai took part in the murder.

We accordingly accept the appeal, set aside the order of acquittal passed by the Court below and convict Ram Sahai accused of an offence under S. 302, I. P. C.

We do not consider that this is a case in which the extreme penalty should be inflicted. On the afternoon before the murder Mt. Bhagwanti had taken refuge with her brother, Ram Sahai, fearing that the deceased would cut off her nose and we must accept the statement in the confession that Man Lodh, who had the greater grievance against Ram Asrey for carrying on an intrigue with his wife, thought the moment suitable to take revenge; that he profited by the anger of Ram Sahai against Ram Asrey to take Ram Sahai with him and that Man took the leading part in the murder. In these circumstances we consider that the lesser penalty will meet the ends of justice and sentence Ram Sahai accused to transportation for life.

W.D./R.K. *Appeal allowed.*

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* A. I. R. 1932 Oudh 118

RAZA J.

B. Bishunath Singh—Applicant.

v.

Khurshed Ahmed and *others*—Opposite Parties.

Criminal Revn. No. 116 of 1931, Decided on 22nd December 1931, against order of Sess. Judge, Fyzabad, D/- 17th September 1931.

*** Criminal P. C. (1898), Ss. 133 and 139-A —Bona fide claim in respect of denial of public right of way — Documentary and oral evidence in support—Magistrate should not decide intricate questions of title.**

Where the denial of the existence of the public right in respect of a way is supported by "reliable evidence" of the revenue records and oral testimony of some 15 witnesses, the Magistrate should not proceed to decide intricate questions of title and easement, but should refer the complainant to the civil Court. [P 120 C 1]

Bishambhar Nath and *Ali Raza*—for Applicant.

Haidar Husein—for Opposite Parties.

Order.—This is an application in revision from an order of the Sessions Judge, Fyzabad, upholding an order passed by Mr. Dwarka Prasad Singh, First Class Magistrate, District Sultanpur, in a case under Ch. 10 (Ss. 133-143), Criminal P. C.

The dispute in this case relates to a public right in respect of a way, the existence of which is denied by the opposite party. I have read the orders of the lower Courts.

While I appreciate the care and intelligence with which the learned Magistrate has tried this case, I am not prepared to uphold his order, in view of the provisions of S. 139-A, Criminal P. C. In my opinion the learned Magistrate should have stayed proceedings until the matter of the existence of the right in question had been decided by a competent civil Court. S. 139-A was added by S. 26, Criminal P. C., Amendment Act of 1923, in view of the following observations made by their Lordships of the Calcutta High Court in the case of *Manipur Dey* v. *Bidhu Bhushan Sarkar* (1) at p. 162:

"From this latter provision it is clear that the provisions of S. 133, Criminal P. C., should be sparingly used. Any order passed under this section cannot be questioned in any civil Court. It is therefore necessary that if the party, against whom the order is contemplated to be passed, raises a question that the pathway is not a public property in the provisions of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land or if it is for public use; but he should, even when the claim of the objector is not substantiated, find whether the claim is bona fide or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim, which is set up, is a mere pretence he should then proceed to pass a final order and make the Rule issued by him absolute. If however he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised bona fide, he should stay his hand and refer the party to the civil Court. And if the party, within a reasonable time, does not have recourse to the civil Court, the Magistrate may then proceed to make the Rule absolute."

The following observations were made by Sulaiman, J., in the case of *Munna Lal* v. *Emperor* (2) at p. 363 (*of* 24 *A. L. J.*):

"That section (S. 139-A) provides that when an order is made under S. 133, Criminal P. C., the Magistrate shall, on the appearance before him of the person against whom the order is made, question him as to whether he denies the existence of any public right, etc. Then sub-Cl. 2 provides that if in such inquiry the Magistrate finds that there is any reliable evidence in support of the denial, he shall stay proceedings until the matter of existence of such right has been decided by a competent civil Court; but if he finds that there is no such evidence he shall proceed as laid down in S. 137 or S. 138. This section is imperative. It does not authorize a Magistrate to look into the question of title and decide for himself whether the accused's case is or is not true. All that the Magistrate is to see is whether there is any reliable evidence in support of such denial. If there is some reliable evidence in support of the denial then the proceedings under the Code have to be stayed."

The question was considered by their Lordships of the Patna High Court in *Thakar Sao* v. *Abdul Aziz* (3). It was held:

" that the procedure laid down in S. 139-A, Criminal P. C., 1898, requires first that the party against whom a provisional order has been made shall appear before the Magistrate and deny the existence of the public right in question, and secondly, that he shall produce some reliable evidence, and thirdly that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied then the Magistrate's jurisdiction to continue the proceedings ceases. He has no jurisdiction to weigh the evidence and decide on which side the balance leans. S. 139-A (2) requires only evidence and not proof, and the only condition requisite to enable the Magistrate to stay the proceedings is that upon the materials before him he shall have no reason to think the evidence false."

In *Nur Ali Shah* v. *Natha* (4) it was held that:

" where in proceedings for removal of obstruction of a public way under S. 133, Criminal P. C., the party obstructing the way denies the existence of any public right in respect of the way and is supported by the revenue records in his denial, the Magistrate is bound to state the proceedings under S. 139-A, Criminal P. C. till the matter is decided by a competent civil Court."

In *Hari Kishan* v. *Kanshi Ram*, *A. I. R.* 1928 *Lah.* 664, it was held that:

" where a right of public way is denied and the person denying as well as the person complaining produces evidence the Magistrate should take the evidence as it stands and see whether, on the face of it, if there was no evidence to the contrary, he could come to the conclusion that the evidence was false and was therefore unreliable. It is not a correct procedure that he should weigh the evidence produced by both sides and then

(1) [1915] 42 Cal. 158=15 Cr. L. J. 698=26 I. C. 146.

(2) A. I. R. 1926 All. 390=93 I. C. 697=27 Cr. L. J. 473.

(3) A. I. R. 1926 Pat. 170=91 I. C. 41=27 Cr. L. J. 9.

(4) A. I. R. 1927 Lah. 745=100 I. C. 119=28 Cr. L. J. 247.

come to the conclusion which he believes or which he prefers."

It was held recently in the case of *Satish Chandra Sen* v. *Krishna Kumar*, *A. I. R.* 1931 *Cal.* 2, that:

" the Record of Rights is a very valuable piece of evidence which raises the presumption of correctness of the entries therein; and if it happens to be in favour of a second party the Magistrate is perfectly justified in considering it as "reliable evidence" in support of the denial. The object with which this S. 139-A is enacted is to prevent the Magistrate in inquiring into the matters under Ch. 10 arrogating to himself the functions of a civil Court and instituting an elaborate inquiry with regard to the rights of the parties; and all that the Magistrate has to do is to inquire into the matter of the existence of a public right and if it appears that there is reliable evidence in support of the denial by the second party, he shall stay proceedings. He has no option in the matter and he is not bound to wait till he has examined all the witnesses produced by the parties unless for the purpose of the inquiry."

The defendant in this case has produced copies of the old and the recent settlement maps and also the current village papers. The way in dispute has not been shown in these papers. His denial of the existence of any public right in respect of the way is supported by revenue records. He has also produced some 15 witnesses in support of his defence. The learned trying Magistrate was not satisfied with all this evidence produced by the defendant. He preferred the oral evidence produced by the applicants to the oral and documentary evidence produced by the defendant. In my opinion he should not have weighed the evidence produced by both parties in the way in which he has done in this case. The evidence which the defendant has produced in support of his denial appears to me to be "reliable evidence."

The learned Magistrate should have referred the party to the civil Court as required by S. 139-A (2), Criminal P. C. In my opinion it is impossible to say in the present case that there was no bona fide claim put forward by the defendant or that there was no reliable evidence in support of his denial. The learned Magistrate should not have proceeded to decide intricate questions of title and easement and ought to have left the matter to be decided by the civil Court.

I am therefore of opinion that the proceedings in this case should be stayed until the matter of existence of the right in question has been decided by a competent civil Court. The order of the learned Magistrate is set aside and he is directed to proceed according to law. The proceedings in this case should be stayed until the matter of the existence of the right in question has been decided by a competent civil Court.

W.D./R.K. *Revision allowed.*

A. I. R. 1932 Oudh 120

RAZA, J.

Sohan Lal—Accused—Applicant.

v.

District Board, Lucknow — Complainant—Opposite Party.

Criminal Ref. No. 59 of 1931, Decided on 22nd December 1931, reference made by Sess. Judge, Lucknow.

Criminal P. C. (1898), Ss. 133 and 139-A —Questions of title — Magistrate should not decide himself.

If in proceedings under S. 133, questions of title arise and there is reliable evidence in support the Magistrate should stay proceedings until the title is decided upon by a competent civil Court.

[P 121 C 1]

D. P. Khare—for Applicant.

J. N. Misra—for Opposite Party.

Order.—This is a reference under S. 438, Criminal P. C.

The dispute in this case relates to certain plots of land measuring 254 sq. ft. at mile No. 13, furlong 7, Lucknow-Sultanpur Road. Mr. Sharafat Ullah, First Class Magistrate of Lucknow, directed Sohan Lal, on the complaint of the District Board, Lucknow, to remove a dwelling house from the land in dispute within a month. Sohan Lal filed an application in revision against the order of the Magistrate in the Court of the Sessions Judge of Lucknow. The learned Judge made this reference to this Court for proper orders. He was of opinion that the learned Magistrate should not have disposed of the case himself in face of the fact that the question of title was involved, as there was 'reliable evidence' in support of Sohan Lal's title, and that the learned Magistrate should have directed the District Board to get their rights established in a competent civil Court.

I have read the detailed and careful order of the learned Sessions Judge. I have also heard the learned counsel on both sides. In my opinion the learned Judge was perfectly right in making this reference to this Court. I agree with the learned Judge that the trying Magistrate should not have disposed of the case himself in face of the fact that the question

of title was involved and there appeared to be "reliable evidence" in support of Sohan Lal's title within the meaning of S. 139-A (2), Criminal P. C. The reasons which the learned Judge has given in the referring order appear to me to be irrefutable. The learned Magistrate should have stayed the proceedings until the matter of the existence of the right in question was decided by a competent civil Court. I set aside the order of the learned Magistrate and direct him to proceed according to law. The proceedings should be stayed until the matter of the existence of the right in question has been decided by a competent civil Court.

W.D./R.K. *Reference allowed.*

A. I. R. 1932 Oudh 121

WAZIR HASAN, C. J. AND KISCH, J.

Bisheshwar Pande and *others*—Defendants—Appellants.

v.

Bhawani Din Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 39 of 1931, Decided on 17th November 1931, against decree of Dist. Judge, Gonda, D/- 5th November 1930.

(a) Landlord and Tenant—Person admitted to be tenant claiming higher rights—Onus is on him to prove such rights.

Where the plaintiffs are admittedly the owner of the mahal and they concede that the defendants held the plots in question in the right of tenants, the onus is on the defendants to establish that they possess rights higher than those conceded to them by the plaintiffs. [P 122 C 1]

(b) Landlord and Tenant—Entries in village papers—Presumption held rebutted by compromise between parties giving different right than one recorded.

Where defendants are recorded as under proprietors of certain plots of land in the village papers, presumption in favour of the correctness of such entries is sufficiently rebutted when it appears that in previous proceedings between the parties, there was a compromise under which the dfeendants agreed to hold the said plots of land as tenants under the plaintiffs. [P 122 C 1]

G. Hasan and *Ali Jawwad* — for Appellants.

H. Hussain—for Respondents.

Judgment.—This is the defendants' appeal from the decree of the District Judge of Gonda, dated 3rd November 1930, reversing the decree of the Subordinate Judge of the same place dated 29th May 1930.

In the suit out of which this appeal arises the plaintiffs asked for a declaration that the defendants have no proprietary or under-proprietary rights in certain plots of land, the list of which was attached to the plaint, situate in village Daulatpur, Mahal Inderdawan Singh, Pargana Nawabganj, in the District of Gonda. The defences with which we are now concerned, were that the plots in question were held by the defendants in under-proprietary rights and that the suit was barred by limitation. Both these defences were upheld by the Court of first instance and the plaintiffs' suit was dismissed. On appeal the learned District Judge of Gonda has disagreed with the Subordinate Judge on both points, allowed the appeal and decreed the plaintiffs' suit.

In second appeal before us the same two questions are reiterated on behalf of the defendants. The judgment of the learned District Judge is so clear and exhaustive that we do not think that we can usefully add to it. The plaintiffs are admittedly the owners of the mahal and they concede that the defendants held the plots in question in the right of tenants. The onus therefore is on the defendants to establish that they possesss rights higher than those conceded to them by the plaintiffs. In discharge of this onus they rely on entries made in village papers since the year 1900 up to the present day. These entries certainly support the defendants' case, and we are asked to give effect to them, as it is argued, they must be presumed to be correct. The learned District Judge has faced this argument in all its details and has come to the conclusion that the presumption is wholly rebutted by the agreement entered into between the predecessors-in-interest of the present parties so far back as the year 1893. This agreement was filed in the form of a compromise in proceedings for mutation of names in respect of a much larger area which comprises the plots in suit. The plaintiff's predecessor-in-interest claimed by an application in the Court of Revenue that his name be entered in respect of that area in the revenue papers as proprietor. The appellants' predecessor seemed to have resisted the application up to a certain stage and then the parties mutually settled the controversy by filing the agreement to which reference has just now been made. On the record of this case this agreement is marked as Ex. 3. Except five plots the rest of the plots in suit have been found by the learned District Judge to be covered by the terms of this compromise.

On the question of the construction of this agreement, there can be no two opinions. The appellants' predecessor-in-interest agreed to hold the plots in suit, except the five plots, in the right of a tenant on a payment of yearly rent of Rs. 31. As regards the remaining five plots, the learned District Judge is of opinion that they too may well be considered to have been included in the agreement, Ex. 3. We are not prepared to affirm this opinion, but as we have already said, the onus lay on the defendants to show that they have rights superior to tenancy rights in any of the plots in suit and we think that they have failed to discharge that onus.

On the question of limitation, we agree with the learned District Judge that the suit out of which this appeal arises is not barred by time. The learned District Judge rightly thinks that this point as well as the point just now disposed of are covered by the decision of their Lordships of the Judicial Committee in *Mohammad Mumtaz Ali Khan* v *Mohan Singh* (1). In the course of arguments the learned advocate for the appellants placed before us a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Bipin Chandra Chaterji* v. *Dawan Singh* (2) as a decision in support of his arguments. We think that that decision is wholly irrelevant to the facts of this case. The entries in the village papers in favour of the appellants were made in the teeth of the terms of the compromise. They are therefore of no value whatsoever and whatever evidential effect they had by reason of a presumption in their correctness, that effect has been altogether swept away by the clear terms of the compromise.

The appeal fails and is dismissed with costt.

K.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 P. C. 118=74 I. C. 476=50 I. A. 202=26 O. C. 231=45 All. 419 (P.C.).
(2) A. I. R. 1925 Oudh 732=91 I. C. 121.

A. I. R. 1932 Oudh 122

RAZA AND SRIVASTAVA, JJ.

Mt. Zahida Begam and *another*—Appellants.

v.

Mumtaz Ali Khan and *another*—Respondents.

Appeals Nos. 4 and 5 of 1931, Decided on 28th October 1931.

Limitation Act (1908), Arts. 142 and 144—Suit for possession by partition by vendee from daughter—Basis of suit, being title of daughter to her share in property left by her deceased father—No allegation made by vendee that vendor was at any time dispossessed—Suit is governed by Art. 144 and not by Art. 142.

Article 142 is restricted to suits which are in terms and substance based on plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. Consequently where the suit is a suit for possession by partition and the basis of the suit is the title of a daughter to her share in the property left by her deceased father and where the plaintiff as the vendee from the daughter does not allege that she had been dispossessed from the property in suit at any time and it is also found that she as the rightful heir and successor of her father is entitled to the property to the extent claimed, the suit is governed by Art. 144 and not by Art. 142. [P 122 C 2]

Bishambhar Nath and *Rauf Ahmad*—for Appellant.

Ghulam Hasan and *Iftikhar Husain*—for Respondents.

Judgment.—These are appeals (Nos. 4 and 5 of 1931) under S. 12 (2), Oudh Courts Act (No. 4 of 1925).

The facts of the case are fully set out in the judgment of our learned brother Kisch, J., dated 19th May 1931, and they need not be repeated in this judgment.

The dispute in this case relates to certain groves in respect of which the plaintiff's claim has been decreed in Second Appeals Nos. 105 and 107 of 1931. The only point for determination in the appeals before us is whether the suit is governed by Art. 144 or by Art. 142, Lim. Act.

It has been held in the second appeals that the suit is governed by Art. 144 and not by Art. 142, Lim. Act. This finding has been challenged in the appeals before us. We have examined the pleadings in this case. We are of opinion that our learned brother, Kisch, J., was perfectly right in holding that the suit is governed by Art. 144 and not by Art. 142, Lim. Act. Art. 142 is restricted to suits which are in terms and substance based on plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. The present suit is a suit for possession by partition. The basis of the present suit is the title of Akhtar Jahan to her share in the property left by her deceased father Ahmad Hasan. The plaintiff is the vendee from Akhtar Jahan. He does not allege that Akhtar Jahan had been dispossessed from the property in suit at any time. It has been found that Akhtar

Jahan, as the rightful heir and successor of her father Ahmad Hasan, is entitled to the property to the extent of the share claimed. It has also been found that Abdulghani is a mere dummy without any shadow of claim of his own either by title or possession. This being the case the suit was properly held to be governed by Art. 144, Lim. Act. In our opinion the case was rightly and properly decided in second appeal. We can find no ground for interference and dismiss both the appeals with costs.

P.N./R.K. *Appeals dismissed.*

A. I. R. 1932 Oudh 123

RAZA AND SMITH, JJ.

B. Lakshmi Narain and *others*—Defendants—Appellants.

v.

Mt. Mohamdi Begam—Plaintiff—Respondent.

First Appeal No. 110 of 1930, Decided on 26th October 1931, against decree of Sub-Judge, Sitapur, D/- 11th August 1930.

(a) Mortgage—Construction — Terms held to be hard and unconscionable.

The mortgagees took interest every year, and over and above the interest a sum of Rs. 3,000 went to pay up the principal also. Though the principal was thus reduced every year by Rupees 3,000 yet there was no reduction proportionate in the interest and the rate of interest worked out at the rate of 12 per cent per mensem while the contract rate was to advance interest at 6 per cent per mensem only. In addition if there was to be any deficiency in the income (gross rental) stated in the deed the mortgagor was to pay that deficiency together with interest at 6 per cent per mensem and was to remain liable for the Government revenue if enhanced. If any enhancement was made by the mortgagees in rent and if they brought uncultivated lands under cultivation and received rents and profits from those lands the mortgagor was to get compensation for that.

Held : that the terms of the mortgage deed were hard and unconscionable. [P 128 C 2]

(b) Pardanashin Lady — Knowledge and understanding—Deeds executed by pardanashin lady should receive special consideration —Independent legal advice is not itself essential — Disposition must be substantially understood by her—Burden of proof to prove settlor's mind is on those setting up the deed.

Deeds executed by illiterate pardanashin ladies deserve special consideration. Independent legal advice is not in itself essential. The real point is that the disposition made must be substantially understood; must really be the mental act as its execution is the physical act of the person who makes it. If however the settlor's freedom and comprehension can be otherwise established, or if the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor and were then substantially embodied in the deed there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. The parties to prove the settlor's mind are the parties who set up and rely on the deed. They must satisfy the Court that the deed was explained to and understood by the party under disability. Mere execution although unaccompanied by duress, protest or signs of misunderstanding or want of comprehension is no real proof of a true understanding mind in the executant. It must be shown that the deed was read over to the executant and if necessary explained. The extent and character of the explanation required must depend upon the circumstances. [P 129 C 2]

On the other hand the mere declaration by the settlor subsequently made that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether having regard to the proved personality of the settlor the nature of the settlement and the circumstances under which it was executed and whole history of the parties it is reasonably established that the deed executed was the free and the intelligent act of the settlor or not : *A. I. R.* 1925 *P. C.* 204; 36 *All.* 81 (*P. C.*); 18 *Cal.* 545 (*P. C.*); *A. I. R.* 1919 *P. C.* 24 and *A. I. R.* 1927 *P.C.* 84, *Rel. on.* [P 130 C 1]

(c) Specific Relief Act (1877), S. 31 — Suit for redemption by pardanashin lady questioning liability under deed on ground that certain clauses were not understood by her—It is not necessary to sue for rectification first—Mortgage, Redemption.

Where a pardanashin lady in a suit for redemption of a mortgage simply questions her liability to pay certain sums which the mortgagees claim under certain clauses of the mortgage-deed which were not explained to, nor understood by her and which she alleges are not binding upon her it is not necessary for her to sue for rectification of the deed first and then for redemption. [P 130 C 1]

(d) Transfer of Property Act (1882), S. 76 (g)—Every mortgagee in possession is under statutory liability to keep full accounts, i. e., even of unauthorized or wrongful realizations—In case of failure to do so Court can make every presumption against him.

Section 76 is applicable to a usufructuary mortgagee. Every mortgagee in possession is under a statutory liability to keep clear, full and accurate accounts. Accounts to be full must be detailed and supported by vouchers under S. 76 (g). The accounts to be kept by the mortgagee are independent of those which may be kept by anyone else, e. g., the patwari and cannot be dispensed with on the ground that the latter was keeping them. The mortgagee is liable to the mortgagor for any sum realized by him out of the mortgaged property. The fact that the realizations were unauthorized or wrongful does not qualify his liability in this matter. If the mortgagee in possession who is liable to keep and give accounts, does not render accounts or has not kept them, the Courts will make every presumption against him. It is fair to draw inferences against him because he being the party who alone can know the actual facts, has failed to keep the accounts

in a manner in which the Court can safely accept them : *A. I. R.* 1927 *Oudh* 199, *Foll.*
[P 132 C 2, P 133 C 1]

(e) Transfer of Property Act (1882), S. 76 (h) — Mortgagee in possession not producing proper accounts—Court can calculate amount due on basis of gross rentals.

Where the mortgagees in possession fail to produce proper accounts the Court is justified in calculating the amount due on the mortgage on basis of gross rentals on the hypothesis that all the tenants had paid their rents : *A. I. R.* 1921 *All.* 197, *Foll.* [P 133 C 2]

(f) Civil P.C. (1908), S.35—Mortgage—Costs —Mortgagee is generally entitled to costs unless he is guilty of misconduct.

A mortgagee is generally entitled to costs in a suit for redemption or foreclosure unless he has been guilty of misconduct. In the matter of costs the Court is given full powers to give and apportion them in any manner it thinks fit. The discretion given to the Court is of course judicial discretion and is not to be exercised arbitrarily.
[P 134 C 1]

A. P. Sen, *Ali Zaheer* and *C. N. Harkauli*—for Appellants.

M. Wasim and *Mohd. Ayub*—for Respondent.

Judgment.—This appeal arises out of a redemption suit. The mortgage in suit was executed by Mt. Mohamdi Begam in favour of Sita Ram (since deceased), and his nephew, Lachmi Narain, for Rs.45,000, in respect of two villages, Akbarganj and Malhui Saraiyan, with hamlets, in the District of Sitapur, on 16th December 1916 (Ex. A-1). It was a possessory mortgage, redeemable on the expiry of 11 years. The present suit for redemption was brought by the plaintiff, Mt. Mohamdi Begam, on 2nd March 1928, against Lachmi Narain (defendant 1), and his cousins, Gajadhar Prasad, Baij Nath Prasad and Pragnarain (defendants 2 to 4), sons and legal representatives of Sita Ram, deceased.

The relevant and important terms of the mortgage may be summarized as below :

(1) That according to the papers prepared by the mortgagor, the yearly income (gross rental) of the mortgaged property was Rs. 9,748-4-9, out of which the Government revenue and cesses, amounting to Rs. 1,635-11-6, the mortgagor's maintenance allowance amounting to Rs. 1,200 and the pay of the bankers' (mortgagees') servants amounting to Rs. 206, total Rs. 3,041-11-6, having been deducted annually, the balance shall continue to be taken by the mortgagees towards principal and interest for 11 years; and after this period Rs. 927-10-3 shall remain payable to the mortgagees, by way of adjustment of accounts of principal and interest, (*barue hisab asil wa sud ke*), which the mortgagor shall pay without interest at the end of Aghan 1335 F (8th December 1927), and if this sum is not paid by that date, the mortgagees shall continue in possession and take the usufruct up to the end of 1335 F (September 1928).

(2) That if during the period of the mortgagees' possession the revenue is enhanced, the mortgagor shall be liable to pay the same, with compound interest at 6 per cent per annum, at the time of redemption.

(3) That if any branch of any tree falls down, or one or two trees dry up entirely, the mortgagees will be entitled to take such branches and trees and they will not be accountable to the mortgagor for the same at the time of redemption.

(4) That the mortgagees are empowered to enhance the rents of tenants and issue notices of ejectment against him.

(5) That the mortgagors shall indemnify the mortgagees for the loss caused to them owing to any property going out of their possession.

(6) That if the profits (gross rental) entered in the lists signed and delivered by the mortgagor along with the kabuliyats fall short, or are found to be deficient, the mortgagor shall pay the deficiency, together with compound interest at 6 per cent per annum, at the time of redemption.

(7) That the mortgagor's liability to pay interest to the prior mortgagees shall cease from the date of the mortgage deed in suit.

(8) That the mortgagor shall not claim compensation from the mortgagees for any enhancement made by the latter during their possession.

(9) That the mortgagor shall get mutation of names effected in respect of the mortgaged property in favour of the mortgagees.

(10) That the mortgagor shall be liable to pay to the mortgagees at the time of redemption arrears of rent due to the mortgagees, up to the amount of Rs.2,000 according to the entries in the patwari's papers, in a lump sum. If the arrears exceed Rs. 2,000, the mortgagees shall realize the excess.

(11) That the mortgagees shall realize the "batai" rent of Jhabboo Khan's field

(measuring 6 bighas kham) during the period of their possession and account for the same at the time of redemption. That rent shall be set off against the amount of the mortgage money remaining due to them.

(12) That according to the practice of the collection of rent in the villages comprised in the mortgage, the mortgagees shall be entitled to collect 8 annas of the rents for Kharif 1335 F (i. e. half of the annual rents).

(13) That redemption shall take place on payment of the sums mentioned above by the mortgagor.

(14) That all the rights of the mortgagor were mortgaged under the deed.

(15) That the mortgagee shall have the power of having every sort of uncultivated land cultivated, and realizing its profits, and the mortgagor shall not claim any compensation, etc., for the same at the time of redemption.

(16) That the mortgagor's maintenance allowance, Rs. 100 shall be paid monthly on receipts obtained from her son Aziz Ahmad, or by money order.

The mortgage in suit was executed to pay off:(a) a prior mortgage and (b) a pro-note. Mt. Mohamdi Begam (plaintiff) had executed the prior mortgage in favour of Ram Narain and Mt. Sudamni Devi for Rs. 40,000 bearing interest at 7 1/2 per cent per annum with six monthly rests, in respect of a 10-annas share in the two villages mentioned above (Akbarganj and Malhui Saraiyan), on 10th March 1914. (Ex. A-3). Rs. 44,039 were due to the prior mortgagees at the time of the execution of the mortgage deed in suit. That sum was made payable to the prior mortgagees by the deed in suit. The sum of Rs. 961 was due to Sita Ram, mortgagee, himself under a pro-note executed by Mt. Mohamdi Begam on 8th October 1916, for Rs. 950 (Ex. A-2). That sum was made payable to the mortgagees (Sita Ram and Lachmi Narain) themselves by the deed in suit.

The plaintiff sent a notice to the defendants on 28th November 1927, asking for accounts. She was informed by the defendants that Rs. 24,339-12-9 were still due on the mortgage. She then brought the present suit on 2nd March 1928 alleging that she was an illiterate pardanashin lady, that some of the terms of the deed were bard and unconscionable, which were not explained to her and were not understood by her, that the terms in question were not binding on her, that the mortgage was satisfied from the usufruct by the end of Kharif 1333-F. (November-December 1925) and that Rs. 15,425-2-3 were due to her, as surplus profits, from the mortgagees (defendants). She challenged Cls. (1) (6) (8) (10) and (15) of the mortgage deed in the suit mentioned above and alleged that the rate of interest agreed between the parties was 6 per cent per annum only which was not clearly or expressly mentioned in the deed.

The defendants admitted that the plaintiff was an illiterate pardanashin lady, but they denied all other material allegations in the plaint. They alleged that the plaintiff was bound by all the clauses of the mortgage deed in suit and that the sum of Rs. 23,575-13-3 was still due to them on the mortgage. They denied half-heartedly the rate of interest (i. e. 6 per cent per annum) alleged by the plaintiff, and said that it was agreed between the parties that no accounting would take place and they would be entitled to appropriate all the profits for eleven years in lieu of principal and interest which according to them, was added for the full period on the entire amount of the principal. Paras (18) and 19 of their written statement run thus:

"(18) The allegations urged on behalf of the plaintiff about contract of interest are not at all correct. The fact is that Lala Sita Ram "(father of defendants 2 to 4 and uncle of defendant 1)' was not willing to advance money on interest less than Re. 1 per cent per mensem, then the advisors of the plaintiff, in consultation with the plaintiff proposed that the amount of interest be fixed at eight annas per cent per mensem and this along with the mortgage money, that is, principal and all interest, be paid out of the profits of the property after deduction of the items of revenue, etc.

"(19) There was no agreement to this effect that interest will go on decreasing according to profits paid annually or that there will be any rendition of accounts at the time of redemption between the parties."

They alleged that the plaintiff had settled the mortgage transaction in consultation with and through her son Aziz Ahmad, her son-in-law, Abdulmajid, and her general agent Sakhawat Ali, and that she had executed the deed in suit intelligently with knowledge of its bearing upon her interests.

The suit was originally disposed of by Mr. Gokul Prasad, the late Subordinate Judge of Sitapur, on 8th February 1929.

He found almost all the issues against the plaintiff and dismissed her suit as premature.

The plaintiff appealed to this Court challenging the findings on all the points decided against her. The appeal was heard by a Bench of this Court on 5th March 1930. The defendants' learned counsel stated that they did not raise any issue as to the premature character of the suit and that it was not premature. It was held by this Court, without going into the merits of the case, that the learned Subordinate Judge was wrong in dismissing the suit on the ground that it was premature and that the plaintiffs' claim for redemption must be decided on the merits, and not on a preliminary point like the one on which the learned Subordinate Judge had disposed of the suit. The result was that the decree of the lower Court was set aside, and the case remanded to the Court of the Subordinate Judge, for retrial, under O. 41, R. 23, Civil P. C. The parties were permitted to produce additional evidence (if any) oral and documentary.

The suit was then tried by Mr. Gauri Shankar Varma, the present Subordinate Judge of Sitapur. He could form his own conclusions irrespective of any finding arrived at by his predecessor at the original trial in respect of matters which were not touched by this Court: see *Ajudhya Prasad* v. *Partab Singh* (1). He found almost all the issues in the case in favour of the plaintiff and held that the mortgage in suit was satisfied from the usufruct, and that the plaintiff was entitled to get Rs. 17,433-14-3 from the defendants as surplus profits. He found that the deed in suit was not intelligently executed by the plaintiff after understanding the contents of the deed and its effect on her interests, that some of the clauses of the deed in suit were hard and unconscionable, and that "yearly accounting of the income and interest should take place." He found clearly that of the clauses in question (Nos. 1, 6, 8, 10 and 15 of the mortgage deed in suit mentioned above) Nos. 1, 8 and 15 were hard and unconscionable and were not explained to and understood by the plaintiff As to Cls. 6 and 10 his finding is not clear. It appears that he found that Cls. 6 and 10 were not hard and unconscionable and were agreed to between the parties. He says so at one place in his judgment; but at another place, he says that :

"thus only Cls. 1, 6, 8, 10 and 15 of the deed are affected by this order; also Cl. 13 will be read as subject to the modifications made by this order."

He appointed a commissioner to take account of the dues and liabilities of the parties, by his order dated 11th August 1930. In his first report, the commissioner fixed the amount due to the defendants from the plaintiff up to the end of 1335-F,. at Rs. 23,678-13-6, calculating the profits on the basis of actual realizations or collections. The plaintiff filed objections. The result was that the learned Subordinate Judge directed the commissioner to prepare accounts on the basis of gross rental (demands) as entered in the village papers. He gave certain directions to the commissioner in that connexion. The plaintiff asked for accounting in respect of the years 1336 and 1337-F or up to the date of actual redemption; and to this no objection was taken by the defendants. The commissioner then prepared accounts on the basis of gross rental as directed by the Court. According to that account Rs. 2,648-8-9 were found due to the plaintiff from defendants at the end of 1335F. and Rupees 17,433-14-3, at the end of 1337F. Then the defendants filed objections which were disposed of on 13th November 1930. Their objections were disallowed and the learned Subordinate Judge accepted the accounts submitted by the commissioner as correct. He accordingly decreed the plaintiff's claim and ordered the defendants to pay Rs. 17,433-14-3, as surplus profits, and Rs. 106, for costs of the miscellaneous proceedings, to the plaintiff. A preliminary decree was thus passed in favour of the plaintiff on 13th November 1930. The defendants admittedly delivered possession of the mortgaged property to the plaintiff in the beginning of 1338F.

The defendants have now appealed to this Court, challenging the findings on all the points decided against them. The plaintiff has also filed cross-objections.

In the memorandum of appeal filed by the defendants several pleas were taken but the learned counsel, who appears for them has confined his arguments to the following points only:

1. The terms of the mortgage deed in suit to which objection is taken are not

(1) [1911] 14 O. C. 321=13 I. C. 813.

hard and unconscionable. The plaintiff executed the deed intelligently. All the terms must be taken to have been duly understood by her, especially because she authorized her agent, Shakhawat Ali, to negotiate the transaction.

2. There should be no accounting under the terms of the mortgage deed in suit.

3. If there should be any accounting, it should be on the basis of actual collections or realizations, and not on the basis of gross rentals.

4. If there should be any accounting on the basis of gross rentals, then some of the terms of the mortgage, which have not been found to be hard and unconscionable, should be given effect to.

5. The pleader's fee was not correctly entered in the decree under the rules.

6. The defendants are not liable to pay any interest on the surplus collections.

We proceed to consider these points.

Point No. 1. — The mortgage in suit (Ex. A-1) was executed to secure the payment of Rs. 45,000 as already stated. The money was advanced on interest; but no rate of interest was entered in the deed. The plaintiffs allegation was that the rate of interest was eight annas per cent per mensem (6 per cent per annum). This was at first denied by the defendants. It was admitted by the defendants in para. (18) of their written statement that interest at 8 annas per cent per mensem was proposed by or on behalf of the mortgagor (plaintiff), but it was not stated clearly that the mortgagees had agreed to that rate. When the plaintiff delivered interrogatories to the defendants in this connexion by leave of the Court, they gave the following reply with some difficulty:

"Lala Sita Ram was not ready to accept interest less than 1 per cent per mensem. Upon this the advisers of the plaintiff said that the plaintiff could not get money at a reduced rate of interest owing to the great war, but as the principal sum Rs. 45,000, was a big amount and as there had been monetary transactions from before as well, and as it was very necessary for the plaintiff to pay off the mortagage in favour of Ram Narain and others, so it was proposed by the plaintiff that on the principal amount interest having been calculated at 8 annas per cent. for eleven years, the principal with interest should be fixed, and this amount be paid off out of the profits given out by the mortgagor; and in this manner after the expiry of eleven years, only a sum of Rs. 927-10-3 would be paid in excess, and at darkati rate interest could not be less than about 13 annas per cent. according to the proposal. Lala Sita Ram according to the proposal of the plaintiff, accepted the profits for eleven years and Rs. 927-10-3, without any liability for rendition of accounts, and got the mortgage deed executed in his favour and that of Babu Lachmi Narain. Lala Sita Ram had not agreed to accept interest at the rate of 8 annas per cent. per mensem . . . . . The amount of interest at the rate of 8 annas per cent per mensem was charged on Rs. 45,000 for eleven years, and this amount of interest was added to the principal sum, Rs. 45,000, and after the realization of this total amount from the gross rental given out by the mortgagor within eleven years, by allowing deduction of land revenue etc., entered in the mortgage deed Rs. 927-10-3 were left as balance."

The plaintiff was not satisfied with this reply and so the statement of defendant 2 himself was recorded by the learned Subordinate Judge on 5th July 1928. He (defendant 2) made the following statement:

"Lala Sita Ram, my father, agreed to the proposal made by the advisers of the plaintiff. The proposal of the plaintiff's advisers was that the principal of Rs. 45,000 and interest thereon at the rate of 8 annas per cent. per mensem for a period of eleven years should be added together. That, after deducting the revenue, etc., for eleven years out of the principal amount and interest at the said rate thereon for eleven years, the balance should be paid by the mortgagor to the mortgagees. That at the end of Kharif 1335-F. the entire mortgage money would be paid with the exception of a sum of Rs. 927-10-3 which should be paid by the mortgagor to the mortgagees at the time of redemption, that, is, at the end of Kharif 1335-F."

This statement does not appear to be quite consistent with para. (18) of the defendants' written statement mentioned above. But Gajadhar Prasad defendant 2, who appears to be the principal contesting defendant in this case, has to admit in his evidence, as D. W. 1, that the rate of interest was settled at 8 annas per cent. per mensem, and Sita Ram (father of defendants 2 to 4 and uncle of defendant 1) had agreed to that. He added however that eleven years' interest was to be added to the principal. When he was cross-examined on this point, he stated that he could not say why no rate of interest was mentioned in the deed and why it was not stated in the deed that interest for eleven years was to be added to the principal. He stated afterwards that the rate of interest was not mentioned in the deed as the mortgage was usufructuary. We see no reason why the rate of interest should not have been entered in Cl. (1) of the deed if it was not attempted by the mortgagees to conceal the rate to keep the mortgagor in the dark as to the accounts which were for their benefit. We have examined his evi-

dence carefully. We have come to the conclusion that the defendants really wanted to conceal the rate of interest dishonestly. The rate of interest was concealed because it would have given a clue to the scheme of the mortgagees. It would have shown clearly that while the mortgagees were professing to take interest at 6 per cent. per annum, they were really taking interest at about 12 per cent. per annum. Under Cl. (1) of the deed the mortgagor was to suffer the loss of three or four thousand rupees more if the mortgage was not redeemed at the end of Aghan 1335-F (8th December 1927) on payment of Rs. 927-10-3. That loss would have resulted because it was provided by that clause that should the mortgagor fail to pay Rs. 927-10-3 at the end of Aghan 1335-F, the mortgagees would remain in possession and take the usufruct up to the end of 1335-F. Defendant 2 admits in his evidence that the annual nikasi (gross rental) of the mortgaged property amounts to Rs. 8,700 or thereabout. It is true that the mortgagor had made certain enhancements in May and June 1916, so as to enhance the annual nikasi (gross rental) from Rs. 8,700 or thereabout to Rs. 9,748-4-9, but even if the income (for gross rental) is taken to be Rs. 8,700 only, the account stands thus:

	Rs.	a.	p.
Income ...	8,700	0	0
Deductions (see Cl. (1) of the deed in suit mentioned above) ...	3,041	11	6
Net profits ...	5,658	4	6
Interest at 6 per cent. per annum on Rs. 45,000 ...	2,700	0	0
Balance ...	2,958	4	6

This sum, at least, goes every year to pay up the principal, but in spite of this reduction of principal the interest runs on the whole amount and is not reduced in any way; the mortgagees were thus taking interest at about 12 per cent. per annum, though they were professing to take interest at 6 per cent. per annum only. They themselves admit that the rate of interest would not be less than 13 annas per cent. per annum if interest were calculated on the figures given in Cl. (1) of the mortgage deed in suit, at the darkati rate (i. e. yearly adjustment of account, and proportionate reduction of principal and interest). Cl. (1) of the deed, as it stands, shows at first sight that interest (whatever it may be) was to be charged at the darkati rate. This is the usual way of accounting. But the way in which the defendants want that clause to be read is an unusual way. They (defendants) know the unusual meaning of the clause in question of course, but it is difficult for any other persons to know the hidden meaning of that clause. On close reading of the deed in suit it would appear that the mortgagees took the interest every year, and over and above that interest a sum of Rs 3,000 (nearly) went to pay up the principal also; and though the principal was thus reduced every year by Rs. 3,000 nearly, yet there was to be no reduction (proportionate) in the interest. This actually works out at the rate of about Rs. 12 per cent. per annum, while the contract was to advance money at 6 per cent per annum only.

In addition to this, if there was to be any deficiency in the income (gross rental) stated in the deed, the mortgagor was to pay that deficiency together with interest at 6 per cent per annum (compound): see Cl. 6 of the deed. The mortgagor remains liable for Government revenue if it is enhanced: see Cl. 2, but if any enhancement is made by the mortgagees in rent, or if the mortgagees bring uncultivated lands under cultivation and receive rents and profits accruing from those lands, the mortgagor is to get no compensation for that: see Cls. (8) and (15) of the deed. If Cls. 1, 6, 8 and 15 of the deed in suit are read together, (and we are of opinion that they should be read together), then the full significance of the terms of the mortgage in suit becomes clear, and the whole scheme of the mortgagees, by which they wanted to take undue advantage over the mortgagor is known. We know all this now when we have come to know that the rate of interest which was settled between the parties was 6 per cent. per annum only. There is no doubt that the terms of the deed in suit are hard and unconscionable. Defendant 1 himself admits in his evidence that they are hard. He says that he was present at the time the terms of the mortgage were settled between his father Sita Ram (since deceased), on the one side, and the plaintiff's agent Sakhawat Ali, her son (Aziz Ahmad) and her son-in-law (Abdul Majid) on the other

side. It has already been stated above that he is unable to explain why no rate of interest was mentioned in the deed, and why it was also not mentioned therein that interest for the whole period was to be added to the principal. He admits that no accounts were added up in his presence to show in how many years the mortgage would be paid off. He then tries to change his statement and says that he himself had added up the accounts. He then tries to change his statement again on this point. He states that he is unable to explain why possession was to be retained by the mortgagees till Rabi 1335 F. to enable them to realize Rupees 4,000 instead of Rs. 927-10-0 due under Cl. 1 of the deed. He admits that he is unable to explain why the mortgagees were to enjoy the profits of the lands newly brought under cultivation, and also enhanced rents, but the mortgagor was to get no compensation for that.

The deed in suit contains hard and unconscionable clauses. It is a lengthy and complicated document. We are asked to enforce all the clauses of this deed against an illiterate pardanashin lady.

Deeds executed by illiterate pardanashin ladies deserve special consideration. In *Faridunnisa* v. *Mukhtar Ahmad* (2), which was a suit to set aside a deed of wakf executed by the plaintiff (Faridunnisa), herself the following observations were made by their Lordships of the Privy Council :

"The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument here is a wakfnama is a mere accident and the general and well-settled law of wakf is not in question. The case of an illiterate pardanashin lady, denuding herself of a large portion of her property without professional or independent advice, is one on which there is much authority. Independent legal advice is not in itself essential. [*Kali Bakhsh Singh* v. *Ram Gopal* (3)]. After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it [*Wajid Khan* v. *Evaz Ali Khan* (4); *Sunitabala Debi* v. *Dharasundari Debi* (5)]. The appellant clearly had no such advice, nor is it contended that she had. If however the settlor's freedom and comprehension can be otherwise established, or if, as is the respondents' case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that some one shold have tried to persuade her to the contrary. Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution or after it under the circumstances which establish adoption of it with full knowledge and comprehension. [*Sudisht Lal* v. *Mt. Sheobarat Koer* (6); *Sham Kuar* v. *Dah Kuar* (7) and *Sajad Husain* v. *Wazir Ali Khan* (8)].

Further, the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviousiy found in proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that ths clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter, are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it. [*Shiam Kuar's* case (7)]. So if the deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person in the settlor's position must perceive and appreciate it

(2) A. I. R. 1925 P. C. 204=89 I. C. 649=52 I. A. 342=28 O. C. 338=47 All. 703 (P.C.).
(3) [1913] 36 All. 81=41 I. A. 23=21 I. C. 985 (P.C.).
(4) [1891] 18 Cal. 545=18 I. A. 144=6 Sar. 46 (P.C.).
(5) A. I. R. 1919 P. C. 24=53 I. C. 151=46 I. A. 272=47 Cal. 175 (P.C).
(6) [1881] 7 Cal. 245=8 I. A. 39=4 Suth. 222 (P.C.).
(7) [1902] 29 Cal. 664=29 I. A. 132=8 Sar. 280 (P.C.).
(8) [1912] 34 All. 455=39 I. A. 156=16 I. C. 197 (P.C.).

for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information had been given, it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters."

In *Barkatunnissa* v. *Debi Bakhsh* (9), the mere declaration of the mortgagor a pardanashin lady subsequently made that she had not understood what she was doing was not held in itself conclusive. It was held by their Lordships of the Privy Council that it must be a question whether, having regard to the proved personality of the settlor, the nature of the mortgage, the circumstances under which it was executed and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the mortgagor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters. Where therefore it is proved that the terms of a mortgage were negotiated between the mortgagee and the mortgagor, a pardanashin lady, assisted by her son, that there was no undue haste, that the draft deed when prepared was read over to her then and the fair copy was read over to her when it was made a few days later and was again read over to her before execution and she fully understood it, the onus of showing that the deed was the mortgagor's free and intelligent act is discharged. It was found in that case that the defendant was a lady of strong personality and the transaction was comparatively simple.

The latest authority on the subject under consideration is the case of *Tara Kumari* v. *Chandra Mauleshwar Prasad* (10). The plaintiff in that case had instituted the suit for enforcement of two mortgages executed by a pardanashin lady. It was found that the lady knew the general nature of the documents she had signed. Appended to each was a statement, which was admitted to be in her handwriting, that she had executed the mortgage bond in the one case for Rupees 12,500, and in the other for Rs. 9,500, and that the contents had been read over and explained to her. The mortgages were not however held to be binding upon her, on the facts of that case.

The following observations were made by their Lordships of the Privy Council in that case:

"If there was nothing more in the case than that the appellant intended to mortgage her property for debts which she knew to be owing, though she had no accurate knowledge of the items or the amount due, it might be that the decision of the High Court would be right, more specially if, as their Lordships are told the result of an adverse decision in the present case would be that the real debts, apart from the mortgages, would be time barred; but if knowledge had been kept from her by the creditor, if there was any ground for suspicion that he was over-reaching her, if she had no independent advice and the relations between them were such as to suggest that they were not on equal terms, it would be impossible for a Court to affirm, with any certainty, that had she known the full truth, as she was entitled to know it, she would have completed the transaction It would only be upon this hypothesis that the lady could be held bound by the mortgages, though not by the accounts. It is no doubt impossible to lay down any hard and fast rule for such cases. Each must depend upon its own facts and the dividing line may often be difficult to draw. There is no doubt, their Lordships think, as to the principles to be applied. They are not merely deductions from the law as to undue influence which finds a place in S. 16, Contract Act, as has been suggested by counsel for the respondent. They are founded upon the wider basis of equity and good conscience which have always been pillars of the administration of justice in India. Their Lordships think it unnecessary to go through the long tale of authorities upon which the Subordinate Judge founded this part of his judgment. The doctrine is, they think, sufficiently summarized by Lord Sumner in *Faridunnisa* v. *Mukhtar Ahmad* (2), a decision which was not available to the Subordinate Judge and is not referred to by the High Court. There undue influence, though pleaded, was negatived. The document in that case, a wakfnama, was read over and explained to the lady, but in what terms the explanation was given, the evidence did not disclose, and its sufficiency was the real issue in the appeal. The test laid down is that the dispositions made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it. The judgment is clear that it is for the party setting up the deed of a pardanashin lady to satisfy the Court that it has been not only explained to but understood by

(9) A. I. R. 1927 P.C. 84=101 I.C. 29 (P.C.).
(10) A. I. R. 1931 P. C. 303=134 I. C. 1076=58 I.A. 450 (P.C.).

her. If the explanation has been partial or erroneous or has not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information had been given, it would have effected the mind of the executant in completing the deed. Lastly it is laid down that the Court must consider the whole history of the parties in order to ascertain whether the deed was the free and intelligent act of the executant. . . . Here the mortgages were no doubt read and explained to the appellant, but there is nothing to show the nature of the explanation."

Bearing in mind the principles laid down by their Lordships of the Privy Council in the case noted above, we proceed to see, if the plaintiff, who is admittedly an illiterate pardanashin lady, executed the mortgage in suit with full understanding of its effect and nature, so far as the clauses in question are concerned. (Their Lordships then discussed the evidence and proceeded as follows:) There is nothing to show that she had understood all the terms of the previous mortgage. Even granting that she had understood all the terms of that mortgage, it does not follow that she must be taken to have understood all the terms of the mortgage in suit also. There was no secrecy about the terms of that mortgage. There is nothing to show that the mortgagees of that mortgage had over-reached her in any way in that transaction. Even if the terms of that mortgage were hard, that could be no excuse for advancing money to the plaintiff to pay off that mortgage on hard terms which were kept secret from her and were never explained to her in any way that she could have understood them.

It has been contended before us that the plaintiff cannot anyhow impeach the deed in suit unless she gets the deed rectified before hand. In our opinion this contention is not well founded and must be overruled. In the first place this plea was not raised in the lower Court. In the second place there is no substance in this plea. There is no question in this case of setting aside the deed on the ground of fraud or undue influence. The plea is that the deed in suit was obtained from the plaintiff without her fully understanding the nature and effect of certain clauses of the deed. The mortgagees were in possession of the property and the suit is one for redemption. In the present suit the money due to the mortgagees is to be determined by the Court. We see no reason why the question relating to certain clauses in the deed cannot be decided in this suit. The plaintiff does not deny the mortgage. She has come to Court to redeem it. She simply questions her liability to pay certain sums which the mortgagees claim under certain clauses of the deed which were not explained to and understood by her, and which are not therefore binding on her. We have not been referred to any rule of law or authority which says that the plaintiff in such a case should sue for rectification of the deed first, and then for redemption. S. 31, Specific Relief Act (Act 1 of 1877), is in the following terms:

"When through fraud or a mutual mistake of the parties a contract or other instrument in writing does not truly express their intention, either party or his representative-in-interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice the rights acquired by third persons in good faith and for value."

This section is an enabling section. There is no question of mutual mistake in regard to the deed in suit. The cancellation of the deed is not an essential part of the plaintiff's relief. The present suit is a suit for redemption of immovable property and fraud (if any) is merely a part of the scheme by which the defendants have attempted to keep the plaintiff out of possession of the property. If the defendants had raised the plea in question in the lower Court an issue would have been framed on that point and tried out. The plea of limitation, which has now been attempted to be taken in this connexion must be repelled as we do not know when the fraud became known to the plaintiff. There is nothing to show that the plaintiff had knowledge of the terms in question at any time before she issued notice to the defendants in November 1927. The present suit was instituted in March 1928. The plea which involves a question of fact cannot be taken for the first time in appeal, when it cannot be decided upon the record before the Court.

Having regard to all the facts and circumstances of the case, we are of opinion that the defendants have failed to discharge the onus of showing that the deed

in suit is the plaintiff's free and intelligent act so far as Cls. 1, 6, 8 and 15 of the deed are concerned. We hold that the clauses in question are not binding on the plaintiff.

Points Nos. 2 to 4.—The defendants contend that there should be no accounting under the terms of the deed in suit. In our opinion this contention is not well founded and must be overruled. In the first place, the deed does not provide, in terms, that there should be no accounting between the parties under Cls. (1), (2), (6) and (11) of the deed. As the mortgagees took possession of the mortgaged property during the continuance of the mortgage they were under a statutory liability to keep accounts under S. 76, Cls. (g) and (h), T. P. Act (Act 4 of 1882). The defendants' learned counsel has argued that S. 76 is not applicable to a usufructuary mortgage. We are not prepared to accept this argument. Every mortgagee in possession, whether usufructuary or otherwise, is bound to account to the mortgagor under S. 76 (h) as to the profits of the mortgaged property unless he establishes a contract in the terms of S. 77, which takes the case out of S. 76 (h). The Courts are loath to exonerate the mortgagee from the liability to account under S. 76 (g). It should be noted that Cl. (1) of the deed in suit does not stand alone. The defendants are bound to keep and render accounts under Cls. (2), (6) and (11) of the deed. The expression "during the continuance of the mortgage" used in S. 76 must mean

"after the contract establishing the relationship of mortgagor and mortgagee between the parties has been entered into and established and till the time the mortgage came to an end or is extinguished."

Point No. 2 should therefore be decided against the defendants. (Their Lordships then dealt with the accounts and proceeded as follows): The correctness of these accounts is not disputed. Now the third account is out of question in view of our findings on the first point.

The question to be decided is whether accounting should be done on the basis of actual relaizations, or on the basis of gross rentals throughout (that is, up to the end of 1337 F.).

We have already observed that the defendants were under a statutory liability to keep accounts under S. 76, T. P. Act. They ought to have produced their accounts in this case, but they have failed to do so. They failed to produce their accounts with their written statement as required by O. 8, R. 1, Sch. 1, Civil P. C. (as amended by the Oudh Chief Court under S. 122, Civil P. C.). The rule is in the following terms :

"The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with the written statement such of the documents as are in his possession or power, and shall cause others to be summoned on a date to be fixed by the Court for the purpose.

Explanation—A certified copy of a public document is a document in the power of a party, but where a document is in the possession of a person other than the defendant it will not be deemed to be in the power of the defendant."

They failed to produce their accounts also at the first hearing of the suit, as required by O. 13, R. 1, Sch. 1, Civil P. C. It is noticeable that Gajadhar Prasad (defendant 2) who was examined as a witness (D. W. 1) in this case, admitted that he was keeping accounts and had got papers relating to the collections made by him, but he was unable to explain why he did not produce the accounts in the Court. After the case was remanded by this Court, the defendants produced some accounts in hundiwali. The accounts in question were not accompanied by a correct translation as required by R. 26 of the Oudh Civil Rules. The plaintiff's counsel objected. No transliteration was filed and no request was made by or on behalf of the defendants to allow them time to file transliterations, though their counsel was present in Court. The documents in question were therefore rejected by the Court. It appears that the defendant had no bona fide intention to produce the documents in question and they had put in the documents for show only. It should be noted that there is no ground of appeal here, objecting to the rejection of the documents in question. This Court cannot therefore take any notice of the documents in question. It must be held under these circumstances that the defendants have failed to keep and produce accounts as required by law. As pointed out by a Bench of this Court in *Kundai Lal* v. *Aishajehan Begam* (11) a mortgagee in possession is under a statutory liability to keep clear, full and accurate

(11) A. I. R. 1927 Oudh 199=102 I. C. 263=2 Luck. 564.

accounts. Accounts to be full must be detailed and supported by vouchers under S. 76 (g), T. P. Act. The accounts to be kept by the mortgagee are independent of those which may be kept by anyone else, as for example the patwari, and cannot be dispensed with on the ground that the latter was keeping them. The mortgagee is liable to the mortgagor for any sum realized by him out of the mortgaged property. The fact that the realizations were unauthorized or wrongful does not qualify his liability in this matter. If the mortgagee in possession, who is liable to keep and give accounts, does not render accounts or has not kept them, the Courts will make every presumption against them. It is fair to draw inferences against him because he being the party who alone can know the actual facts, has failed to keep the accounts in a manner in which the Court can safely accept them. The defendants having failed to keep and produce accounts as required by law have now themselves to thank for the consequences. Patwari papers are, of course, admissible in evidence as public documents, but they are prepared on the dictation of the zamindar.

The zamindar may dictate whatever he likes. It is noticeable that Gajadhar Prasad (defendant 2) does not even say that he had dictated correctly. He admits in his evidence as D. W. 1 that it was he who made collections. The defendants relying on the patwari's papers contend that the collections made by them should be held to be sufficient, as they collected about 79 per cent of the total nikasi (gross rental). They have produced no evidence to show the circumstances under which they did not or could not realize the whole amount. There is no justification for their not realizing the whole amount. In *Har Deo Prasad* v. *Ganga Sahai* (12), which was a suit for redemption of a usufructuary mortgage of zamindari property, the mortgagees in possession did not produce full and proper accounts, the accounts produced by them showing simply in one lump sum the alleged income from the zamindari for each year or part of the year, but no detailed accounts of all the incomings and all the outgoings. It was held by their Lordships of the Allahabad High Court that in view of the failure of the mortgagees to produce proper accounts the Courts below had properly proceeded to calculate the amount due on the mortgage on the hypothesis that all the tenants had paid their rents. In our opinion the learned Subordinate Judge was perfectly right in directing the commissioner to prepare accounts on the basis of gross rentals, in the circumstances of this case. He was perfectly justified in accepting the accounts which was prepared by the commissioner on that basis.

It should be noted that the defendants produced their accounts for 1336 and 1337 F., but they failed to prove them in the manner required by law. The proceedings of the lower Court, dated 22nd July 1930, show that the defendants were permitted to prove the documents at the time when the commissioner was appointed in the case to take accounts. The commissioner was appointed on 11th August 1930. However the defendants did not prove their accounts, and took no steps in that connexion though they had ample time and opportunity to do so. Neither the Court nor the commissioner prevented them from proving the accounts in question. These accounts also were therefore properly rejected by the learned Subordinate Judge. It should be noted that there is no ground of appeal here objecting to the rejection of these documents also. It is not satisfactorily made out why the defendants could not realize the entire rental in the years in question (1336 and 1337 F.) also. The mere fact that the suit was going on is no ground or excuse for not realizing the entire rental. On the contrary it may be said that they may have tried to make as much money as they could out of the property which they were going to lose soon on redemption.

The result is that we agree with the learned Subordinate Judge in accepting account B which was prepared by the commissioner on the basis of gross rentals.

Points Nos. 3 and 4 also should therefore be decided against the defendants.

Point No. 5.— It appears that the pleader's fee was not calculated correctly according to the Oudh Civil Rules, and the correct amount is Rs. 1,200, instead of Rs. 800, but as we are going to dismiss the defendants' appeal substantially, we

(12) A. I. R. 1921 All. 197=61 I. C. 48.

do not feel called upon to amend the decree in that connexion.

Point No. 6.—We think there is no substance in this plea also.

It is the duty of the mortgagee to pay to the mortgagor the surplus receipts from the mortgaged property. It is at least the duty of the mortgagee to set this money apart in such a way as to be fruitful for the benefit of the persons beneficially entitled to it. Interest has been allowed at the Court rate of 6 per cent per annum only. We see no sufficient reason to disagree with the finding of the learned Subordinate Judge on this point.

The result is that the appeal fails and must be dismissed.

Now we take up the plaintiff's cross-objections. The plaintiff's learned counsel has given up grounds 1, 3 and 4. He has pressed the remaining four grounds (2 and 5—7), only.

In our opinion there is no force in ground 2. The plaintiff is liable to pay to the defendants Rs. 2,000 towards the arrears of rent under Cl. (10) of the deed in suit. We see no reason why Cl. (10) of the deed should not be enforced. The plea has not been seriously pressed by the plaintiff's learned counsel. He has contended however that if the amount is to be deducted, it must be deducted at the end of 1337 F. The period of 11 years ended in 1335 F. The amount in question was properly deducted in that year.

Ground 5 relates to interest on surplus collections. Interest has already been allowed to the plaintiff on the sum of Rs. 2,649-8-9 the surplus profits found due at the end of 1335 F. Interest has not, of course, been allowed to the plaintiff on the surplus profits for the years 1336—37 F. (i. e. after the period of the mortgage). As the entire gross rental has been allowed to the plaintiff in those years (1336 and 1337), we think the learned Subordinate Judge was not wrong in not allowing interest to the plaintiff on the profits in question.

Grounds 6 and 7 relate to costs.

A mortgagee is generally entitled to costs in a suit for redemption or foreclosure, unless he has been guilty of misconduct. In the matter of costs, the Court is given full power to give and apportion them in any manner it thinks fit. The discretion given to the Court is, of course, a judicial discretion and is not to be exercised arbitrarily. Having regard to all the facts and circumstances of the case, we do not think it proper to interfere with the discretion of the learned Subordinate Judge in this matter.

The result is that the cross-objections also fail and must be dismissed.

Nothing more remains to be decided in this appeal. Hence we dismiss the defendants' appeal and also the plaintiff's cross-objections with costs. The decree of the lower Court is confirmed in all respects.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 134

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Wajid Ali Khan—Defendant—Appellant.

v.

Jaffar Hussain Khan and *another*—Plaintiffs—Respondents.

Civil Misc. Appln. No. 583 of 1931, Decided on 8th December 1931, for leave to appeal to His Majesty in Council in P. C. A. No. 21 of 1931.

Civil P. C. (1908), S. 110—Substantial question of law—Whether certain words in Urdu have effect of divorce is not substantial question of law.

The question whether the use of certain words in Urdu by a woman's husband must be held to effect a divorce under the Hanafi Mahomedan law inspite of the admitted fact that there was no intention of divorce on the part of the husband, is not a substantial question of law and therefore leave to appeal to the Privy Council cannot be granted, only on this question: *A.I.R.* 1927 *P. C.* 15, *Ref.* [P 134 C 2]

Ghulam Husan—for Appellant.

Siraj Hasain—for Respondent 1.

Order.— This is an application for leave to appeal to His Majesty in Council from the judgment and decree of this Court dated 2nd November 1931, affirming the judgment and the decree of the Subordinate Judge of Hardoi, dated 10th November 1930.

The case fulfils the requirements of the rule as to valuation, but on behalf of the opposite party, it is contended that the appeal does not involve any substantial question of law We agree with this contention. The only question of law which we have decided in this appeal was as to whether the use of certain words in Urdu by a woman's husband, must be held to effect a divorce under the Hanafi Mahomedan law in spite of the admitted fact that there was no intention of divorce on the part of the husband. Un-

doubtedly as we have just now said this is a proposition of law which has been dealt with in the present case, but we are far from accepting the argument that it is a substantial question of law.

It seems to us that the matter is concluded by the decision of their Lordships of the Judicial Committee in *Ma Mi* v. *Kallander Ammal* (1).

We accordingly reject this application with costs.

As a result of our order dismissing this application, Civil Miscellaneous Application No. 583 of 1931 is also dismissed.

K.N./R.K. *Application dismissed.*

(1) A. I. R. 1927 P. C. 15=100 I. C. 1=54 I. A. 61=5 Rang. 18 (P. C.).

A. I. R. 1932 Oudh 135

SMITH AND SRIVASTAVA, JJ.

Indar Gir—Plaintiff—Appellant.

v.

Special Manager, Court of Wards, Balrampur Estate—Defendant—Respondent.

Second Appeal No. 38 of 1931, Decided on 29th September 1931, from order of Addl. Sub-Judge, Gonda, D/- 24th October 1930.

(a) Transfer of Property Act (4 of 1882), Ss 118 & 54—Transfer followed by delivery of possession, not effected by registered instrument, but acted upon for about 30 years—No evidence to prove its value 30 years ago—Transfer is valid.

When the transfer of certain property, though not effected by a registered instrument is accompanied by delivery of possession and is acted upon for about 30 years and where there is no evidence to show the value of it 30 years ago, the transfer is not open to objection and is valid under the provisions of S. 118 read with S. 54. [P 136 C 2]

(b) Adverse possession — Parti land — Adverse possession of one portion does not lead to presumption in respect of other.

In the case of parti land the adverse possession of one portion of the land cannot lead to any presumption of adverse possession in respect of the other portion. There can be no presumption of possession in favour of a trespasser. [P 137 C 1]

(c) Adverse possession—Presumption—Possession can be presumed to be adverse when it is of open, visible and notorious character.

Where the possession is of an open, visible and notorious character the Court can properly presume the possession to be adverse though there may not be evidence of any assertion of hostile title by the person in possession. [P 136 C 2]

Ghulam Hasan and *Iftikhar Husain*—for Appellant.

H. K. Ghose—for Respondent.

Judgment.—This is a plaintiff's appeal against the judgment and decree dated 24th October 1930, of the Additional Subordinate Judge of Gonda modifying the judgment and decree dated 23rd December 1929, of the Munsif of Utraula. It arises out of a suit for possession of three plots, Nos. 994, 995 and 996, situate in village Harraiya. The parties are agreed that the Balrampur estate is the superior proprietor of village Harraiya and that the predecessor in title of the plaintiff was the under-proprietor of the village under a decree of the settlement Court dated 12th March 1873.

The plaintiff came to Court on the allegation that the Balrampur estate had constructed a tahsil building and certain other buildings appurtenant thereto, including a phulwari, on the plots in suit with the permission of the plaintiff's ancestors on the understanding that the buildings and the phulwari would be removed and the land vacated whenever the defendant was required to do so. It was further averred that in 1928 the plaintiff asked the defendant to remove the buildings and the phulwari and to vacate the land, that the defendant offered to give the plaintiff some other land in exchange for the land in suit, but the proposals for exchange were not approved by the Board of Revenue, that subsequently the defendant made some new constructions on the aforesaid land and failed to vacate it. The plaintiff therefore claimed a decree for possession of the land by demolition of the buildings standing thereon.

The defendant denied that the Balrampur estate had been in possession of the plots in suit with the permission of the plaintiff's ancestor. As regards plot No. 995, it was pleaded that the plaintiff had been given a plot No. 1402/1 measuring 1·90 acres, in village Gujauli in exchange for it, that the exchange was oral and had been effected by means of delivery of possession about 30 years ago. As regards plot No. 996, the defendant's case was that the tahsil and other buildings had been in existence from before the passing of the decree for under-proprietary rights in favour of the plaintiff's ancestor, and that in any case the defendant had acquired an indefeasible title to it by adverse possession extending for more than 12 years.

The learned Munsif dismissed the suit in its entirety. The plaintiff appealed to the additional Subordinate Judge with regard to only two of the plots, namely, Nos. 995 and 996. In regard to plot No. 995 the learned Subordinate Judge found that the alleged exchange had been

fully established, that it had been acted upon by the parties and that the plaintiff was not therefore entitled to claim possession of the plot. With regard to the other plot No. 996 he held that the defendant had succeeded in establishing his title by adverse possession only with regard to four structures, namely, temple No. 2, living quarters No. 4, Tahsil building No. 6, and kachcha building No. 7, but had failed to make out any title by adverse possession with regard to the rest of the plot. He therefore gave the plaintiff a decree for possession of plot No. 996 with the exception of the land occupied by the four structures just mentioned. The plaintiff has challenged before us the correctness of the decision of the lower appellate Court with regard to No. 995 and the four structures on plot No. 996 to which reference has been made above. The defendant-respondent has on the other hand, filed cross objections in respect of that portion of plot No. 996 for which a decree has been passed in the plaintiff's favour.

The first contention urged by the learned counsel for the plaintiff-appellant is that the alleged exchange of No. 995 is contrary to the provisions of S. 118, T. P. Act, and is therefore illegal. He also questioned the correctness of the finding of the lower Court about the exchange having been acted upon by the parties. It is admitted that the plaintiff has been in possession of No. 1402/1, 1·90 acres, in village Gujauli, and that he has not been paying rent in respect of it, but it is contended that his possession over this plot has not been recognized by the Balrampur estate to be possession of the proprietary interest. For this reason it is argued that the transfer of No. 1402/1 in the plaintiff's favour was not a transfer of ownership such as is contemplated by the definition of exchange as given in S. 118, T. P. Act. We are of opinion that the contention is not well founded. The documents relating to the mutation proceedings which took place in respect of the exchange in question, have been exhibited in this case. Ex. A-7, the report of the patwari and Ex. A-8, the statement made by the patwari show clearly that the plot in question was given to the plaintiff by the Balrampur estate in exchange for plot No. 995 in village Harraiya. The mutation order, Ex. A-10, shows that the name of Baijnath Gir was ordered to be substituted in place of Maharaja Bhagwati Prasad Singh in the khewat with regard to 1·90 acres of plot No. 1402/1 in village Gujauli. The khasras for subsequent years shows that the aforesaid plot has been recorded in the name of the plaintiff as his khudkasht. Thus there can be no doubt that the ownership of plot No. 1402/1 has been transferred to the plaintiff and that he is in possession of it as proprietor. We might as well add that the learned counsel for the defendant-respondent has not disputed before us that the plaintiff is the proprietor of plot No. 1402/1. We have therefore no hesitation in accepting the finding of the learned Subordinate Judge that the exchange set up by the defendant has been fully proved and has been acted upon by the parties This being so the burden lies upon the plaintiff to show that the value of the land at the time of the exchange was Rs. 100, or upwards so as to make the transaction invalid for want of a registered instrument.

The learned counsel for the plaintiff-appellant is unable to refer us to any evidence on this point. The valuation given in the plaint gives the value of all the three plots in suit, but does not specify the value of plot No. 995 separately. Even if it did, it would not prove the value of it 30 years ago when the exchange took place. We must therefore hold that the exchange in the present case, which was accompanied by delivery of possession is not open to objection and is valid under the provisions of S. 118 read with S. 54, T. P. Act. In this view of the matter it is not necessary for us to deal with the other ground based on the doctrine of part performance relied on by the learned Subordinate Judge.

As regards No. 996 stress has been laid on behalf of the plaintiff-appellant on the fact that there is no evidence of any assertion of hostile title by the defendant to the knowledge of the plaintiff. The possession of the Balrampur estate over the tahsil building and the other structures appurtenant to it with regard to which the plaintiff's claim has been dismissed, is of such an open, visible and notorious character that in the circumstances of the case, the learned Subordinate Judge was justified in presuming the defendant's possession to be adverse. Further, the statement of Sri Kishen Gir, the predecessor-in-title of the plaintiff,

shows that there had been disputes between him and the Balrampur estate in regard to the boundaries of the tahsil buildings and other houses appurtenant to it. These disputes arose more than 12 years ago. This evidence shows that the relations between the parties were by no means friendly. We must therefore uphold the finding of the lower appellate Court about the defendant's possession being adverse. Next as regards building No. 5, it was contended that there was no evidence of its being more than 12 years old. The evidence of D. W. 5, Tej Bahadur Singh who was formerly a Tahsildar of the Balrampur estate, shows that this building is used as the residential quarters of the Naib Tahsildar and that it has been in existence for more than 12 years. We must therefore reject the contention.

Lastly it was contended that the possession of building No. 4 which consists of *phus* houses used by the Tahsil Chaprasis as their living quarters should not be regarded as adverse because the structures by their nature are of a temporary character. The evidence shows that the building in question is an appurtenance of the main Tahsil building. Even though the houses may be made of straw, yet when they were being used regularly as living quarters by the chaprasis of the Tahsil, we are not prepared to disagree with the lower Court that the possession in the circumstances of the case must be regarded as adverse. The result therefore is that the decision of the lower Court in respect of No. 996 in so far as it is in favour of the defendant must be upheld. As regards the cross-objections: The main contention on behalf of the respondent is that having established his adverse possession with regard to the main buildings standing on plot No. 996 his possession with regard to the rest of that plot must also be presumed to be adverse. It is not denied that the plot is parti land. This being so possession of one portion of the plot cannot lead to any presumption in respect of the other portion. There can be no presumption of possession in favour of a trespasser. In the absence of definite evidence showing actual possession over the "parti" land the defendant cannot lay any claim to it.

Next it is contended that the defendant's adverse possession with regard to the chhappar No. 3 and the kachcha wall with the thatch on it described as No. 5, has been made out. The learned Subordinate Judge has described both these structures as being of a temporary character. He has further found that it is not established that they have been in existence for more than 12 years. The learned counsel for the defendant-appellant has referred to the statements of P. W. 5, Tej Bahadur Singh and D. W. 6, Bhikhari Lal, with regard to these structures. If this evidence is accepted it will show that the structures have been in existence for over 12 years, but we are not prepared to say that they are not of a temporary character. The defendant has in our opinion failed to make out any case for our disturbing the finding of the learned Subordinate Judge in respect of these two structures. Lastly it was contended that the defendant has got a right of egress and ingress over the open land of No. 996 for the use of the Tahsil and other buildings appurtenant thereto and that the defendant's right of easement of way with regard to buildings Nos. 4, 2, 6 and 7 should be declared in this case. It is admitted that no such right was set up in the pleadings in the suit. The plaintiff had no opportunity to answer any claim of easement and there was no issue framed in respect of it. It is not therefore possible for us to enter into a discussion of this question in the present case at this stage. If the defendant has any such claim, he must if possible establish it by a separate suit. The result therefore is that both the appeal and the cross-objections fail and are dismissed with costs.

P.N./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 137

KISCH, J.

Abheraj Singh—Plaintiff—Appellant.

v.

Gaya Singh and *another* — Defendants —Respondents.

Second Appeal No. 103 of 1931, Decided on 3rd September 1931, against decree of Sub-Judge, Fyzabad, D/- 21st January 1931.

Evidence Act (1872), S. 35 — Report in police diary is admissible though writer of report is not called as witness.

A report by the party to the suit, made at a police station is an entry in a public record made by a public servant in the discharge of his official duties and as such is a relevant fact under S. 35. Such an entry is admissible in evidence under this section, even if the person who made it is alive

and not called as a witness : *A. I. R.* 1927 *Oudh* 310 and 46 *Cal.* 152, *Rel. on.* [P 138 C 2]

Akhlaque Husain—for Appellant.

M. L. Khandailal—for Respondent 1.

Judgment.—In the suit out of which this appeal arises the plaintiff sued the defendant Mt. Mahadei and Gaya Singh for possession of a grove and certain other property with which this appeal is not concerned on the allegation that he was in possession of the property under a registered mortgage deed for Rs. 200 executed by the defendant Mt. Mahadei in his favour on 2nd September 1926 and the defendant Gaya Singh had unlawfully dispossessed him from the property two years before the institution of the suit. The defendant Gaya Singh denied having dispossessed the plaintiff and alleged that he was in possession of the grove in suit under an unregistered mortgage deed for Rs. 80 executed by the defendant Mt. Mahadei in his favour about two years before the plaintiff's mortgage. He further alleged that he had lost this mortgage deed about six days before the institution of the suit and stated that he had made a report at the police station as soon as he discovered the loss of the document. The defendant Mt. Mahadei admitted the plaintiff's claim and denied having executed any mortgage in favour of the defendant Gaya Singh stating that he had once fradulently obtained her thumb impression on a blank paper.

The trial Court accepted the evidence tendered by the defendant Gaya Singh with regard to the alleged loss of his mortgage deed and allowed him to produce secondary evidence of its contents. The defendant did not produce the report made by him at the police station of the loss of the document in which the consideration of the mortgage deed was stated to be Rs. 120. If this were the consideration and not Rs. 80 as stated by the defendant the document would have required registration and without it would have been inadmissible in evidence. The original report was summoned by the plaintiff and was produced by the Head Constable of the police station. A copy made by the Head Constable and compared by him with the original was tendered in evidence by the plaintiff, but was rejected by the Court as not proved because the writer of the report had not been examined as a witness. After considering the secondary evidence given as to the contents of the mortgage deed set up by the defendant Gaya Singh, the trial Court came to the conclusion that he was in possession of the grove under this prior mortgage and therefore dismissed the plaintiff's suit brought on his subsequent registered mortgage deed. On appeal by the plaintiff it was contended on his behalf that the trial Court had improperly rejected the police report made by the defendant Gaya Singh and had wrongly believed the evidence tendered by the defendant Gaya Singh to prove that his mortgage deed had been lost. The learned Subordinate Judge however upheld the findings of the trial Court on both points and dismissed the appeal.

The plaintiff has come up to this Court in second appeal. It is conceded by the learned counsel for the plaintiff that if the defendant Gaya Singh succeeds in proving that he had a legal prior mortgage accompanied by possession, even if such mortgage were unregistered, he could not be ousted from his possession by the plaintiff. The learned counsel for the plaintiff-appellant has however contended in a very able argument that the defendant Gaya Singh has failed to prove the mortgage set up by him; that the Courts below were wrong in refusing to admit the police report in evidence, that this material piece of evidence not having been taken into consideration the finding of fact of the Courts below that the original mortgage deed was lost and consequently their admission of secondary evidence of its contents are unsustainable.

It seems to me that these contentions are sound and that effect must be given to them. In my opinion there can be no doubt as to the admissibility in evidence of Gaya Singh's report made at the police station. It is an entry in a public record made by a public servant in the discharge of his official duties and as such is a relevant fact under S. 35, Evidence Act. Such an entry is admissible in evidence under this section, even if the person who made it is alive and not called as a witness. In *D'Cruz* v. *D'Cruz* (1), it was held that an entry in a prescription register maintained at a Government dispensary was admissible in evidence under S. 35, Evidence Act, although the particular compounder who made the entry was not called as a witness to prove his handwriting. In

(1) A. I. R. 1927 Oudh 310=103 I. C. 512.

Tamijuddin Sarkar v. *Tazu* (2), it was held that an entry in the register of deaths maintained at a police station under the police regulations was admissible in evidence under the same section although it has not been shown by what particular police officer the entry was made. Messrs. Woodroffe and Amir Ali, the learned commentators on the Evidence Act also take the same view: Woodroffe and Amir Ali's Law of Evidence, Edn. 8, p. 372. Under the provisions of S 114, Evidence Act, the Court is entitled to presume that the entry was properly made. In this Court the learned counsel for the defendant-respondent has not attempted to controvert these propositions of law.

When the police report is read together with the various statements of the defendant Gaya Singh on the subject of the alleged loss of the mortgage deed it seems to me impossible to resist the conclusion that Gaya Singh's mortgage deed was not lost, but has been deliberately withheld because he knew that its production would be fatal to his case inasmuch as it would show that his unregistered deed was for a sum in excess of Rs. 100 and therefore inadmissible in evidence under S. 17 read with S. 49, Registration Act. The report contains an admission by the defendant that the consideration for his mortgage deed was Rs. 120. This accounts for the defendant himself not putting in his report at the police station of the loss of the document as part of his own evidence, although the proof of the loss of the original mortgage deed was essential to the success of his defence.

The story put forward by the defendant with regard to the loss of this document was that it was shown to the land records officer in the course of mutation proceedings based on the mortgage evidenced by this document on 23rd July 1930, that it had been returned to him by the land records officer after inspection and that it had been lost on the same day. He has however given a number of inconsistent statements as to the circumstances of its loss and the time when he discovered it. It was on 16th August 1930 that he made his report at the police station in which he says that after receiving back the document from the land records officer he kept it with him and that he discovered that it was missing when he returned to his house the same day. As has been already mentioned he gave the consideration of the mortgage deed as Rs. 120. In his written statement filed on 12th September 1930 he merely stated that the document had been lost and that he suspected the complicity of the plaintiff in its disappearance. He was examined at length on the subject by the trial Court on 18th September 1930, the date of the framing of the issues. He then alleged that after receiving back the document from the land records officer he handed it over together with other documents to one Mendai Singh who returned the bundle to him the same day. He did not examine the bundle to see that all the documents were there and did not discover that it was missing until the date on which he received the summons on which he immediately made a report at the police station. He made no inquiry from Mendai Singh. This Mendai Singh's name does not appear in the police report. He was examined as a witness by the plaintiff and denied having even been entrusted with any documents by Gaya Singh. Gaya Singh's statement that he only discovered the loss of the document on receiving the summons in the case conflicts with his statement in the report that he discovered the loss on his return home from the Court of the land records officer on 23rd July 1930. It may also be noted that in this statement he was unable to give the date of his mortgage deed or even the year in which it was executed, though he had given the exact date in his written statement which makes it difficult to resist the conclusion that the mortgage deed was in his possession at the time the written statement was drafted. In his statement made on oath as a witness in the suit on 16th October 1930 he repeated his statement that he had handed over the document to Mendai Singh and that he did not look into the papers when he returned home and only discovered the loss when he received the summons in the case.

The various statements made by the defendant Gaya Singh constitute the sole evidence on the record of the loss of the mortgage deed and clearly, in view of what has been stated above, they are not sufficient to prove the loss of the document. The report at the police station was evidently made before Gaya Singh had consulted his legal advisers. There

(2) [1918] 46 Cal. 152=46 I. C. 237.

is no resemblance in appearance or sound between the figures Rs. 120 and Rs. 80. either in English or the vernacular and the theory of a mistake having been made in recording the figure can therefore be excluded. It is obvious that the defendant Gaya Singh in making the report stated the true consideration of the mortgage deed before he had realized that the registration of a mortgage deed for more than Rs. 100 was compulsory and such a deed was inadmissible in evidence without registration. I am therefore satisfied that the defendant has failed to prove that the original document has been lost as alleged by him. It follows that secondary evidence of its contents is inadmissible. Such being the case the defendant Gaya Singh has failed to prove his prior mortgage and cannot resist the plaintiff's claim to possession under the plaintiff's registered mortgage.

I accordingly allow the appeal and modify the decree of the Court below so as to give the plaintiff a decree for possession over the grove (No. 541) as well as over the other property in respect of which he has been granted a decree by the lower appellate Court.

The plaintiff will also be given a decree for Rs. 19 mesne profits which was the amount agreed upon between the parties in the trial Court as the mesne profits of the grove in question.

The plaintiff-appellant will get his costs in this Court. With regard to the costs in the Courts below, in view of the fact that plaintiff unnecessarily included in his suit the property other than the grove No. 541 value Rs. 140 and overvalued his claim for mesne profits by Rs. 80, the appellant will receive costs in the trial Court and the lower appellate Court proportionate to Rs. 80 and will pay the costs of defendant 2 proportionate to Rs. 220 in the trial Court and Rs. 140 in the lower appellate Court.

B.V./R.K. *Appeal allowed.*

A. I. R. 1932 Oudh 140

RAZA, J.

Sitla Bakhsh Singh—Appellant.

v.

Subadar and *others*—Respondents.

Second Appeal No. 41 of 1931, Decided on 19th November 1931.

(a) Adverse Possession — Landlord and Tenant—Evidence.

Where there is no reliable evidence to prove that the plaintiffs physically dispossessed the defendants or that they ever asserted a hostile title and all that is made out by the evidence is that the plaintiffs have been in possession for many years, that they have never paid any rent in respect of it and that in the village papers they have been recorded as bila tasfia tenants whereas the defendants have been recorded as proprietors, these facts are by no means sufficient to establish title by adverse possession nor can the mere assertion of a hostile title as proprietors in certain proceedings relating to mutation or correction of entries in village papers not accepted by Revenue Court by mere lapse of time convert what was a tenant title into that of a proprietor: *A. I. R.* 1923 *P. C.* 118 and *A. I. R.* 1931 *Oudh* 144, *Foll.* [P 141 C 1,2]

(b) Adverse Possession—Acquisition title by —Requisites for acquiring title by adverse possession exemplifed.

To prove title to land by adverse possession for the statutory period it is not sufficient to show that some acts of possession have been done; the possession required must be adequate, in continuity, in publicity and in extent, to show that it is possession adverse to the competitors; in other words, the possession must be actual, physical, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitation: 35 *Cal.* 961, *Ref.* [P 142 C 1]

Bhagwati Nath—for Appellant.

Haidar Hussain — for Respondents 1 and 2.

Judgment.—This is an appeal from a decree of the Additional Subordinate Judge, Sultanpur, dated 31st October 1930, affirming a decree of the Munsif, Musafirkhana, at Sultanpur, dated 14th December 1929.

The dispute in this case relates to Nos. 16/3, 9/2 and 16/4 in village Gajanpur in the District of Sultanpur.

Defendant 1 Sitla Bakhsh Singh brought a suit against Harbans Singh (plaintiff 2) son of Onkar Singh for arrears of rent under S. 108 (2)/127, Oudh Rent Act, in respect of plot No. 16/3 and obtained a decree in July 1929. Sarabjit Singh (plaintiff 1) and Harbans Singh (plaintiff 2) brought the present suit in September 1929 for a declaration that the plots in suit were owned and possessed by them jointly with defendants 4 to 10 and that the defendants 1 to 3 had no right to or interest in the said plots. The claim was resisted by defendants 1 to 3 on various grounds.

The learned Munsif found that defendants 1 to 3 were the original proprietors of the plots in suit but the plaintiffs have now become owners thereof by right of adverse possession for more than twelve years. He therefore decreed the plaintiffs' claim.

Defendant 1 alone appealed from the whole decree under O. 41, R. 4, Sch. 1, Civil P. C. The appeal was dismissed by the learned Additional Subordinate Judge on the finding that the plaintiffs had succeeded in establishing their adverse possession for more than 12 years before the suit. Defendant 1 has now appealed to this Court from the whole decree.

I have heard the learned counsel on both sides at some length. In my opinion this appeal should be allowed. As I understand the judgment of the learned Additional Subordinate Judge, he has found that the plaintiffs have succeeded in establishing their adverse possession simply because they have been entered as "bila tasfia" tenants in the village papers for more than 12 years. In my opinion this finding is clearly wrong and cannot be accepted. The possession of the plaintiffs, who are holding the plots in suit as tenants according to the entries in the village papers, did not and could not become adverse to the rightful proprietors merely because they (plaintiffs) were entered as tenants "bila tasfia" in the village papers. It has been definitely found in this case that defendants 1 to 3 are the proprietors of the plots in suit. The entries in the village papers show that the plaintiffs are the tenants of the plots in suit. Defendants 1 to 3 (or their ancestors) have all along been recorded as proprietors of the plots in suit while plaintiffs 1 and 2 (or their ancestors) have all along been recorded as tenants of the said plots. As pointed out in the case of *Babu* v. *Thakur Din* (1) where there is no reliable evidence to prove that the plaintiffs physically dispossessed the defendants or that they ever asserted a hostile title and all that is made out by the evidence is that the plaintiffs have been in possession for many years, that they have never paid any rent in respect of it and that in the village papers they have been recorded as "bila tasfia" tenants whereas the defendants have been recorded as proprietors, these facts are by no means sufficient to establish title by adverse possession.

The respondents' learned counsel has attempted to show that the plaintiffs had asserted a hostile title in or about 1904 in certain proceedings relating to mutation or correction of entries in village papers. I have not been referred to any documentary evidence on that point. As to oral evidence, I think there is no clear evidence on that point which can be safely relied upon. It should be borne in mind that it has been definitely found in his case that the title to the plots in suit is in defendants 1 to 3 and not in the plaintiffs. The fact remains that the plaintiffs never succeeded in their attempt to get themselves recorded as proprietors of the plots in suit. The assertion if any was never accepted by the Revenue Court. Their assertion if any was surely unfounded at the time it was made and cannot by the mere lapse of time convert what was a tenant title into that of a proprietor: *Mumtaz Ali Khan* v. *Mohan Singh* (2). The respondents' learned counsel has referred to the case of *Nadir Singh* v. *Anpurna Kuar* (3). It was held in that case that where it is found that a person has been in continuous possession of some property for more than 12 years without any right whatever and that although he did not at any time make any openly avowed claim of right to it, his acts and the circumstances attending his possession clearly show that he intended to hold possession as of right, he has to be declared as having acquired title by adverse possession.

In my opinion that ruling does not help the plaintiffs in this case. The entries in the village papers show that the plaintiffs or their ancestors have all along been recorded as tenants of the land in suit and were never recorded proprietors thereof. They were thus holding the land as tenants. The mere fact that no rent was realised from them is of no consequence. If they ever attempted to assert a hostile title that assertion was not accepted by the Revenue Court. They never instituted any suit in the civil Court to establish their right or title to the land in suit. They were content that possession should remain with them as tenants simply and so they have all along been recorded as tenants of the land in suit. It should be noted that the judgment of the learned Additional Subordinate Judge shows that it was not contended before him that the plaintiffs or their ancestors had ever asserted a

(1) A. I. R. 1931 Oudh 144=131 I. C. 400.

(2) A. I. R. 1923 P. C. 118=74 I. C. 476=50 I. A. 202=26 O. C. 231=45 All. 419 (P.C.).

(3) [1920] 56 I. C. 759.

hostile title to the land in suit. It appears that what was argued before him was simply this: that the plaintiffs should be held to have perfected their title by adverse possession as they had been entered as "bila tasfia" tenants of the land in suit for more then 12 years before the institution of the suit. It should be borne in mind that to prove title to land by adverse possession for the statutory period it is not sufficient to show that some acts of possession have been done; the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitors, in other words, the possession must be actual, physical, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitation: see *Jogendronath Roy* v. *Baldeo Das* (4).

In my opinion the plaintiffs' claim is not made out. Hence I allow this appeal, set aside the decrees of the lower Courts and dismiss the plaintiffs' suit with costs.

K.N./R.K. *Appeal allowed.*

(4) [1908] 35 Cal. 961=6 C. L. J. 735=12 C. W. N. 127.

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* A. I. R. 1932 Oudh 142

KISCH, J.

Mr. Aziel Julius--Applicant.

v.

Mrs. Jane Julius —Opposite Party.

Divorce Case No. 11 of 1931, Decided on 5th December 1931, against decree of Judl. Commr.'s Court, D/- 7th September 1929.

*** Divorce Act (4 of 1869), S. 7 — Decree for judicial separation is ipso facto annulled by resumption of cohabitation—Proceedings if to be taken must be by fresh suit — Agreement by husband, prior to resumption, to contrary is immaterial.**

A decree for judicial separation is ipso facto annulled by resumption of cohabitation as the resumption of cohabitation puts an end to the cause for which the decree was granted and after such resumption of cohabitation, if proceedings are to be taken at all they must be by a fresh suit. Not can n agreement by the husband before the resumption of cohabitation that the order granting the wife an allowance would remain in force and that she would have the right to separate from him if she had any fresh grievance against him cannot have the effect of maintaining the decree: *A. I. R.* 1924 *Rang.* 314 and *Haddon* v. *Haddon*, (1887) 18 *Q. B. D.* 778, *Foll.* [P 143 C 1]

H. G. Walford and *S. D. Misra* —for Applicant.

M. L. Saksena—for Opposite Party.

Order.—On 7th September 1929 this Court granted a decree for judicial separation to Mrs. Julius with alimony of Rs. 30 per mensem for herself and Rs. 10 for her daughter. On 21st September 1931 her husband, Mr. Julius, applied to this Court for the discharge of the decree on the ground that his wife had resumed cohabitation with him in November 1929 and had left his protection again in July 1930, that she had returned to him in November 1930 and had left him again in June 1931. He accordingly contended that as after the decree of separation the parties had resumed cohabitation, the decree was ipso facto annulled. Mr. Julius also asked for the custody of the daughter aged five and a half years to be granted to him.

Thereafter on 1st October 1931, Mrs. Julius applied for the execution of the decree for alimony for the period from 7th September 1929 to 30th September 1931 which it will be observed covers the two periods during which she resumed cohabitation with her husband. She admits this resumption of cohabitation from 5th December 1929 to 8th July 1930 and again from November 1930 to June 1931. The application for execution is opposed by Mr. Julius on the ground that the decree is no longer executable for the reasons given in his application referred to above.

In reply to Mr. Julius' application for discharge of the decree, Mrs. Julius sets up an agreement executed by her husband on 4th December 1929 under the terms of which Mr. Julius took upon himself the blame for what had occurred in the past, expressed his desire that his wife and child should return to his house and undertook not to ill-treat her. He further agreed that the order of this Court granting his wife an allowance of Rs. 40 should remain in force and that she should have the right to live separate from him, if she had any fresh grievance against him. Mrs. Julius alleged further acts of cruelty on the part of her husband since her return to him and prayed that in any event her written statement might be treated as a petition for a fresh decree for judicial separation and alimony. She also opposed Mr. Julius' application for the custody of the child.

I have heard the learned counsel for the parties on the preliminary point raised by these proceedings as to whether

the decree of this Court is still in force in view of the resumption of cohabitation by the parties subsequent to that decree. In my opinion the decree is ipso facto annulled by such resumption of cohabitation and the agreement above referred to cannot have the effect of maintaining the decree. The point in question is not covered by any of the provisions of the Divorce Act (4 of 1869) or subsequent amendments to that Act, but S. 7 of the Act lays down that in suits and proceedings thereunder the Court shall act and give relief on principles and rules which, in the Court's opinion, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. It was laid down by A. L. Smith J., in *Haddon* v. *Haddon* (1) that

"it is beyond question the law as administered in the Divorce Court . . . . . that upon resumption of cohabitation a decree theretofore made of judicial separation on the ground of cruelty comes to an end . . . . . The reason is that the resumption of cohabitation puts an end to the cause for which the judicial separation was granted ; and after such resumption of cohabitation if proceedings are to be taken at all, they must be taken by a fresh suit."

This principle was adopted in what appears to be the only reported case on the subject in India, namely *Ellen Ma Noo* v. *William Po Thit* (2). The facts of that case were almost identical with the facts in the present case. There was a resumption of cohabitation after a decree of judicial separation with alimony and there was an agreement by the husband when the wife returned to him that if he misbehaved against her in future he would continue to pay the alimony decreed. The learned Judge of the Rangoon High Court in rejecting the wife's application for execution of the decree for alimony followed the established practice of the Divorce Court in England and held that the resumption of cohabitation had annulled the decree. He further held that the agreement did not affect the matter in the slightest degree as permanent alimony granted to her by the decree for judicial separation was merely consequential and the wife either accepts her decree for judicial separation and lives apart from her husband or she does not accept it. There cannot be any such thing as conditional resumption of cohabitation. In the case of *Haddon* v. *Haddon* (1) referred to above, Hawkins J. has observed that

"it is impossible to suppose that the legislature in giving Magistrate's power to release a wife from the obligation of cohabitation by reason of imminent danger from her husband's violence, intended to confer upon them jurisdiction to make an order which should give a wife liberty to live apart from and resume cohabitation with her husband when and as often as she should think fit, and compel her husband to maintain her at all times and when it pleased her to separate from him even though her safety no longer required a separation . . . . . If after resumption of cohabitation fresh assaults a of an aggravated character are made by the husband, so as again to imperil her safety, the wife must apply for a new order, and cannot again avail herself of that which by her own act in returning to cohabitation she has exhausted."

I find myself in entire agreement with the view taken by the Rangoon High Court in *Ellen Ma Noo* v. *William Po Thit* (2) and hold that the decree of this Court dated 7th September 1929, has been annulled by the parties' resumption of cohabitation. The application for execution is accordingly dismissed.

I accept the prayer of Mrs. Julius that her written-statement be treated as an application for a fresh decree for judicial separation subject to the requisite stamp fee of Rs. 20 being paid within ten days or if so advised she may put in a fresh application for judicial separation within that period.

Mr. Julius should file his written statement on or before 18th January 1932 on which date the case is fixed for issues.

Mrs. Julius will retain the custody of the child pending the decision of the case. Mr. Julius must pay to his wife alimony pendente lite at the rate of Rs. 40 per month from today's date.

As Mrs. Julius has already been granted a lump sum for the expenses of her defence there will be no order as to costs.

R.M./R.K. *Order accordingly.*

(1) [1887] 18 Q. B. D. 778=56 L. J. M. C. 69=56 L. T. 716=51 J. P. 486.

(2) A. I. R 1924 Rang. 314=83 I. C. 566=2 Rang. 163.

A. I. R. 1932 Oudh 143

RAZA, J.

Badlu—Defendant—Applicant.

v.

Ram Das and *another* — Plaintiff and Defendant—Opposite Parties.

Civil Revn. Appln. No. 89 of 1931, Decided on 23rd November 1931, from order of Second Additional Judge, Small Cause Court, Lucknow, D/- 11th September 1931.

Civil P. C. (1908), O. 20, R. 4—Small Cause Court cases must be decided as carefully as regular suits—Judgment must contain points for decision and decision thereon.

A Judge of a Small Cause Court is expected to apply his mind to the decisions of a Small Cause Court case as carefully as he would apply his mind to the decision of a regular suit under O. 20, R. 4. The Judge may reduce his remarks to a minimum and they need not contain more than the points for determination and the decision thereon but this minimum must be intelligible, thus enabling the High Court in revision to satisfy itself that the decree or order was according to the law without the necessity of perusing the whole record.

Where the order which could be taken as judgment of the Court ran as follows; "Decree for Rs. 150 and costs. Attempt to be made to realize first from defendant 1."

Held: that the order could not be treated as judgment of the Court. [P 144 C 1]

Rama Shankar Srivastava — for Applicant.

Sri Ram and *Narain Lal*—for Opposite Parties.

Order.—This is an application in revision under S. 25, Small Cause Courts Act. The plaintiff sued to recover Rs. 150 on the basis of a pro-note. The suit was contested by the defendants. The claim was decreed by the learned Second Additional Judge of the Small Cause Court Lucknow, on 11th September 1931. I find there is no judgment according to law in this case. The order which is to be taken as the judgment of the Court runs thus:

"Decree for Rs. 150 and costs. Attempt to be made to realize first from defendant 1."

It is impossible to treat this order as the judgment of the Court. Under O. 20, R. 4 (1), Civil P. C., the judgment of a Court of Small Causes must contain the points for determination and the decision thereon. The Judge of a Court of Small Causes is expected to apply his mind to the decision of a Small Cause Court case as carefully as he would apply his mind to the decision of a regular suit. Under O. 20, R. 4, Civil P. C., a Judge in a small cause suit may reduce his remarks to a minimum and they need not contain more than the points for determination and the decision thereon but this minimum must be intelligible, thus enabling the High Court in revision to satisfy itself that the decree or order was according to law, without the necessity of perusing the whole record. The learned Judge ought to have written a judgment according to law to enable this Court to see if the case had been decided properly. He is directed to write his judgment according to law and submit the file to this Court without any unnecessary delay. The case will then be taken up by this Court for disposal. An early date will be fixed as soon as the record is received back from the lower Court after compliance.

R.M./R.K. *Case remanded.*

A. I. R. 1932 Oudh 144

RAZA, J.

Badri Misir and *others*—Defendants—Appellants.

v.

Shankar Misir and *others*—Plaintiff 1—Respondents.

Second Appeal No. 111 of 1931, Decided on 26th November 1931, against decree of Addl. Sub-Judge, Sultanpur, D/- 22nd December 1930.

(a) Hindu Law—Joint family—Property acquired as trespasser but held as joint family property becomes joint family property.

Where property is originally acquired by members of a joint family as trespassers and held for more than 12 years treating it as joint property of the family, it becomes the joint property of the family in which all the members have interest. [P 145 C 1]

(b) Civil P. C. (1908), S. 100 — Finding that property held by persons is joint family property is question of fact.

The findings that the property in suit is the joint property of all the descendants of *J* and that it came to be held after the partition by all descendants of *J* as tenants-in-common are findings of fact based upon admissible evidence and cannot be impugned in second appeal. [P 145 C 1]

Haidar Husain—for Appellants.

Ghulam Imam—for Respondent 1.

Judgment.—This is an appeal from a decree of the Additional Subordinate Judge, Sultanpur, dated 22nd December 1930, setting aside a decree of the Munsif, Sultanpur, dated 18th November 1929.

The facts of the case are fully set out in the judgment of the learned Additional Subordinate Judge and they need not be repeated in detail.

The dispute in this case relates to certain zamindari shares in three villages called Kalkhaura, Nakha and Kambhain in the District of Sultanpur.

The principal parties to the suit are the descendants of one Jasai Ram who died long ago. The plaintiff is the son of Sat Narain, one of the three sons of Jasai Ram. The principal contesting defendants are the descendants of the remaining two sons of Jasai Ram, namely,

ghisiawan and Bindeshuri. All the descendants of Jasai Ram were living jointly as members of a joint Hindu family before the year 1897. The property in suit originally belonged to one Beni Dayal Singh. Bindeshuri obtained a possessory mortgage from Beni Dayal Singh on 28th August 1875, in respect of certain shares in five villages including the three villages mentioned above. The property in suit was not comprised in the said mortgage but the descendants of Jasai Ram had been in possession of that property also along with the shares covered by the mortgage in the three villages mentioned above. It is not clear by what right they got possession of the property in suit which was not comprised in the mortgage, but the fact remains that they got possession of the property and held it as their property for more than 12 years. Achchebar Singh (defendant 13 since deceased) sued for redemption of certain shares as transferee from Bajrang Singh son of Beni Dayal Singh in 1915. Bajrang Singh was the father of defendant 12. It was finally decided in that suit that Achchebar Singh was not entitled to redeem the entire shares of Beni Dayal Singh in villages Kalkhaura, Nakha and Kambhain and that he could redeem only the shares covered by the mortgage of 1875. The property in suit was thus left in the possession of the descendants of Jasai Ram.

The learned Additional Subordinate Judge has found that the property in suit as well as the property covered by the mortgage was the joint property of all the descendants of Jasai Ram and that the plaintiff is entitled to a one-third share in the property in suit which was not included in the partition which took place among the descendants of Jasai Ram in the year 1897. He held that the descendants of Jasai Ram were in possession of the property in suit as joint tenants before the partition of 1897 and that it came to be held after that partition by all the descendants of Jasai Ram as tenants-in-common. He therefore gave the plaintiff a decree for a one-third share in the property in suit holding that the plaintiff's claim was not barred by time.

Some of the defendants have filed this appeal in this Court.

In my opinion there is no substance in this appeal.

The findings of the learned Additional Subordinate Judge that the property in suit is the joint property of all the descendants of Jasai Ram and that it came to be held after the partition of 1897 by all the descendants of Jasai Ram as tenants-in-common are findings of fact based upon admissible evidence and cannot be impugned in second appeal. The possession of one tenant-in-common is not adverse to the other until ouster. As pointed out in the case of *Dagadu Govind* v. *Sakhubai Nana* (1), where no co-parceners in a joint Hindu family come to partition and divide the joint property with the exception of a portion of it, they are, in absence of indication to the contrary, tenants-in-common with reference to the excepted property. I am not prepared to accept the contention that the property in suit was not the joint property of the descendants of Jasai Ram as they had originally acquired it as trespassers. In the first place it appears that this plea was not raised in defence in the lower Courts. In the second place I think there is no substance in this plea. It may be that the property was originally acquired by the members of the joint family as trespassers, but they held it as such for more than 12 years and it became the property of the family after that period in which all members were interested. They held the property treating it as joint property of the family. The plea in question must therefore be repelled in second appeal. No ouster or adverse possession is satisfactorily established.

In my opinion no case has been made out to disturb the judgment of the learned Additional Subordinate Judge. Hence I dismiss the appeal with costs.

K.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1924 Bom. 31=73 I. C. 369=47 Bom. 773.

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* A. I. R. 1932 Oudh 145

PULLAN, J.

Shiam Sunder—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 459 of 1930, Decided on 24th November 1930, against order of Addl. Sess. Judge, Unao, D/- 17th October 1930.

*** (a) Penal Code (1860), S. 408—Servant receiving sums for master and neither paying them to him nor accounting for them, has misappropriated those sums.**

Generally speaking, it is impossible for the prosecution to follow the money in the hands of

an accused person and prove that he spent a certain specific item in any particular manner. The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts. Where it is proved that the accused has received certain sums for his master and that he did not pay them to him nor did he enter them into his accounts, the inference is that he has misappropriated them to his own use: 33 *All.* 249, *Ref.*

[P 146 C 2]

(b) Criminal P. C. (1898), S. 222 (2)—Persons can be convicted of criminal misappropriation without specifying particular items.

Clause 2, S. 222 has been primarily enacted so that persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated this or that specific sum: (*Case law referred.*) [P 147 C 2]

(c) Interpretation of Statutes—Rule.

In India the Courts have to construe not the English law but the Indian Codes. [P 147 C 1]

J. M. Basu—for Appellant.

Ali Muhammad—for the Crown.

Judgment. — The appellant Shiam Sunder was the Munim of Lala Dwarka Nath, Taluqdar of Maurawan. He has been convicted on three counts of offences under S. 408, I. P. C., and he has been sentenced to five years' rigorous imprisonment on each charge, the sentences to run concurrently. The learned Sessions Judge has written a long and elaborate judgment in which he has given in full all the accounts which were kept by this man for the period of one year during which the offences are said to have been committed. There are three charges: two of specific acts of embezzlement and one of a general defalcation evidenced by the deficiency in his balance at the end of the year. This last charge is supported by the evidence of the account books kept by the accused himself and he has been unable to show either that he has entered the accounts correctly or that he has handed over to his master the correct balance. On the contrary in many cases the kachchi rokar showed different totals from the pakki rokar. At times where his balance showed a deficit he has entered fictitious items as deposits made by himself in order to square the totals, and when he was finally called upon to pay in the balance in hand he only paid in a sum of Rs. 335 odd, whereas his accounts showed according to the learned Sessions Judge, that he should have had in hand at that time over Rs. 1,771. I may remark that the Judge has cut down this sum. According to the evidence it was considerably more. In appeal the learned counsel for the accused has attacked the conviction on the two specific items on the ground that there is no definite proof that the accused took this money.

It is true that there is no proof as to how he dealt with the money but it is proved without doubt that he received both these items, one of Rs. 15-6-11 on 26th September 1928 and the other of Rs. 175 on 12th June 1929 from ziladars of his master, that he gave receipts for them and that he himself signed arz irsals which showed that these items had been paid in. Yet there is no mention of either item in the accounts and he never handed in these sums to his master or complained that he had given receipts without receiving the money. It is consequently too late for him to make that defence now and I hold that it is proved that he received both these items, that he did not pay them to his master, that he did not enter them into his accounts and I must infer from that that he misappropriated both these items to his own use. Generally speaking it is impossible for the prosecution to follow the money in the hands of an accused person and prove that he spent a certain specific item in any particular manner. The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts: see *Emperor* v. *Kadir Bakhsh* (1).

The learned counsel for the appellant has challenged the conviction on the third charge on the ground that a conviction on a general deficiency is not in accordance with S. 222, Criminal P. C. Before the passing of the present Act a Bench of the Allahabad High Court in the case of *Buddhu* v. *Babu Lal* (2) made the following observations:

" Where an agent or servant has received over a period of time several sums on behalf of his employer, and has during the same time, expended moneys on behalf of or made payments to his employer but still a deficiency was left, for which the agent or servant would or could not account, it might be impossible to fix him with the embezzlement of any particular item received by him although taking the items proved on both sides of the account and his course of conduct, it might be obvious that he had embezzled a large sum of money, namely, the difference between the

(1) [1911] 33 All. 249=11 Cr. L. J. 699=8 I.C. 687.

(2) [1896] 18 All. 116=(1896) A. W. N. 11.

amounts received and those expended and accounted for."

Their Lordships then said that the question of liability in such a case had been decided by Aikman, J., in *Queen-Empress* v. *Kellie* (3), and they agreed with that decision and therefore held that a servant charged with on offence of this nature could be legally convicted. I have been asked to consider that the law as laid down by the learned Judges of the Allahabad High Court is not good law in view of the provisions of S. 222 of the present Criminal Procedure Code, 1898. Cl. 2 of that section runs as follows:

" When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed."

Commenting on this section as far back as the year 1901 a Bench of the Madras High Court in the case of *Thomas* v. *Emperor* (4) observed that they were unable to accept the argument addressed to them that S. 222 was only intended to apply to cases where there is a general deficiency of account, and this ruling has led to many rulings by other High Courts to the effect that a number of specific charges may be included in one charge framed in accordance with the provisions of this section. There is as far as I know only one ruling of any High Court which takes the point of view that a conviction on a general deficiency of accounts is improper. This is to be found in the case of *Emperor* v. *Mohan Singh* (5). But I observe that in that case the learned Judge only expressed a grave doubt as to whether the form of the charge in which it was sent to the Sessions Judge was one which the Judge ought to have entertained and he gave his own opinion that S. 222 was meant for a case where a man is charged with embezzling the gross sum by which he appears to have meant the total of items embezzled as distinct from the difference between the sums actually received and the sums actually credited. It is probable that the learned Judge accepted the view of law taken in England by certain authorities that at a trial for embezzlement it is not sufficient to prove a general deficiency in account.

But in England there is a conflict of authority on this question, and in India the Courts have to construe not the English law but the Indian Codes. A Bench of the Calcutta High Court in the case of *Khirode Kumar Mukerji* v. *Emperor* (6), considered the object of the amendment in the Criminal Procedure Code by the introduction of sub-S. (2), S. 222. The learned Judges pointed out that it was not to amend the Penal Code but merely to get rid of a technical difficulty in framing the charge. As the law then stood it was difficult to convict, where there was a running account and the prosecution was unable to put their hand on specific items out of which the particular sum was embezzled. There is therefore no question that the learned Judges were of opinion that S. 222, Cl. (2) was primarily enacted so that persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated this or that specific sum. In an earlier case in 1904: *Samiruddin Sarkar* v. *Nibaran Chandra* (7), the same High Court held that a man who had realized by 23 rent receipts a sum of Rs. 103 and misappropriated out of this the sum of Rs. 67 could be properly convicted on a charge framed in accordance with S. 222. And the Bombay High Court in *Emperor* v. *Vinayak Laxman* (8) has taken the same view as the Calcutta High Court and distinguished the Allahabad ruling to which I have referred: *Emperor* v. *Mohan Singh* (5).

In the present case the accused is shown to have kept false accounts. These accounts were checked by one Deokinandan and the learned Sessions Judge has considered this man to be an expert and has accepted for the most part his evidence. The accused who is himself a munim and should at least understand his own accounts had made no serious attempt to explain what he has done with the money which he is shown to have received and which he entered wrongly in his accounts. He made an elaborate written statement and when he was examined in Court his usual reply to any question was that it was contained in his written statement even when it is not. For the rest he contented himself with making

(3) [1895] 17 All. 153=(1895) A. W. N. 37.
(4) [1906] 29 Mad. 558=5 Cr. L. J. 133.
(5) [1920] 42 All. 522=59 I. C. 372.
(6) A. I. R. 1925 Cal. 260=85 I. C. 372 = 26 Cr. L. J. 592.
(7) [1904] 31 Cal. 928=8 C. W. N. 807.
(8) A. I. R. 1928 Bom. 557=113 I. C. 612=30 Cr. L. J. 185=53 Bom. 119.

foolish allegations as to his master. It is certainly difficult to say with certainty the amount which he embezzled but the learned counsel has been unable to show any item on which the learned Sessions Judge can be held to have gone wrong. He finds that the total deficiency apart from the two specific items was Rupees 1,771-7-1 and this sum was embezzled in the course of a single year. In my opinion the conviction was proper in law and in accordance with the evidence. As to the sentence I do not consider that it is excessive and I accordingly dismiss this appeal and uphold the conviction and sentence on all counts. The accused must surrender to his bail.

K.N./R.K. *Appeal dismissed.*

** A. I. R. 1932 Oudh 148
Full Bench

WAZIR HASAN, C. J., RAZA AND SRIVASTAVA, JJ.

Ram Bharose and *others*—Appellants.

v.

Ramman Lal—Respondent.

Execution Decree Appeal No. 55 of 1931, Decided on 25th January 1932.

(a) Limitation Act (as amended by Act 9 of 1927), Art. 182 (5)—Previous to amendment period ran from date of application; after amendment from date of final order.

Whereas under Limitation Act (9 of 1908), limitation ran from the date of applying in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order, the Amending Act (9 of 1927) makes the period of limitation to begin not from the date of the previous application but from the date of the final order passed on it. [P 149 C 1]

(b) Limitation Act (as amended by Act 9 of 1927), Art. 182 (5)—Conditions of applicability stated.

To make this clause applicable, the necessary conditions which must be satisfied, whether the application is one for execution or to take some step-in-aid of execution of the decree or order are that in either case (1) the application must be in accordance with law, (2) it must be made to the proper Court and (3) there must be a final order passed on the application. On the plain grammatical construction of the clause these conditions are adjectival both to the application for execution and to the application to take step-in-aid of execution of the decree or order.

[P 149 C 1, 2]

(c) Limitation Act (as amended by Act 9 of 1927), Art. 182 (5)—Question whether particular proceeding is or is not step-in-aid must depend on facts of each case.

It is not possible to lay down any rule of thumb which might constitute a criterion in all cases for determining whether a particular proceeding is or is not a step-in-aid of execution. The question must depend upon the circumstances of each case. If the facts of a particular case show that the proceeding in question has the effect of facilitating or advancing the execution to any extent of removing some obstacle from the way or execution, it may well be regarded as a step-in-aid of execution. [P 149 C 2]

(d) Limitation Act (as amended by Act 9 of 1927), Art. 182 (5)—Presumption of oral application does not arise on application for certification under Civil P. C. (1908), O. 21, R. 2.

The presumption of an oral application can arise when there is necessity for an application. As no necessity for an application arises in the case of a certification under Civil P. C., O. 21, R. 2, sub-Cl. (1), there is no room for any such presumption : *A. I. R.* 1929 *P. C.* 19, *Foll.* [P 150 C 2]

**** (e) Limitation Act (as amended by Act 9 of 1927), Art. 182 (5)—Final order—Recording of payment by Court under O. 21, R. 2 (1), Civil P. C, is not final order.**

The words " final order " imply that it should be final as far as the Court passing the order is concerned. It should be an order which if not reversed or modified by a Court of appeal would be binding between the parties. In the case of a certification by the decree-holder and the recording of payment by the Court, the law does not require any notice being sent to the judgment-debtor and it is always open to the judgment-debtor to question the alleged payment, hence recording of payment by the Court under O. 21, R. 2 (1) cannot be regarded as a final order within the meaning of Art. 182, Cl. 5 : *A. I. R.* 1929 *P. C.* 19, *Rel. on.* [P 151 C 1]

**** (f) Limitation Act (as amended by Act 9 of 1927), Art. 182 (5)—Mere certification under O 21, R. 2 is not step-in-aid.**

The mere certification of itself by the decree-holder of a payment of money under the decree is not an application to take some step-in-aid of execution within the meaning of sub-Cl. (5), Art. 182 : *A. I. R.* 1930 *Rang.* 64 and *A. I. R.* 1931 *Cal.* 719, *Ref.* [P 151 C 1]

H. Husain and *Sunsur Dayal*—for Appellants.

Radha Krishna Srivastava—for Respondent.

Opinion.—The facts of the two cases which have given rise to this reference are briefly these :

The decree-holders who are the appellants, obtained two decrees for sale which were made absolute on 31st July 1923. The last application for execution of the decrees in both the cases was consigned to the records after part satisfaction of the decree on 25th August 1926. On 29th July 1929 the decree-holders filed certificates of payments of a sum of Rs. 85 in one case and Rs. 5 in the other case under O. 21, R. 2, Sch. 1, Civil P. C., and the payments were recorded by the Court on the same day. The applications for execution which have given rise to these appeals were made on 28th February 1931. The judgment-debtors contested the

applications, amongst others, on the grounds that the alleged payments were never made and that the present applications were barred by time under Art. 182, Cl. 5, Sch. 1, Limitation Act.

Both the lower Courts found that the decree-holder's allegation about the payments made towards part satisfaction of the two decrees was correct. The Munsif was of opinion that the certification of these payments was a step-in-aid of execution and saved limitation. The lower appellate Court, on the other hand, held that the certification was not a step-in-aid of execution of the decrees and that the applications were therefore barred by time. When the case came in second appeal before our learned brother, Kisch, J., he referred the following questions for decision by a Full Bench :

1. Whether the certification to the Court under sub-R. (1), R. 2, O. 21, Civil P. C., of a payment of money payable under a decree is an application to take some step-in-aid of execution of the decree within the meaning of sub-Cl. (5), Art. 182, Limitation Act ?

2. If so, whether the order of the Court under sub-R. (1), R. 2, O. 21 recording such payment is a final order on such application within the meaning of sub-Cl. (5), Art. 182 ?

3. If the answer to the above two questions are in the affirmative, whether any distinction is to be drawn between such certification and recording if it takes place within three years of the date of the decree or the decision of the previous application for execution and if it takes place more than three years from such date ?

The answer to these questions depends upon the interpretation to be placed on Cl. (5), Art. 182, Limitation Act. This clause as amended by Act 9 of 1927 runs as follows :

5. Where the application next hereinafter mentioned has been made " the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order."

It is to be noted that whereas under the Limitation Act 9 of 1908, limitation ran from the date of applying in according with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order, the amending Act 9 of 1927 makes the period of limitation to begin not from the date of the previous application but from the date of the final order passed on it. To make this clause applicable, the necessary conditions which must be satisfied whether the application is one for execution or to take some step-in-aid of execution of the decree or order are that in either case (1) the application must be in accordance with law; (2) it must be made to the proper Court and (3) there must be a final order passed on the application. On the plain grammatical construction of the clause, those conditions are adjectival both to the application for execution and to the application to take some step-in-aid of execution of the decree or order. In this case we are not concerned with an application for execution nor is there any question about the alleged application not being in accordance with law or not having been made to the proper Court. The question therefore reduces itself to this, whether there was an application to take some step-in-aid of execution of the decree and whether there was a final order passed on the application within the meaning of this clause.

It is not possible to lay down any rule of thumb which might constitute a criterion in all cases for determining whether a particular proceeding is or is not a step-in-aid of execution. The question must depend upon the circumstances of each case. If the facts of a particular case show that the proceeding in question has the effect of facilitating or advancing the execution to any extent or removing some obstacle from the way of execution, it may well be regarded as a step-in-aid of execution. Thus to take the concrete case of certification for an example it will be seen that O. 21, R. 2, Cl. (3), Civil P. C., provides that an uncertified payment shall not be recognized by any Court executing the decree. If for instance a decree-holder claims an extension of limitation under S. 20, Lim. Act, by reason of payment of interest as such or of part payment of principal the payment must be certified before it can be recognized by the Court executing the decree. In such a case the certification of payment being a step in furtherance of execution can be regarded as a step-in-aid of execution. It is not necessary for us to multiply examples or to pursue this matter further because whether the proceeding for certification in the present case is or is not regarded as a step-in-aid of execution it can be of no avail to the decree-holders in saving limitation for reasons to be presently stated.

Order 21, R. 2, Cl. (1) provides that where any money payable under a decree is paid out of Court the decree-holder

shall certify such payment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly. In *Prakash Singh* v. *Allahabad Bank Limited* (1) the decree-holder made an application to the Court certifying certain payments made by the judgment-debtor in partial satisfaction of the decree. One of the pleas raised by the judgment-debtor was that the payments could not be recognized as the certification had not been made within three years of the date of payment and reliance was placed on Art. 181, Sch. 1, Lim. Act in support of the plea. A Bench of this Court held that as a certification by a decree-holder under O. 21, R. 2, sub-Cl. (1), does not raise any point on which a Court has to decide judicially the certification is not in any circumstances an application within the meaning of Art. 181. This decision was affirmed by their Lordships of the Judicial Committee in *Prakash Singh* v. *Allahabad Bank Limited* (2). Dealing with the provisions of O. 21, R. 2, sub-Cl. (1), their Lordships held that the rule imposed a duty on the decree-holder to certify the payment and a duty on the Court on such certificate being given to record such payment. Their Lordships further observed:

"that the mere certification by the decree-holder of a payment to him out of Court by the judgment-debtor under O. 21, R. 2 (1) is not an application within the meaning of Art. 181, Sch. 1, Lim. Act . . . . . the mere fact that the document was called an "application" and was in the form of a petition cannot in their Lordships' opinion after the real nature of the procedure and convert what was really no more than a certificate of certain payments into an "application" within the meaning of Art. 181."

It is no doubt true that it was argued before their Lordships that in some cases in India it had been held that proceedings for certification constituted a step-in-aid of execution within the meaning of Art. 182, Cl. (5), Lim. Act. Their Lordships did not think it necessary to express any opinion with reference to the cited cases dealing with matters which were held to be steps-in-aid of execution of a decree or order. So the precise question arising in this case was left open by their Lordships. However we have to see whether in view of the observations of their Lordships as regards the nature of certification proceedings it can be possible to treat them as an application within the meaning of Art. 182. Even though the certification in the case before their Lordships was made by means of a document which was in the form of an application and also described as such, yet their Lordships held that it was really no more than a certificate which could not be regarded as an application within the meaning of Art. 181. The decision of their Lordships is conclusive on the question that the terms of O. 21, R. 1, Cl. (1) involve no application and that certification under that clause is not an application within the meaning of Art. 181. It may be mentioned that the certificates filed in the present case were exactly in the form prescribed for a certificate by R. 177 of the Oudh Civil Rules which makes a distinction between a certificate and an application. They were not in the form of an application and did not contain any request to the Court. The documents as they stand cannot therefore in any sense be regarded as applications.

It was also argued on behalf of the appellants that it might be presumed that the written certificate was coupled with an oral application which should be effective as a step-in-aid of execution. The presumption of an oral application can arise only when there is necessity for an application As according to the decision in *Prakash Singh* v. *Allahabad Bank Limited* (2) no necessity for an application arises in the case of a certification under O. 21, R. 2, sub-Cl. (1), Civil P. C. there is no room for any such presumption. If by any stretch of reasoning it were possible to accede to the appellants' argument and treat mere certification as an application to take some step-in-aid of execution, it would lead to awkward results. The law has now been settled by the decision of their Lordships of the Judicial Committee in *Prakash Singh* v. *Allahabad Bank Limited* (2) that a decree-holder can certify payment at any time. There is nothing to prevent his certifying a payment, more than three years after the order passed on the last application for execution. If he does so and if the certification is regarded as an application constituting a step-in-aid of execution, there is nothing in the terms of Art. 182, Cl. (5) to prevent his seeking execution at any time within three years of the certification. In other words he

(1) A. I. R. 1927 Oudh 7=98 I. C. 353=29 O. C. 358.
(2) A. I. R. 1929 P. C. 19=114 I. C. 581=56 I. A. 30=3 Luck 694 (P. C.).

would be able to certify payment after any length of time and then use the certification as giving a fresh start to limitation for executing the decree. It might be possible to meet such an application by calling in the aid of the general principle that once a decree has become barred by limitation, it cannot be revived but the fact remains that there is nothing in the language of Art. 182, Cl. 5, to prevent the decree-holders maintaining the application. The conclusion therefore reached by us is that the mere certification of itself by the decree-holder of a payment of money under the decree is not an application to take some step-in aid of execution within the meaning of sub-Cl. (5), Art. 182, Lim. Act. It may be noted that the same view has been taken by a Bench of the Rangoon High Court in *Maung Tun Hlaing* v. *U Aung Gyaw*, *A. I. R.* 1930 *Rang.* 64 and by a Full Bench of the Calcutta High Court in *Amar Krishna* v. *Jagat Bandhu* (3).

Another reason for our holding that the decree-holders are not entitled to save limitation under Cl. 5 Art. 182, is that there is no final order such as is contemplated by that clause. All that O. 21, R. 2, sub-Cl. (1), requires the Court to do, and all that was actually done in this case was to record payment. This, as was held in *Prakash Singh* v. *Allahabad Bank Limited* (2) the Court was in duty bound to do. Thus it is clear that the law does not allow to the Court any discretion in the matter. The Court in recording the payment, does merely a ministerial act and does not exercise any judicial function. The words "final order" imply that it should be final as far as the Court passing the order is concerned. It should be an order which if not reversed or modified by a Court of appeal would be binding between the parties. In the case of a certification by the decree-holder and the recording of payment by the Court, the law does not require any notice being sent to the judgment-debtor and it is always open to the judgment-debtor to question the alleged payment. We are therefore of opinion that the recording of payment by the Court under O. 21, R. 2 (1) cannot be regarded as a final order within the meaning of Art. 182, Cl. (5).

For the above reasons we would answer questions 1 and 2 in the negative. As in the present case the certification and recording took place within three years of the decision of the previous application, the third question does not arise and we do not consider it necessary to answer it.

K.N./R.K. *Answer accordingly.*

(3) A.I.R. 1931 Cal. 719=134 I.C. 922 (F.B.).

A. I. R. 1932 Oudh 151

PULLAN, J.

Budh Sen and *others*—Defendants—Applicants.

v.

Nanak Chand and *another*—Plaintiffs—Opposite Parties.

Civil Revn. Appln. No. 42 of 1930, Decided on 18th September 1930, from order of Sm. Cause Court Judge, Kheri, D/- 24th March 1930.

Civil P. C. (1908), Sch. 2, Para. 8—Case referred to arbitration cannot be tried by Court, except under provisions of Code.

Once the case has been referred by the parties to arbitration, it is removed from the jurisdiction of the Court except where Sch. 2, Civil P. C., brings that jurisdiction again into force : 33 *All.* 743, *Rel. on.* [P 152 C 1]

Ram Bharose Lal—for Applicants.

Bishmbhar Nath Khanna—for Opposite Parties.

Judgment.—This is an application in revision of an order of the Judge of the Small Cause Court, Kheri. The suit was referred by the parties to arbitration by a certain arbitrator on 27th January 1930. The Court fixed 19th February 1930 for the return of the arbitrator's award and the parties were directed to attend the Court on that date. In the meantime the arbitrator refused to act and on 19th February 1930, the date fixed for the receipt of the award, the Court acting suo motu superseded the reference to arbitration and fixed 24th March for final disposal. On that date the defendants did not appear and the suit was decreed ex parte on the evidence of the plaintiffs. This was a case which falls under para 5, Cl. (1) (a), Sch, 2, Civil P. C., that is to say, it was a case where the person appointed refused to accept the office of the arbitrator. In such a case any party may serve the other party with a written notice to appoint an arbitrator, and Cl. (2) of the same para shows what the Court may do. The Court may, if no arbitrator is appointed within seven days after the notice has been served or such further time as the Court may have granted on an application by the party who gave the notice and after giving the other party an opportunity of being heard, appoint an

arbitrator or make an order to supersede the arbitration except on an application and after the opposite party has been given an opportunity of being heard. Para. 3, Cl. (2) of the same schedule enacts that where a matter is referred to arbitration the Court shall not, save in the manner and to the extent provided in the schedule deal with such matter in the same suit. It is only in para. 8 that the Court can make an order superseding the arbitration suo motu and that is in special cases where the arbitrators cannot complete the award within date specified. In my opinion unless the case falls under para. 8 the Court's powers are limited by para. 3 and para. 5 in the manner which I have indicated, and this view is in accordance with the principles laid down by their Lordships of the Judicial Committee in *Sadiq Husain* v. *Kaniz Zahra* (1). In para. 752 their Lordships said :

"Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to to another tribunal such as a district or other Judge."

Once the case has been referred by the parties to arbitration it is removed from the jurisdiction of the Court except where Sch. 2, Civil P. C., brings that jurisdiction again into force. In this case it appears to me that nothing has occurred which enabled the Court to act suo motu and supersede the arbitration. Accordingly the order of the Court superseding the arbitration must be held to be contrary to law and all the subsequent proceedings are void. I need not consider the further objection raised in the grounds of revision. It is sufficient to say that I am satisfied that the defendants-applicants have an answer which must be considered in the case set up by the plaintiffs, and I cannot therefore dismiss this application on the ground that no substantial injustice has been inflicted on the parties. I am unable to say whether the decision was just or unjust, but as in my opinion the procedure was contrary to law. I allow this application with costs and set aside all the proceedings of the lower Court commencing with the order superseding the arbitration passed on 19th February 1930. The Court will take up the case again from that point and dispose of it according to law.

B.V./R.K. *Revision allowed.*

(1) [1911] 33 All. 743=38 I.A. 181=14 O. C. 289=12 I.C. 15 (P.C.).

A. I. R. 1932 Oudh 152

Full Bench

WAZIR HASAN, C. J., RAZA AND SRIVASTAVA, JJ.

Kedar Nath and *another*—Plaintiffs—Appellants.

v.

Pearey Lal Gupta and *another*—Defendants—Respondents.

First Appeal No. 38 of 1931, Decided on 14th February 1932, against decree of Dist. Judge, Lucknow, D/- 6th December 1930.

(a) Interpretation of Statutes—Intention of legislature should be gathered from the law taken as a whole, i.e., title, preamble and enacting part.

The key to the opening of every law is the reason and spirit of the law—it is the "*animus imponentis*," the intention of the law maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute. It is to be viewed in connexion with its whole context, meaning by this the title and the preamble as well as the purview or enacting part of the statute. It is the preamble, more especially, that should be looked to for the reason or spirit of every statute: *Brett* v. *Brett*, 3 *Add.* 213, *Foll.* [P 153 C 1]

***(b) Religious Endowments Act (1863), S. 14—No land endowed for support of temple—S. 14 does not apply.**

Provisions of S. 14 are inapplicable to temples for the maintenance of which no endowment in land has been made. [P 154 C 1]

Manohar Lal—for Appellants.

Ram Prasad Varma and *N. Banerji*—for Respondents.

Wazir Hasan, C. J. — The circumstances, out of which this reference has arisen are as follows:

In Aminabad, in the city of Lucknow, is situated a Hindu temple which according to the plaintiffs' allegations, was constructed by their ancestors. At the present moment the defendants are in possession and management of it. It is said that the defendants have allowed a portion of the land on which the temple stands to be used for purposes not connected with the worship at the temple. The plaintiffs therefore instituted the suit in the Court of the District Judge of Lucknow asking for action to be taken under S. 14, Religious Endowments Act, 1863. The learned District Judge dismissed the suit on the ground that the aforementioned Act had no application to a case where it is not shown that the land had been endowed for the support of the temple. In the present case it had

not been so shown. The appeal from his decision was heard in the first instance by two of us who referred the following question to a Full Bench for answer;

"Are the provisions of S. 14, Religious Endowments Act, inapplicable to temples for the maintenance of which no endowment in land has been made ?"

On a perusal of the several sections of the Religious Endowments Act, 1863, I find that there is no section in the Act which expressly prescribes a condition precedent to the exercise of the jurisdiction by the Court under that Act that there should be an endowment in land for the maintenance and support of a temple or other religious institutions nor there is any section which expressly prescribes to the contrary. In the circumstances we have to interpret the provisions of the Act with a view to determine whether those provisions collectively indicate a necessary implication one way or the other.

As observed by Sir John Nicholl in the case of *Brett* v. *Brett* (1):

"The key to the opening of every law is the reason and spirit of the law—it is the "animus imponentis," the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute; it is to be viewed in connexion with its whole context meaning by this as well the title and the preamble as the purview or enacting part of the statute. It is to the preamble more especially that we are to look for the reason or spirit of every statute, rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature in making and passing the statute itself.

The object of this Act is stated to be "an Act to enable the Government to divest itself of the management of religious endowment"

and the preamble is as follows:

"Whereas it is expedient to relieve the Boards of Revenue ..... in the Presidency of Fort William in Bengal and the Presidency of Fort Saint George, from the duties imposed on them by Regn. 19 of the Bengal Code (for the due appropriation of the rents and the produce of lands granted for the support of mosques, Hindu temples, colleges and other purposes ..... and Regn. 7 of 1817 of the Madras Code for the due appropriation of the rents and produce of lands granted for the support of mosques, Hindu temples and colleges or other public purposes .....) so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples and for other religious uses; the appropriation of endowments made for the maintenance of such religious establishments ..... and the appointment of trustees or managers thereof ..... It is enacted as follows:"

It seems to me that the preamble quoted above is explicit enough as to the intention of the legislature in enacting the Religious Endowments Act, 1863. That intention was to relieve the Boards of Revenue from the duties imposed on them by Regn. 19 of 1810 of the Bengal Code, and Regn. 7 of 1817 of the Madras Code. It is admitted that the duties imposed by those regulations on the Boards of Revenue were limited to such mosques, Hindu temples, colleges and other religious establishments to which were endowed rent and produce of lands for their support and which the Board of Revenue managed and administered under the aforementioned regulations. Having thus ascertained the intention of the Act of 1863 we must construe its sections as laying down provisions for the administration of the same institutions as were administered under the said regulations or similar institutions as might have been administered under the said regulations had they not been repealed by the Act of 1863. This interpretation of the Act is not opposed to any specific section of the Act except S. 14. This section is certainly so worded as to be wide enough in its scope to include any mosque, temple or religious establishment whether any land is or is not endowed for the support and maintenance of such mosque, temple or religious establishment. This can be the interpretation of S. 14, but only if we disconnect it with the rest of the provisions of the Act and its dominating object as revealed in its preamble. Obviously we should not approach the interpretation of S. 14 as detached from its context in the whole of the statute. S. 14 therefore also must be held to refer to such mosques, temples or other religious establishments as would have come under the control and management of the Boards of Revenue in pursuance of the provisions of the two regulations had those regulations been still in force.

This interpretation is supported by a decision of the High Court at Calcutta in *Jan Ali* v. *Ram Nath* (2). The arguments which the learned Judges of the Calcutta High Court have advanced in

(1) 3 Add. 213=162 E. R. 457.

(2) [1882] 8 Cal. 32=9 C. L. R. 433.

the decision just now mentioned in support of this interpretation are so full and convincing, if I may respectfully say so, that I realize that it will serve no useful purpose to make efforts to improve upon those arguments. I fully agree with the view taken by those learned Judges and hold that the provisions of S. 14, Religious Endowments Act, are not applicable to temples for the maintenance of which no endowment in land has been made and this is my answer to the question.

Raza, J.—I agree. I can find nothing that I may usefully add to what has been said by the learned Chief Judge in his judgment.

Srivastava, J.—I am of the same opinion. Act 20 of 1863 is entitled the Religious Endowments Act. The object of it as stated in the heading is:

"an Act to enable the Government to divest itself of the management of religious endowments."

The relevant portion of the preamble is as follows:

"Whereas it is expedient to relieve the Boards of Revenue and the local agents ..... from the duties imposed on them by Regn. 19 of 1810, of the Bengal Code .... and Regn. 7 of 1817 of the Madras Code ..... so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples and for other religious uses; appropriation of endowments made for the maintenance of such religious establishments; the repair and preservation of buildings connected therewith; and the appointment of trustees or managers thereof; or involve any connexion with the management of such religious establishments; it is enacted as follows:"

Thus the title, the heading and the preamble which afford the keynote to the Act, show clearly that the Act was intended to replace certain provisions of the two Regulations so as to relieve the Boards of Revenue and the local agents from the duties imposed on them under the said regulations. An analysis of the provisions of the Act shows clearly that Ss. 3, 7, 8, 9, 11 and 12 refer to religious establishments to which the provisions of either of the regulations specified in the preamble of the Act were applicable, and nomination of the trustee, superintendent or manager thereof at the time of the passing of the Act was vested or was to be exercised by or was subject to confirmation of the Government or by any public officer. Ss. 4, 5 and 6 relate to religious establishments under the management of any trustee, manager or Superintendent whose nomination shall not vest in nor be exercised by nor be subject to the nomination of the Government or any public officer.

It is also clear that both groups of sections above referred to, relate to religious establishments to which the regulations were applicable. S. 14 comes in the wake of these two groups of sections. It does not make specific reference to the regulations, yet there can be little doubt that the mosque, temple or religious establishment mentioned therein must refer to the mosque, temple or religious establishment dealt with in the preceding sections. This is also the interpretation most consistent with the preamble. The scope of Act 20 of 1863 cannot in my opinion be wider than that of the regulations which it has replaced. The application of the Act must therefore be confined to religious establishments which were governed by the regulations mentioned in the preamble or at most to institutions which could fall within the scope of the said regulations. It is not disputed that Bengal Regn. 19 of 1810 contemplates endowment of land only and Madras Regn. 7 of 1817 contemplates endowments of money, land and produce of land.

My answer therefore to the question referred for opinion is that S. 14, Religious Endowments Act, is inapplicable to temples for the maintenance of which no endowment has been made.

K.N./R.K. *Answer accordingly.*

A. I. R. 1932 Oudh 154

KISCH, J.

Baij Nath Prasad—Appellant.

v.

Sheo Dularey and *another* — Respondents.

Execution Decree Appeal No. 28 of 1931, Decided on 14th August 1931, against order of Addl. Sub-Judge, Unao, D/- 15th January 1931.

Limitation Act (1908), S. 19, Art. 180—Each case of acknowledgment saving limitation should be treated on its own merits—Language and circumstances must be considered.

Each case relating to the question of an acknowledgment saving limitation must be treated on its own merits, and, from the language used and the circumstances in which the acknowledgment is made it must be decided whether it amounts to an acknowledgment or an implied acknowledgment of the particular liability under consideration. [P 155 C 2]

A partition decree was passed between *A* and *B*. The property partitioned included bahikhatas

and plots of lands and there was a sum of Rs 60 which *A* was to pay *B* in cash under the terms of the decree. *A* paid up the sum of Rs. 60 together with other sums which he owed to *B* under various decrees and executed a so-called receipt referring to the various decrees in connexion with which money had been paid, including the partition decree and stating that nothing further was owing under any of the decrees.

Held : that the receipt executed by *A* was not sufficient acknowledgment to give a fresh start of limitation for an application for possession of the plots of land mentioned in the partition decree : 21 *O. C.* 151, *Rel. on.* ; *A. I. R.* 1931 *Oudh* 295, *Dist.* [P 156 C 1, 2]

R. D. Sinha—for Appellant.

Makund Bihari Lal—for Respondents.

Judgment.—The facts of this case are as follows : On 14th January 1925, a partition decree was passed between one Gayadin deceased now represented by his son Baijnath, the opposite party and Jagannath Prasad, the property partitioned which included bahi khatas and plots of land being divided into two lists and there was also a sum of Rs. 60 which Jagannath had to pay to Gayadin in cash under the terms of the decree. On 30th March 1927, Gayadin applied for execution of the decree, but the application appears not to have been prosecuted and was consigned to the records on 3rd May 1927.

On 22nd February 1929 Jagannath paid the sum of Rs. 60, the amount due by him under the terms of the decree, to Baijnath, son of Gayadin deceased together with other sums which he owed to Gayadin under various other decrees and executed a so called receipt referring to the various decrees in connexion with which money had been paid, including the decree of 14th January 1925, and stating that nothing further was owing under any of the decrees. On 12th August 1930 Baijnath certified the payment of the sum of Rs. 60 to the Court.

On 3rd September 1930, Baijnath applied for the execution of the decree for possession of the plots of land allotted to him. Jagannath objected that this application was beyond time. The application of 3rd September 1930 was made more than three years from the last application, namely, that of 30th March 1927, for execution of the decree, but it was claimed by the decree-holder Baijnath that the application was saved from the bar of limitation by the acknowledgment of Jagannath in the receipt dated 22nd February 1929, which, it is alleged, amounted to an acknowledgment of liability for the whole decree.

The learned Additional Subordinate Judge came to the conclusion that as what was stated in the receipt was that Rs. 60 are due to Gayadin by Jagannath in respect of the decree in Suit No. 4 of 1925 Jagannath must be taken to have limited his acknowlelgment of liability to this sum of Rs 60 only, and cannot be held to have admitted his liability with respect to the whole decree. He accordingly found that the execution application in respect of the possession of the plots of land dated 3rd September 1930, was beyond time and dismissed it.

In appeal it is again contended on behalf of the decree-holder that the receipt executed by Jagannath on 22nd February 1929, was an acknowledgment of liability in respect of the whole decree and therefore saved limitation. In my opinion the view taken by the learned Additional Subordinate Judge is correct. The material words of the document on which the decree-holder relies as an acknowledgment are as follows :

"*Jo ki mubligh Rs.* 491-7-0 *babat mutaliba degriat zail yaftani manmugir zimmagi Gayadin wald Lalta Prasad, Vaish, sakin Gaja Khera mazkur wajib hain, aur mubligh Rs.* 215-13-6 *babat mutaliba degriat zail yaftani Gaya Din mazkur zimma mujh manmugir wajib hain, chunanche mainjumla Rs.* 491-7-0 *mutalibi mundarjai bala se mubligh Rs.* 215-13-6 *yaftani Gaya Din mujra de kar baqiya mubligh Rs.* 275-9-6 *jo yaftani manmuqir zimma Gayadin mazkur baqi rahe hain woh kul mutaliba baqir Rs.* 275-9-6 *naqd robru gawahan hashya asin Baijnath, Pisar wa waris Gayadin se wasul pae. Ab ek hibbi mutaliba degriat yaftani manmuqir zimma Gayadin wa Baijnath mazkur ke baqi nahin rahi hai. Is liye yeh rasid likhdee ke sanad rahe aur waqt par kam awe.*"

The question for determination is whether the above document constitutes an acknowledgment of the whole of the decree so as to include the portion relating to the possession of the plots of land. Each case relating to the question of an acknowledgment saving limitation must be treated on its own merits and from the language used and the circumstances in which the acknowlelgment is made it must be decided whether it amounts to an acknowledgment, or an implied acknowledgment, of the particular liability under consideration. The document in question merely states that a certain amount has been paid in cash and that now nothing remains due by the writer to Gayadin or

Baijnath in respect of the decrees mentioned (including the decree of 14th January 1925). Thus the document executed by Jagannath on 22nd February 1919, contains an acknowledgment that the amount due under the decree in suit had been paid up and for the rest contains only a statement of the fact of the decree having been passed. It does not mention anything about the plots of land or that any portion of the decree remains unsatisfied. This does not appear to be a sufficient acknowledgment that he was still liable to deliver the possession of certain plots under the decree. So far from admitting that there is any further liability on Jagannath under the decree the wording suggests that all matters outstanding between Jagannath and Gayadin or Baijnath have been settled.

The learned counsel for the appellant has relied on a judgment of a Bench of this Court, to which I was a party, in the case of *Ram Bilas* v. *Lachhmi Narain* (1). This case, it is true, also related to the acknowledgment of the existence of the decree, but the facts appear to me to be distinguishable from the facts of the present case inasmuch as in that case the decree in question was a decree for a sum of money due on a mortgage and the acknowledgment which was contained in another deed of mortgage recited that the money was being borrowed in order to save the property from sale under the decree in question. There was thus no question in that case of there being any other liability on the judgment-debtor other than the payment of the sum of money decreed in the mortgage suit. The case of *Beni Madho* v. *Bir Bal Singh* (2) decided by the late Court of the Judicial Commissioner of Oudh which has been cited on behalf of the respondent appears to me to be more in point. In that case the acknowledgment was with respect to the liability to pay the money due on a mortgage and it was held that it could not be availed of to give a fresh start of limitation for a suit for possession of the mortgaged property which was subsequently brought by the mortgagee. I therefore concur in the finding of the Court below that the document executed by Jagannath on 22nd February 1929, is not sufficient acknowledgment to give a fresh start of limitation for an application for possession of the plots in question. The appeal accordingly fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(1) A.I.R. 1931 Oudh 295=132 I.C. 542.
(2) [1918] 21 O.C. 151=46 I.C. 813.

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* A. I. R. 1932 Oudh 156

RAZA AND SRIVASTAVA, JJ.

Baldeo Sahai and *another*—Plaintiffs—Applicants.

v.

Abdur Rahim and *another*—Defendants—Opposite Parties.

Civil Revn. Appln. No. 68 of 1931, Decided on 25th January 1932.

*** (a) Civil P. C. (1908), Sch. 2, Paras. 15 and 16—Neither appeal nor revision lies against decree in accordance with award even though invalid.**

The intention of para. 16 is clearly to give finality to a decree passed in accordance with an award and not in excess of or at variance with it. The change made in para. 15, Cl. (c) as compared with S. 521 of the old Code of 1882, viz. the addition of the words " or being otherwise invalid " makes this clearer. The result of this amendment is that even in the case of an invalid award, if the party concerned fails to impeach it before the Court making the reference or if his objection on the ground of the invalidity of the award is disallowed and a decree is passed in accordance therewith, the award becomes final and the decree passed upon it is not open to appeal. Since an appeal is not permitted, the revision is also incompetent : 29 *Cal.* 167 (*P. C.*) ; *A. I. R.* 1929 *Lah.* 476 and *Adams* v. *Great North of Scotland Ry. Co.* (1891) *A. C.* 31, *Rel. on.*

[P 158 C 1]

(b) Civil P. C. (1908), S. 115—Discretion—Revision will not be allowed where order of lower Court is eminently just.

The interference with decisions of the lower Court in the exercise of revisional jurisdiction under S. 115 is a matter of discretion. Even if the revision were competent, the High Court would be loath to interfere with the decree of the lower Court which is eminently just.

[P 158 C 1]

Radha Krishna and *A. C. Mukerji*—for Applicants.

Akhtar Hussain—for Opposite Parties.

Order.—Plaintiff 1, Baldeo Sahai and his minor son Ram Dularey, plaintiff 2, constituted a firm known as Baldeo Sahai Ram Dularey which carried on money lending and other business. The defendants were the partners of another firm called Abdur Rahim Muhammad Halim.

The plaintiffs instituted a suit in the Court of the Munsif of Sultanpur claiming Rs. 1,062 principal with interest on the basis of certain hundis. After the issues had been framed, plaintiff 1 for himself and as guardian of his minor son plaintiff 2, and the defendants agreed to refer the case to the arbitration of a

pleader. Accordingly the Munsif made an order of reference and on 8th July 1931 the arbitrator filed an award recommending that the suit be dismissed. Thereupon the plaintiffs filed certain objections against the award, only one of which need be mentioned. It was to the effect that the award was invalid because plaintiff 2 was a minor and no leave of the Court was taken by his next friend for referring the suit to arbitration.

The learned Munsif relying on *Hardeo Sahai* v. *Gauri Shankar* (1) and *Lutawan* v. *Lachya* (2), held that O. 32, R. 7, Civil P. C., did not apply to the case and no leave of the Court was necessary. He also rejected the other objections and having accepted the award passed a decree in accordance therewith. This order of the learned Munsif forms the subject of the revision before us.

The only contention urged in support of the application was that the next friend not having obtained the leave of the Court to enter into an agreement for reference to arbitration, the order of reference was invalid and the Court below acted illegally in accepting the award and passing a decree in terms thereof.

The learned counsel for the defendants disputed the correctness of this contention and also objected in limine that the decree passed by the learned Munsif was final and not open to question in revision. We are of opinion that the objection raised on behalf of the defendant is correct and must succeed. Para. 16, Sch. 2, Civil P. C., (Act 9 of 1908) which corresponds to S. 522 of the old Civil P. C., (Act 14 of 1882), provides as follows:

(1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

The decree in the present case is admittedly in accordance with the award and not in excess of it nor at variance with it. The intention of the provisions quoted above clearly is to give finality to a decree passed in accordance with the decision of the arbitrator. In *Ghulam Jilani* v. *Muhammad Hussan* (3) a reference was made to arbitration through Court. The award made by the arbitrators was accepted by the Subordinate Judge, who passed a decree in accordance therewith. On an appeal against the decree of the Subordinate Judge, one of the objections raised was that the award was bad having reference to S. 462, Civil P. C., (which corresponds to the present O. 32, R. 7) inasmuch as a minor defendant's guardian had agreed without leave of the Court to refer the case to arbitration. A Full Bench of the Punjab Chief Court decided that the appeal did not lie but suggested that an application might be made in revision. Accordingly an application in revision was filed and a Division Bench of that Court varied the decree in some respects. There was an appeal to their Lordships of the Judicial Committee against the decision of the Full Bench as well as against the decision of the Division Bench. Their Lordships discussed the scheme of the provisions contained in the Civil Procedure Code (Act 14 of 1882) relating to arbitration and making reference to the provisions of S. 522 which are substantially the same as those of para. 16, Sch. 2, quoted above observed as follows :

"Those words appear to be perfectly clear. Their Lordships would be doing violence to plain language and the obvious intention of the Code if they were to hold that an appeal lies from a decree pronounced under S. 522 except in so far as the decree may be in excess of or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time bas long gone by since the Courts of this country showed any disposition to sit as a Court of appeal on awards in respect of matters of fact or in respect of matters of law : see *Adams* v. *Great North of Scotland Railway Co.* (4)."

Referring to the application in revision which was heard by the Division Bench, they made the following remarks :

"Their Lordships are inclined to agree with the view of Clark, J., that in the case of an award a revision would be more objectionable than an appeal. If an application in revision were admissible in a case like the present, the finality of any award would be open to question. Their Lordships however are of opinion that such an application is incompetent."

These remarks seem to us to be fully apposite to the present case. In fact it seems to us that, if anything, the remarks apply with greater force in view of

(1) [1905] 28 All. 35 = 2 A. L. J. 493= (1905) A. W. N. 171.
(2) A. I. R. 1914 All. 446=36 All. 69(F. B.).
(3) [1902] 29 Cal. 167=29 I. A. 51 =8 Sar. 154 (P. C.).
(4) [1891] A. C. 31.

the change made by the legislature in Para. 15, Sch. 2 which corresponds to S. 521 of the old Code. Before the enactment of the present Civil Procedure Code, there existed a conflict in the decisions of the various High Courts in this country as to whether or not an appeal could lie from a decree passed in accordance with an award which was invalid and illegal. At the end of Cl. (c), para. 15, the legislature have now added the words " or being otherwise invalid," which did not find a place in the old S. 521. The result of this amendment is that even in the case of an invalid award, if the party concerned fails to impeach it before the Court making the reference or if his objection on the ground of the invalidity of the award is disallowed and a decree is passed in accordance therewith, the award becomes final and the decree passed upon it is not open to appeal. Thus the amendment gives further effect to the principle of finality enunciated by their Lordships in the passage quoted above. We are supported in this opinion by a decision of the Lahore High Court in *Balkishan* v. *Sodan Singh* (5), in which a number of other decisions in support of the same view have been cited. It might be pointed out that one of the objections raised against the validity of the reference of the award in the case of *Ghulam Jilani* v. *Muhammad Hussan* (3) was identically the same as the one raised before us. If, as held by their Lordships of the Judicial Committee, revision in that case was incompetent, it would be much more so under the present Code in which the scope of para. 15 has been enlarged as pointed out above.

We should also add that interference with decisions of the lower Court in the exercise of revisional jurisdiction under S. 115, Civil P. C., is a matter of discretion. Even if the revision were competent we would be loath to interfere with the decree of the lower Court which is eminently just. As stated before plaintiff 1 made the reference, took his chance before the arbitrator, and, now that the award has gone against him, seeks to go behind it under the cover of his minor son on the basis of a technical plea.

The application must therefore fail and is dismissed with costs.

W.D./R.K. *Revision dismissed.*

(5) A. I. R. 1929 Lah. 476=116 I. C. 559 = 10 Lah. 871.

* A. I. R. 1932 Oudh 158

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Baijnath and *another*—Plaintiffs—Appellants.

v.

Maharaj Bahadur and *others*—Defendants—Respondents.

Second Appeal No. 114 of 1931, Decided on 4th February 1932, against decree of Dist. Judge, Gonda, D/- 13th December 1930.

*** (a) Hindu Law—Joint family—Ancestral property—Self-acquired property of father coming into hands of sons forming joint family is not joint family property.**

In Hindu law the term "ancestral" in its technical sense can apply only to property belonging to the grandfather and his ascendants in the male line.

The self-acquired property of a Hindu father when it devolves on his sons who form members of a joint Hindu family cannot in their hands be regarded as joint famiiy property and each son can alienate his share on the death of the father: 35 *Cal.* 1039, *Ref.*; *A. I. R.* 1931 *Oudh* 108 and 25 *Mad.* 678 (*P.C.*), *Dist.* [P 159 C 2]

(b) Hindu Law — Joint family—Ancestral property—Issues have interest by birth.

In the case of ancestral property under the Mitakshara law, the sons, grandsons, and great-grandsons of the person who inherits it, are entitled to an interest in such property by birth. [P 159 C 2]

Ali Zaheer and *Ghulam Imam*—for Appellants.

Radha Krishna and *Muhammad Hussain*—for Respondents.

Judgment.—This is a plaintiffs appeal against the decree dated 13th December 1930 of the learned District Judge of Gonda, affirming the decree, dated 30th April 1929 of the Additional Subordinate Judge of that place. It arises out of a suit for sale on foot of a mortgage deed dated 8th October 1918. The mortgage deed was executed by one Shiam Behari who is now dead and related to a 1 anna share in village Katha Mafi in the Gonda District. Shiam Behari was one of the four sons of Munshi Baijnath who was at one time in Government service in the Gonda District. The names of the other three brothers of Shiam Behari are Lal Behari, Fateh Behari and Kishen Behari. Lal Behari is also dead and has left a son, Maharaj Bahadur. Maharaj Bahadur, Fateh Behari and Kishen Behari defendants 1 to 3 respectively were impleaded as representatives of the deceased mortgagor, Shiam Behari. These defendants resisted the suit, amongst others, on the ground that the property in suit was the

joint anscestral property of all the four sons of Munshi Baijnath and that the mortgage by Shiam Behari alone was incompetent.

Both the lower Courts have found that Munshi Baijnath in 1891 when he was employed as a Tahsildar in the Gonda District, purchased a 4 annas share in village Katha Mafi in the name of his three sons, Lal Behari, Fateh Behari and Kishen Behari. Shiam Behari was born subsequent to this purchase. After his birth his name was also recorded as a co-owner in respect of the 4 annas share along with his three brothers. It has been found that Munshi Baijnath had no other means of income except his salary, that at the time of the purchase his three sons were minors and that the property was purchased by Munshi Baijnath benami in the name of his sons. It has further been found that Shiam Behari and his three brothers were joint in estate and no separation ever took place amongst the brothers. As a result of these findings of fact, the Courts below arrived at the conclusion that the 4 annas share in village Katha Mafi was the self-acquired property of the father and on the latter's death it became the joint ancestral property in the hands of his sons. It was therefore held that Shiam Behari was incompetent to transfer by mortgage any portion of the property.

The learned counsel for the plaintiffs-appellants has not disputed the correctness of the findings of fact stated above which are conclusive in second appeal. He has however challenged the correctness of the conclusion drawn by the learned District Judge about the property in the hands of Shiam Behari and his brothers being joint ancestral property and about Shiam Behari's incompetence to mortgage his one-fourth share.

The rule that the individual interest of a coparcener in a joint family is not alienable is a corollary from the principle that according to the true character of a Mitakshara joint family, no individual member of that family can predicate that he has a certain definite share in the joint and undivided property of the family. It therefore becomes necessary to find out whether the self-acquired property of the father when it devolves on his sons who form members of a joint Hindu family can in their hands, be regarded as joint family property. According to the well recognized classification of joint family property, it may be divided into three broad heads; (1) ancestral property; (2) property acquired with joint exertion or with the aid of joint funds: (3) self-acquired property thrown into the common stock.

Admittedly the share in question does not fall under any of the last two heads. The question therefore arises whether it can be regarded as ancestral property.

In Sastri's Hindu Law, 6th Edn., p. 310, the learned author observes as follows;

> "The Sanskrit word for ancestral is *paitamaha* meaning, belonging to *pitamaha*. This word *pitamaha* though it is ordinarily applied to the father's father, means in the plural number, all the paternal male ancestors of the father in the male line, how high soever"

Thus in Hindu law the term "ancestral" in its technical sense can apply only to property belonging to the grandfather and his ascendants in the male line. In *Atar Singh* v. *Thakar Singh* (1), their Lordships of the Privy Council also have held that unless lands come to a person by descent from a lineal ancestor, they cannot be deemed ancestral in Hindu law. It is also important to note that in the case of ancestral property under the Mitakshara law, the sons, grandsons and great-grandsons of the person who inherit it, are entitled to an interest in such property by birth. According to the Mitakshara "property in the paternal or grandpaternal estate is by birth," Mitakshara Ch. 1, S. 1, para. 27. Colebrooke's translation of the word *paitamaha* in this passage as ancestral is not accurate. Its literal and more correct translation is grandpaternal. Admittedly the property in question in the present case was the self-acquired property of Munshi Baijnath. His sons had no interest therein by birth. It cannot therefore be regarded as their ancestral property. Shiam Behari had no son. If he had a son born to him, the property, as regards the rights of the sons, could be described as ancestral property. But it would be quite incorrect to describe it as ancestral property in the hands of Shiam Behari.

The learned counsel for the defendants-respondents has placed strong reliance on

(1) [1908] 35 Cal. 1039=35 I. A. 206=6 I. C. 721=42 P. R. 1910 (P.C.).

our decision in *Mt. Lakhpati* v. *Parmeshwar Misra* (2) and on the decision of their Lordships of the Privy Council in *C. Venkayyamma Garu* v. *C. Venkatarama Nayyamma* (3) in support of his contention that the property in suit in the hands of the sons of Munshi Baijnath must be held to be ancestral. These cases can be regarded as authority only for what they actually decide. In *Mt. Lakhpati* v. *Parmeshwar Misra* (2), the self-acquired property of the father had devolved on his sons who were members of a joint Hindu family. On the death of one of these sons, competition arose between his widow and his surviving brothers and it was decided that the property was held by the brothers jointly with benefit of survivorship and that the interest of the deceased son would go to his surviving brothers and not to the widow. We have been unable to discover one word in our judgment in this case to justify the contention that the property in the hands of sons was held to be joint family property. We had referred to the decisions of their Lordships of the Privy Council in *Katama Natchier* v. *Moottoo Vijaya Ragandha* (4); *Jogendra Bhupati* v. *Nityanund Mansingh* (5) and *C. Venkayyamma Garu* v. *C. Venkatarama Nayyamma* (3), and on the authority of these decisions, all that we actually decided was that the property was held by the sons as joint tenants subject to the rule of survivorship. Referring to the last-mentioned case, we took care to say that it was not necessary for us to enter into a discussion as regards the true import of the word "ancestral" as used by their Lordships in a passage quoted by us from their judgment. It is hardly necessary to point out that though in some respects there is a resemblance between a Mitakshara coparcenary and an estate in joint tenancy, yet they materially differ in many respects. To say that the sons held as joint tenants subject to the incident of survivorship is very different from saying that they held it as coparcenary property without the right of alienating their share.

In *C. Venkayyamma Garu* v. *C. Venkatarama Nayyamma* (3), the question was as regards property inherited by the grandsons from their ancestral grandfather. It was held that

> "in the hands of the grandsons, it was ancestral property which had devolved on them under the ordinary law of inheritance"

and that they held it jointly with the benefit of survivorship. But in view of the meaning given to the word "ancestral" by their Lordships of the Judicial Committee in the later case of *Atar Singh* v. *Thakur Singh* (1), referred to above, it is difficult to say that their Lordships intended to use the word "ancestral" in relation to the maternal grandfather's estate in its technical sense. It is not necessary for us to enter into an elaborate discussion of this decision as the case before us does not involve any question regarding the estate of a maternal grandfather and has therefore no direct bearing on the present case.

Lastly it is admitted that on the death of Munshi Baijnath the property in question devolved on his sons according to the ordinary rules of succession and not by right of survivorship. Each son therefore inherited a definite share in the property. This would clearly distinguish it from a case of joint family property in respect of which it is impossible for a coparcener to say that he has any definite share. Therefore the reason underlying the rule that the individual interest of a coparcener cannot be transferred does not exist in the case.

For the above reasons we are of opinion that the share in suit was not held by Shiam Behari as joint family property and that there was nothing to prevent his making a mortgage of it.

We would accordingly allow the appeal set aside the decision of the lower Court and decree the plaintiffs claim for Rupees 2,363-10-0 together with interest at 12 annas per cent per mensem from the date of suit till six months from today and future interest till the date of realization at 8 annas per cent per mensem together with costs in all the Courts. If the money is not paid by the date fixed, the mortgaged property shall be sold. A decree for sale in the prescribed form will be prepared but the provision as regards the personal decree will be scored out.

B.V./R.K. *Appeal allowed.*

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(2) A. I. R. 1931 Oudh 108=125 I. C. 414=5 Luck. 631.
(3) [1902] 25 Mad. 678=29 I. A. 156 (P.C.).
(4) [1862] 9 M. I. A. 539 (P.C.).
(5) [1894] 18 Cal. 151=17 I. A. 128=5 Sar. 596 (P.C.).

A. I. R. 1932 Oudh 161

WAZIR HASAN, C. J. AND
SRIVASTAVA, J.

Debi Shankar—Appellant.

v.

Nand Kishore and *others*—Respondents.

Execution Decree Appeal No. 47 of 1930, Decided on 24th August 1931, against order of Sub-Judge, Unao, D/- 30th April 1930.

Transfer of Property Act (1882), S. 27—Award in respect of religious endowment agreed by parties, as binding providing for appointment of sons of dedicator as manager each for term of 21 years, in succession and after them eldest son of each of these sons, each for same term—Eldest son of dedicator acting as manager for 21 years—Second son dying before expiry of term of 21 years and third son dying before second son—Principle underlying S. 27 held applicable and eldest son of first son of dedicator was entitled to succeed as manager after death of second son.

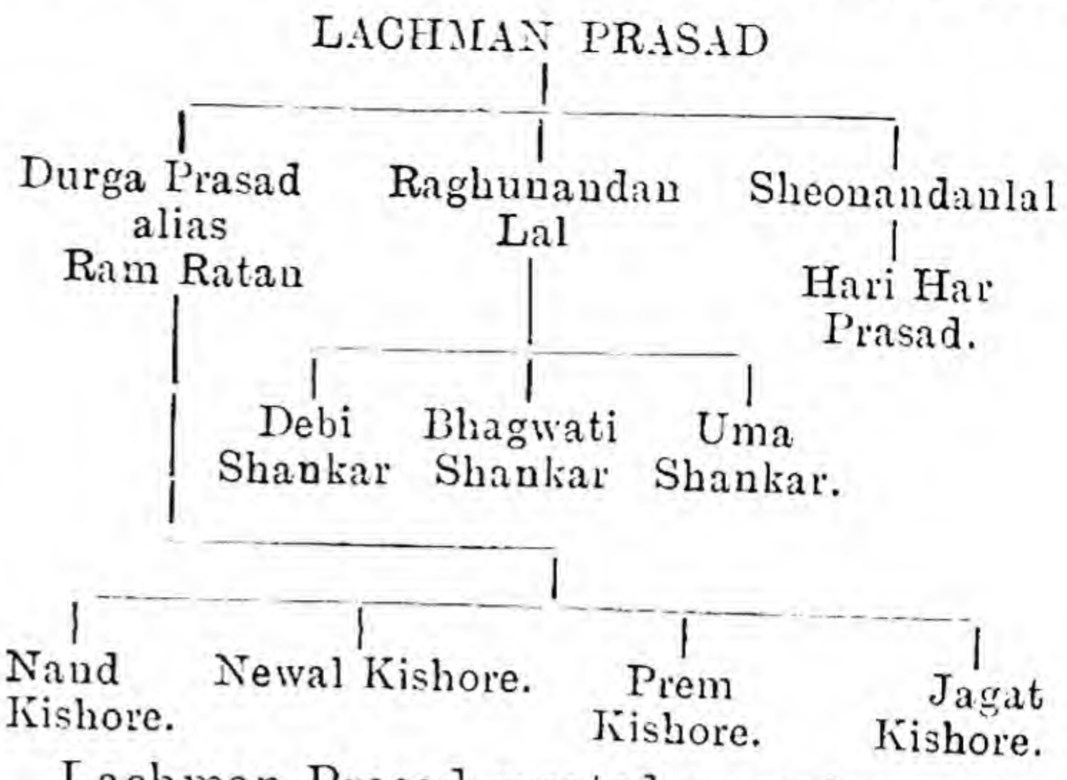
An award in respect of a religious endowment, which was agreed by the parties as binding between them, appointed the eldest son *D*, the dedicator, as the first manager and directed that he was to retain management for 21 years, and after the expiry of the *D's* term of office appointed his younger brother *R* as manager for 21 years and further provided that after the expiry of the period of *R's* managership, *S*, the third son of the dedicator, was to be manager for 21 years, thereafter the eldest son of *D*, then the eldest son of *R* and then the eldest son of *S* and so on. *R* died before the completion of the full term of 21 years, *S* had predeceased *R*. The eldest son of *R* claimed the right of management for the unexpired portion of the term of 21 years.

Held: that the right of managership given to *R* was personal to him. The award contemplated the descent of managership to the grandsons of the dedicator only in the order laid down therein after the cycle of managership of sons was complete. The principle underlying S. 27 was applicable. The only proper construction to be placed on the award was that the subsequent disposition took place as soon as prior disposition failed whether by efflux of time or otherwise. The result of *R's* death before the completion of his term of managership and of *S* dying before *R* was to accelerate the succession of the eldest son of *D*. [P 162 C 2, P 163 C 1]

Ali Zaheer, *K. P. Misra* and *D. K. Seth*—for Appellant.

M. Wasim—for Respondents.

Judgment.—It will be convenient to give a short pedigree showing the relationship of the parties:



Lachman Prasad created an endowment in favour of an idol Sri Thakurji, the terms of which are embodied in two documents described as 'beosthapatra and arpanpatra.' It appears that there was some dispute after the death of Lachman Prasad which resulted in a reference to arbitration. The arbitrator's award is dated 24th March 1915. The parties are agreed that this award is binding between them.

Raghunandan Lal obtained a decree against Nand Kishore, Newal Kishore, Prem Kishore, Jagat Kishore and Hari Har Prasad, and in execution of it obtained delivery of possession over a one-third share in a grove in village Lachmi Khera. Nand Kishore and Newal Kishore, two of the judgment-debtors, made an application to have the proceedings regarding delivery of possession set aside on the ground that the grove in question was endowed property in favour of Sri Thakurji by virtue of the award above mentioned. In the course of the objection proceedings, the decree-holder Raghunandan Lal died and the names of his three sons, Debi Shankar, Bhagwati Shankar and Uma Shankar, were substituted in his place. They denied that the grove in dispute was endowed property. They also set up an alternative case that even if the grove in question were held to be endowed property they were entitled to retain possession of it as managers.

The Subordinate Judge of Unao upheld the judgment-debtor's objection about the grove being endowed property. This decision was upheld by this Court, but the case was remanded for an inquiry whether the decree-holders had a right of possession over the grove as managers. The learned Subordinate Judge, relying on the arbitrator's award, has held that the managership since the death of Raghunandan Lal has vested in Nand Kishore,

the eldest son of Durga Prasad. He has accordingly allowed the judgment-debtor's objection. Debi Shankar, the eldest son of Raghunandan Lal, has preferred the present appeal against this order of the Subordinate Judge.

The only question which requires determination in this appeal is whether the right of managership since the death of Raghunandan Lal vests in Debi Shankar or in Nand Kishore. We have already stated that the parties are agreed before us that the arbitrator's award is binding between them. It is also the common case of the parties that Lachman Prasad had appointed his eldest son Durga Prasad alias Ram Ratan as the first manager and had directed that he was to retain management for 21 years. The arbitrator in his award held that the period of 21 years having expired, and Durga Prasad alias Ram Ratan being no longer fit to act as manager in future, another manager should be appointed. He accordingly appointed Raghunandan Lal as manager for 21 years in place of Durga Prasad. The award further provides as follows:

"After the expiry of the period of Raghunandan Lal's managership, Sheonandan Lal will be appointed manager for 21 years; thereafter the eldest son of Durga Prasad and then the eldest son of Raghunandan Lal and after that the eldest son of Sheonandan Lal and so on. This rule shall always be observed."

Raghunandan Lal continued as manager of the endowed property from the date of the award, but he died before completion of the full term of 21 years for which he had been appointed manager. Sheonandan Lal, the third son of Lachman Prasad predeceased Raghunandan Lal. The question therefore arises: Who is entitled to succeed as manager after the death of Raghunandan Lal?

The first contention urged on behalf of the appellant is that he as the eldest son of Raghunandan Lal is entitled to be the manager of the endowment for the unexpired portion of the 21 years' terms of managership of his father. It is argued that the intention of the arbitrator, in the passage of the award which we have reproduced above, is that each of the three branches of the sons of Lachman Prasad was to hold the management of the property for a period of 21 years. We regret we are unable to accede to this argument. It seems to us clear that the right of managership given to Raghunandan Lal was personal to him. The reference to Raghunandan Lal in the passage quoted above cannot possibly include his son because the award clearly contemplates the descent of managership to the grandsons of Lachman Prasad only in the order laid down therein after the cycle of managership of the sons is completed.

Next it was contended that the award makes no provision for the case of any of the managers dying before the completion of his term of 21 years. It was argued that there being no provision for such a contingency as had actually arisen in the present case, it should be left to the managing committee of the endowment known as the Dharma Sabha to determine the succession to the managership after the death of Raghunandan Lal. Reliance was placed upon the following condition of the 'arpanpatra' in support of this argument:

"*Condition No.* 10.—When anything new which is not laid down either in the beosthapatra or this deed arises, it will be given effect to only after it has been decided by the Dharma Sabha."

Having given our careful consideration to the argument we regret we cannot see our way to accept it. The award purports to lay down a complete course of succession to the managership. We must give effect to the award with all its legal implications. Though the award provides that the managership is to devolve on the next successor after it has been held by the previous one for 21 years, yet the effect in law of the failure of the prior interest is to accelerate the subsequent interest even though the failure may not have taken place in the precise manner laid down in the award. S. 27, T. P. Act, provides:

"Where on a transfer of property an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor."

"But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner."

The same rule has been stated in Halsbury's Laws of England, Vol. 28, Para. 1188, as follows:

"The effect of failure of a prior life-interest of other particular interest through the donee of that interest being dead or prevented by law from

taking the gift, for example owing to the attestation of the will by him or his spouse, or through revocation by codicil, disclaimer, forfeiture, or lapse, is to accelerate the subsequent interests which are limited to take effect on the regular determination of that prior interest, the Court construes gifts of such interests as intended to take effect on the failure or determination of the prior interest in any manner. This rule applies both to real and to personal estate."

"Such a failure of a prior gift however does not accelerate a subsequent executory limitation not taking effect merely on the determination of the prior interest; and subsequent gifts cannot be accelerated where the persons who are to take under them are only contingently ascertainable at a future date."

We are of opinion that the principle underlying the rule enunciated above applies to the case. The intention of the arbitrator clearly was that the ulterior disposition is to take effect on failure of the prior one and not that the ulterior disposition is to be ineffectual unless the previous manager has completed his full term of 21 years. We think that the only proper construction to be placed on the award is that the subsequent disposition takes effect as soon as the prior disposition fails, whether by efflux of time or otherwise. Condition No. 10 of the 'arpanpatra' cannot be applied to the award. Even if we assume it to be applicable there is no occasion for its application, if the construction which we have placed upon the award is correct.

The result therefore of Raghunandan Lal having died before completion of his full term of managership, and of Sheonandan Lal having predeceased him, is to accelerate the succession of Nand Kishore, the eldest son of Durga Prasad.

We are of opinion that the decision of the lower Court is correct. The appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 163

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Bhaiya Mohammed Azim Khan and *others*—Plaintiffs—Petitioners.

v.

Raja Mumtaz Ali Khan—Defendant—Opposite Party.

Privy Council Appeals Nos. 18 and 19 of 1931 and Civil Misc. Appeals Nos. 291 and 292 of 1931, Decided on 21st September 1931.

(a) Civil P. C. (1908), Ss. 111 and 109 (b)—Chief Court of Oudh is High Court within meaning of S. 109 (b), though not under S. 111—General Clauses Act (1897), S. 3 (24).

Though the Chief Court of Oudh is not a High Court of the nature described in S. 111, yet it is a High Court within the meaning of the first part of Cl. (b), S. 109, inasmuch as it falls within the definition of a High Court given in S. 3, sub-S. (24), General Clauses Act (10 of 1897). [P 163 C 2, P 164 C 1]

(b) Civil P. C. (1908), S. 109—S. 12, Oudh Courts Act, overrides S. 109, Civil P. C., regarding appeals to Privy Council—Appeal from judgment of single Judge lies to Bench and not to Privy Council—Oudh Courts Act (1925), S. 12.

The general provisions in respect of the procedure of appeals to His Majesty in Council enacted in S. 109, Civil P. C., must give place to "any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force." S. 12, Oudh Courts Act (1925), abrogates the general provisions of S. 109, Civil P. C. Under S. 12, Oudh Courts Act, an appeal from a judgment of a single Judge lies to a Bench of the Chief Court and to the Privy Council under S. 109 (b), Civil P. C. [P 164 C 1]

(c) Interpretation of Statutes—Special law overrides general law.

Where a conflict arises between the special law and the general law the special law must prevail. [P 164 C 1]

Sita Ram and *B. P. Misra*—for Petitioners.

H. Husein, *Mahabir Prasad Srivastava*, *M. Wasim* and *Khaliquzzama*—for Opposite Party.

Judgment. — In these applications prayer is made for leave to appeal to His Majesty in Council from the decree of Nanavutty, J., dated 23rd December 1930, by which the applicant's suits were dismissed.

The jurisdiction to entertain suits in which those decrees were made was conferred upon this Court by the special law enacted in S. 7, Oudh Courts Act 1925, and by S. 10 of the same Act that jurisdiction was to be exercised by a single Judge of the Court. The Court has not made any rule to the contrary.

It is contended that these applications are maintainable under S. 109, Cl. (b), Civil P. C., 1908. It is obvious that the provisions of S. 111, Civil P. C.. are not applicable to this case because they bar appeals to His Majesty in Council from the decree of one Judge of a High Court established under the Indian High Courts Act, 1861 or the Government of India Act, 1915. The Chief Court of Oudh is not such a High Court. It is agreed that though this Court is not a High Court of the nature described in S. 111, yet it is a High Court within the meaning of the

first part of Cl. (b), S. 109, inasmuch as it falls within the definition of a High Court given in S. 3, sub-S. (24), General Clauses Act (10 of 1897). It appears to us that if there were nothing else these applications would be maintainable under Cl. (b), S. 109, and an appeal from the decree of Nanavutty, J., dated 23rd December 1930, shall lie to His Majesty in Council. But the law does not rest there. The general provisions in respect of the procedure of appeals to His Majesty in Council enacted in S. 109, Civil P. C., must give place to

" any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force vide S. 4, sub-S. (1), Civil P. C."

For the purpose of ascertaining such jurisdiction or procedure as abrogates the general provisions of S 109, we are referred to S. 12, Oudh Courts Act, 1925. Sub-S. (1), S. 12, is relevant and is as follows :

" Except as otherwise provided by any enactment for the time being in force, and appeal from any original decree or from any order against which an appeal is permitted by any law for the time being in force made by a single Judge of the Chief Court shall lie to a Bench consisting of two other Judges of the Chief Court."

As regards the subsection just now quoted, it is argued on behalf of the applicants that the substantive provisions of the subsection are expressly made subject to any provision to the contrary in any enactment for the time being in force and that enactment is to be found in Cl. (b), S. 109, Civil P. C. It seems that if this construction of sub-S. (1) were accepted, the result would be a conflict between the general law enacted in Cl. (b), S. 109, and the special law enacted in sub-S. (1), S. 12, Oudh Courts Act. But if such a conflict does arise, it seems to us that the special law must prevail. This should be so both on the general principle of interpretation '*generalia specialibus non derogant*,' and under the provisions of S. 4, Civil P. C. But apart from that, we think that the exception made to the substantive procedure as to appeals from a decree of a single Judge of the Chief Court is subject only to such provisions of any other enactment for the time being in force as prescribes for an appeal from a decree of a single Judge of the Chief Court to some Court other than a Bench consisting of two Judges of the same Court. The provisions of Cl. (b), S. 105 do not appear to us to embrace such a procedure. They only refer to procedure for appeals to His Majesty in Council in general and contain no reference in particular to a decree of a single Judge on the Chief Court of Oudh.

We accordingly reject these applications with costs.

B.V./R.K. *Applications dismissed.*

A. I. R. 1932 Oudh 164

STUART AND RAZA, JJ.

Muzaffar Ali Khan—Assessee.

v.

Commissioner of Income-tax, U. P.

Civil Ref. No. 2 of 1929, Decided on 10th May 1929.

Income-tax Act (1922), Ss. 23 (4) and 66 —Question whether there is compliance with all terms of notice is not question of law —Evidence not sufficient to determine assessment—Income-tax Officer can proceed under S. 23 (4).

Where the accounts or documents or evidence produced by the assessee do not furnish sufficient material for an assessment and in particular if they so far from revealing the income intentionally falsify the income, it is open to the Income-tax Officer to make an assessment under S. 23 (4) for the assessee has failed to comply with all the terms of the notice.

The question whether there has been a compliance with the terms of the notice is not a question of law but a question of fact. Further whether the evidence before the Income-tax Officer is sufficient to justify him in rejecting the accounts of the assessee is also a question of fact. [P 165 C 1]

Judgment.—This is a reference to the Chief Court under S. 66, Cl. (2), Income-tax Act (Act 11 of 1922). The facts are stated in the order of reference. It is sufficient to note here that the assessee in 1925-26 filed no return. His assessment was then made under the provisions of S. 23 (4). In 1926-27 he also filed no return. His assessment was again made under S. 23 (4). In 1927-28 he filed a return of Rs. 2,293. He was called upon to produce accounts under the provisions of S. 22 (4). As he did not do so his assessment was again made under S. 23 (4). In 1928-29 he made a return and produced accounts but the Income-tax Officer considering that the income disclosed in the accounts had been intentionally understated proceeded to assess on the 1927-28 figures with a slight addition. The assessment was said to be made under S. 23 (3). It is in

regard to that assessment that this reference has been made.

Under the Act the procedure is as follows: The assessee when called on must make a return. If the Income-tax authorities are not satisfied with the entries in the return they can call on the assessee to produce such accounts or documents or such evidence as they may require. If those accounts or documents or evidence furnish sufficient material for an assessment, the assessment should then be made under S. 23 (3), but if those accounts or documents or evidence do not furnish sufficient material for an assessment and in particular if they so far from revealing the income intentionally falsify the income, it is open to the Income-tax Officer to make an assessment under S. 23 (4), for the assessee has failed to comply with all the terms of the notice. The Income-tax authorities can then further take action under the provisions of S. 28, Income-tax Act, or under S. 177, I. P. C., against the assessee. This is the procedure.

The question remains whether a High Court has any jurisdiction to interfere with the decision of the Income-tax authorities as to whether there has been a compliance with the terms of the notice. In our opinion this is not a question of law but a question of fact. We have been asked by the Commissioner of Income-tax to determine whether the evidence before the Income-tax Officer was sufficient to justify him in rejecting the accounts of the assessee. We do not consider that this is a question of law. It is a question of fact and as it is a question of fact we can express no opinion on it. As this reference was made at the instance of the assessee we direct that he pays the costs of the reference. We fix the costs of the Government Advocate at Rs. 100.

P.N./R.K. *Order accordingly.*

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* A. I. R. 1932 Oudh 165

WAZIR HASAN, C. J. AND RAZA, J.

Brij Nath Shargha and *others*—Defendants—Appellants.

v.

Lakshmi Narain Kaul — Plaintiff—Respondent.

Second Appeal No. 64 of 1931, Decided on 1st February 1932, against decree of Addl. Dist. Judge, Lucknow, D/- 20th October 1930.

***(a) Civil P.C. (1908), O. 22, R. 1—Remedy for wrongful act can be pursued against estate of deceased wrong-doer, where property belonging to another or its proceeds have been appropriated by deceased — Test to determine liability stated—Succession Act (1925), S. 306.**

The only cases in which apart from questions of breach of contract, expressed or implied a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, are those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases whatever the original form of action, it is in substance brought to recover property or its proceeds or value, and by amendment can be made such in form as well as in substance. In such cases the action though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executor of a wrong doer cannot be sued merely because it was worth the wrong doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby : *Phillips* v. *Homfray*, (1884) 24 *Ch. D.* 439, *Foll.* [P 166 C 2]

(b) Hindu Law—Debts—Loss due to breach of trust held not avyavaharika.

Where the essence of a transaction between two Hindu brothers is that one stands in the position of a trustee to the other then if any loss is incurred by one, by reason of the breach of trust on the part of the other, the duty to make good the loss is highly moral and lawful and the other has to repay that loss. Such debt is not avyavaharika and the obligation to repay the loss is binding even on his estate : 39 *Cal.* 862, *Rel. on.* [P 167 C 1]

(c) Interest — Interest should not be allowed, where decree awards damages.

Where the decree in its very nature is one for damages no interest should be allowed on such damages. [P 167 C 1]

H. Husain—for Appellants.

Makund Behari Lal—for Respondent.

Judgment.—This is the defendants' appeal from the decree of the Additional District Judge of Lucknow, dated 20th October 1930, affirming the decree of the Subordinate Judge of Malihabad, dated 10th February 1930, except in the matter of a small sum of money for interest which the Court of first instance had refused to award to the plaintiff but which the learned Additional District Judge has allowed.

The facts of this case are very simple. There were four brothers, two of whom were Sri Krishen Kaul and Bishunath Shargha. The difference in the caste name was due to the adoption of one of them. Sometime ago Pandit Sri Krishen Kaul handed over a box for safe custody to his brother Pandit Bishunath Shargha. The box contained jewellery and gold coins. But the box when opened after it was returned by Pandit Bishunath Shargha to Pandit Sri Kishen, did not contain a number of the articles which it had originally contained when it was delivered to the former by the latter. There is no dispute in this case now as to what the missing articles were nor as to their value. Pandit Sri Krishen Kaul died in January 1928 and the suit out of which this appeal arises was instituted by his legal representative against Pandit Bishunath Shargha. During the pendency of the suit, Pandit Bishunath Shargha also died and in the array of defendants were then impleaded his representatives.

The Courts below have given a decree to the plaintiffs against the defendants for a sum of Rs. 2,264 as representing the value of the missing articles.

In support of the appeal before us, three points were argued by the learned counsel for the appellants : (1) that the finding of the lower appellate Court that there existed a contract between the two brothers for the repayment of the value of the missing articles is not based on evidence ; (2) that the suit abated on the death of Pandit Bishunath Shargha and ; (3) that no decree could be passed against the defendants because Pandit Bishunath Shargha must be deemed to have been guilty of criminal breach of trust, it being admitted that he and the present defendants formed a joint Hindu family governed by the Mitakshara law.

As to the first point, very little need be said. The learned Additional District Judge on the question of contract refers both to oral and documentary evidence and at the hearing of the appeal we were taken through that evidence. We are unable to hold that there is no evidence in support of the finding though it may be reasonably urged that there is no sufficient evidence. The finding is therefore conclusive in second appeal. Be that as it may, it seems to us that on the facts admitted and found by the lower appellate Court, the position in which the two brothers stood with regard to the box in question, was one of trust which the giver of the box reposed in the taker of it. The subsequent disappearance of large number of articles from the box was clearly a breach of trust on the part of Pandit Bishunath Shargha and any loss that resulted to Pandit Sri Krishen must be made good by Pandit Bishunath Shargha. We therefore reject the first point urged in support of the appeal.

As regards the second point, we are of opinion that there is no substance in it either. It was argued that the maxim *actio personalis moritur cum persona* applied to the present case. But to this maxim there are several exceptions and we think that the present case falls within one of such exceptions. If we may respectfully say so, the judgment of Bowen, L. J., in the case of *Phillips* v. *Homfray* (1), is most illuminating. His Lordship said :

"The only cases in which apart from questions of breach of contract, expressed or implied a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appeared to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases whatever the original form of action, it is in substance brought to recover property or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action though arising out of a wrongful act does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executor of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby."

The present action must be taken to be in substance an action to recover the specific articles which were found to be missing when the box was returned. But as a decree for the delivery of these articles would be infructuous as they no longer exist, the Court having jurisdiction to do so has decreed in favour of

(1) [1884] 24 Ch. D. 439 = 52 L. J. Ch. 833= 49 L. T. 5=32 W. R. 6.

the plaintiff in value of these articles. It cannot be said of the present case that this was a claim for an unliquidated and uncertain sum of money. On the other hand the claim and the decree represent the ascertained and market value of the missing articles.

Under the third point it was argued that the debt to which Pandit Bishunath Shargha rendered himself liable by the fact of the articles being missing, was not vyavaharika but that on the other hand it was avyavaharika, having been incurred by an act of criminal misappropriation. We are unable to accept this argument. The essence of the transaction between the two brothers was that one stood in the position of a trustee to the other and it seems to us that if any loss is incurred by one, by reason of the breach of trust on the part of the other, the duty to make good the loss is highly moral and lawful. This subject is discussed at length in the judgment of the late Sir Ashutosh Mukerjee in the case of *Chhakauri Mahton* v. *Ganga Prasad* (2), and it will serve no useful purpose to repeat that discussion in this judgment.

The lower appellate Court has allowed interest in favour of the plaintiffs on the value of the articles of which they have been deprived by reason of the Act of the late Pandit Bishunath Shargha. We are of opinion that there is no ground for allowing interest. The decree in its very nature is one for damages and allowing interest will be tantamount to awarding damages upon damages.

We therefore modify the decree of the lower appellate Court in the matter of interest and direct that the plaintiffs shall not be allowed any interest. The rest of the appeal is dismissed with costs.

B.V./R.K. *Appeal partly allowed.*

(2) [1912] 39 Cal. 862=12 I. C. 609.

A. I. R. 1932 Oudh 167

SRIVASTAVA, J.

Sh. Mohammad Raza—Plaintiff—Appellant.

v.

Ganga Devi and *others*—Defendants—Respondents.

Civil Misc. Appln. No. 663 of 1931, Decided on 15th February 1932 in Second Appeal No. 396 of 1931.

Limitation Act (1908), S. 5 — Appeal — Limitation expiring on 9th December but actual filing on 19th December — Appellant contending that he misread "9" as "19" in counsel's attorney's letter informing him of limitation—Letter not produced—Delay not condoned.

The limitation for filing an appeal expired on 9th December 1931 but the appeal was actually filed on 19th December 1931. The appellant contended that he misread "9" as "19" in the date written in the letter sent to him by his counsel's attorney informing him of the last date of limitation for filing the appeal and prayed that the delay be condoned under S. 5. The alleged letter was not produced in Court.

Held that in the above circumstances the delay could not be condoned under S. 5.

[P 167 C 2]

H. Husein—for Appellant.

A. C. Mukerji—for Respondent 1.

Order.—This is an application under S. 5, Lim. Act. The limitation for the appeal expired on 9th December 1931, but the appeal was filed in the office on 19th December and presented in Court for admission on 21st December. It is said that the appellant's agent had entrusted the papers to a counsel in Lucknow for an appeal being filed, that the counsel's clerk wrote to the appellant informing him that the limitation for filing the appeal was to expire on 9th December 1931 but the appellant made a mistake in reading the date given in the letter. He read it as "19th December 1931" and therefore the appellant's general agent came to Lucknow on 19th December with necessary expenses for the filing of the appeal. The contentions in the application are supported by an affidavit of an agent of the appellant. I am not satisfied that the appellant has made out sufficient cause for the delay in filing the appeal. When his agent came to Lucknow and entrusted the papers to a counsel here he must have found out the last date for the filing of the appeal. It is difficult to believe that he did not and waited for the counsel's clerk to inform him of the date later on. The letter alleged to have been sent by the counsel's clerk has not been produced. The learned counsel who appears in support of the application on being questioned by me about it says that the letter was not sent by post. Under the circumstances I am unable to believe the story told by the appellant and must hold that he has failed to make out a sufficient cause for the delay in filing

the appeal. The application is therefore dismissed with costs.

The appeal also stands dismissed as time barred.

B.V./R.K. *Appeal dismissed.*

** A. I. R. 1932 Oudh 168

RAZA AND SRIVASTAVA, JJ.

(*Mahant*) *Har Narain Das*—Defendant—Appellant.

v.

Mt. Bibi Rup Kuar—Plaintiff—Respondent.

First Appeals Nos. 51 and 33 of 1930, Decided on 12th March 1931, against decree of Sub-Judge, Lucknow, D/- 23rd December 1929.

(a) Deed—Construction—Property bequeathed by will—Deed of agreement among claimants granting maintenance allowance to certain persons — Person holding estate held not personally liable but maintenance was charge upon the estate—But as person in possession had not paid allowance but enjoyed profits, he was personally liable for arrears.

Certain disputes as to succession to a property bequeathed by a Mahant, by will to his son and chela *S* were settled by a deed of agreement, described as a family settlement, by which one *N*, a chela of the testator was to succeed (*S* having died after having succeeded to the property) to the property for life and after him the estate was to devolve on *P*, the testator's daughter's son. The deed also provided that the testator's daughter *R* was to get maintenance allowance of Rs. 125 per month. The words used in respect of the maintenance allowance were that they were to be paid from the "riayasat taluka" which stood in marked contrast to the words used in an earlier part of the same document with reference to allowances payable to *S* in respect of which it was stated that Mahant *N* and the taluka would be liable for them. *N* who was in possession of the property did not pay any allowance to *R* from the time he obtained possession and *R* thereupon brought a suit for arrears of the maintenance allowance.

Held : that the words "riayasat taluka" did not create a personal liability on the holder of the estate. *N* having been in possession of the entire taluka and having enjoyed its income during the period in suit without paying the allowances which were payable out of the said income must, to the extent of those allowances, be regarded as debtor to *R* and was therefore personally liable to make them good out of the profits enjoyed by him : *Oudh S. A. No. 427 of 1909, Foll.* [P 170 C 1, 2]

**** (b) Evidence Act (1872), S. 92—Mortgagees or vendees are parties to mortgage deed or sale deed although not signatory to it—Case of deed of family settlement is different—Mere fact that deed makes provisions for maintenance allowance for certain relations does not make them parties to deed and oral evidence on question of allowance is not excluded.**

Sale deeds and mortgage deeds are essentially transactions between the vendor and the vendee or the mortgagor and the mortgagee. Though according to the practice of Indian conveyancing the vendee or mortgagee is not usually a signatory to the sale deed or mortgage deed, yet by the nature of the instrument they must be regarded as parties to the deed. But the case of an instrument which is essentially a deed of family settlement between the claimants to an estate is quite different. The mere fact that they agree to make provisions for certain relations or dependents does not make such persons parties to the instrument and oral evidence given by a person concerning a maintenance allowance to be given to one of such relations cannot be excluded by reason of S. 92 the relation not being a party to the deed of agreement. [P 172 C 1]

Radha Krishna, *Mahesh Prasad*, *Karta Kishan* and *Ganga Dayal*—for Appellant.

Ali Zaheer and *B. P. Misra*—for Respondent.

Judgment. — *First Civil Appeals Nos.* 51 *and* 33 *of* 1930.—These appeals arise out of two suits for recovery of arrears of maintenance from December 1927 to July 1928. It is necessary to give a short history of the Bagh Baba Hazara estate in connexion with which these claims for maintenance arise. The earliest holder of this estate to whom reference is made in this litigation was Mahant Har Charan Das. On 1st December 1898 he executed a will (Ex. 2) bequeathing the estate to his son and chela Mahant Sant Rain Das. By this will he also provided for a life annuity of Rs. 50 per month in favour of his daughter Rup Kunwar who is the plaintiff in the suit which has given rise to Appeal No. 33 of 1930. On 13th June 1907 he executed a codicil (Ex. 3). By means of this codicil he increased the amount of the guzara in favour of Mt. Rup Kunwar to Rs. 100 per month and made it heritable.

On the death of Mahant Har Charan Das which occurred on 17th April 1910, the Bagh Baba Hazara estate came into the possession of Mahant Sant Rain Das in accordance with the will, Ex. 2. Mahant Sant Rain Das died on 8th January 1922. On his death disputes arose as regards succession to the estate. The three rival claimants were Mt. Sheoraj Kunwar, mother of Sant Rain Das; Har Narain Das a chela of Mahant Har Charan Das and Satgur Prasad alias Hari Saran Das son of Mt Rup Kunwar who claime

in his right as a chela and a sister's son of Sant Rain Das. The dispute between these three parties was settled by means of a deed of agreement (Ex. 1) dated 20th January 1922, which is described as a family settlement. By virtue of this deed, Mahant Har Narain Das was to succeed to the estate for his life and after his death the estate was to devolve on Satgur Prasad. The deed also provided for maintenance allowances to be paid in cash out of the income of the estates to certain persons for their life. Amongst others Bibi Rup Kunwar, plaintiff, was to be paid Rs. 125 per month and Pandit Jadunandan Prasad, husband of Bibi Rup Kunwar who is plaintiff in the other suit which has given rise to Appeal No. 51 of 1930, was to be paid Rs. 30 per month. Mt. Sheoraj Kunwar who was a claimant to the estate, as stated before, was also to get a cash maintenance of Rs. 125 per month. In addition to this cash allowance she was also to receive the necessary provisions for her kitchen and was to be paid the cost of upkeep of her cattle and the pay of six servants, in the same manner as she used to get during the lifetime of her son Sant Rain Das. Lastly the deed also provided that in case Mt. Sheoraj Kunwar predeceased Bibi Rup Kunwar, then the latter would be entitled to the provisions for the kitchen, cost of upkeep of cattle and the pay of six servants, which were in the first instance made payable to Mt. Sheoraj Kunwar.

Mahant Har Narain Das came into possession of the estate under the deed of settlement dated 20th January 1922, but subsequently surrendered the estate in favour of his next successor, Satgur Prasad alias Hari Saran Das, by means of a deed of surrender dated 25th November 1924, and Satgur Prasad acquired possession of the estate thereunder. Three years later, in 1927, Mahant Har Narain Das instituted a suit against Satgur Prasad on the original side of this Court, for cancellation of the deed of surrender and for recovery of possession of the estate. This suit was decreed by Pullan, J., on 27th October 1927, and his decision, so far as it related to the cancellation of the deed of surrender and the decree for possession of the estate, was upheld by a Bench of this Court, on 2nd May 1928.

Mt. Bibi Rup Kunwar came into Court on the allegation that the defendant Mahant Har Narain Das obtained possession of the estate on 15th December 1927, but has not paid her a single shell towards the maintenance to which she was entitled under the will of Mahant Har Charan Das and under the deed of family settlement dated 20th January 1922. The suit was instituted on 8th August 1928 and related to the arrears of maintenance for eight months ending with 31st July 1928. She claimed a personal decree for Rs. 5,560 which was made up of the following items :

	Rs.
1. Cash allowance—(a) Under the will of Mahant Har Charan Das at Rs. 100 p. m.	800
——(b) Under the deed of agreement dated 20th January 1922 at Rs. 125 p. m.	1,000
2. Kitchen expenses at Rs. 248 p. m.	1,984
3. Cattle expenses at Rs. 150 p. m.	1,200
4. Pay of six servants at Rs. 12 p. m.	576

Simultaneously with this another suit was instituted by Pandit Jadunandan Prasad, claiming a money decree for Rs. 240 on account of arrears of maintenance for the same period payable under the deed dated 20th January 1922 at the rate of Rs. 30 per month. The two suits were consolidated and tried together, the suit of Mt. Bibi Rup Kunwar being treated as the leading suit.

Both these suits were resisted on various grounds. It is not necessary to state them in detail ; reference will be made to such of the defences as are material for the purposes of the appeals before us when we discuss the arguments urged by the parties in these appeals.

The learned Subordinate Judge held that Mt. Bibi Rup Kunwar was not entitled to claim maintenance allowed to her under the will of Mahant Har Charan Das in addition to the maintenance granted to her under the deed of agreement dated 20th January 1922. He further held that the claims set forth under the last three heads mentioned above were rather exaggerated. In the result he gave Bibi Rup Kunwar a decree for Rs. 2,088 made up as follows:

1. Cash allowance under the deed dated 20th January 1922 at Rs. 125 p. m.=Rs. 1,000.
2. Kitchen expenses at Rs. 60 p. m.=Rs. 480.
3. Cattle expenses at Rs. 40 p. m.=Rs. 320.
4. Pay of servants at Rs. 36 p. m.=Rs. 288.

The plaintiff was also allowed proportionate costs. The claim of Pandit Jadunandan Prasad was decreed in full.

One contention which is common to both the appeals and on which emphasis has been laid on behalf of the defendant-appellant is that no personal decree should have been passed against him. It may be noted that no such plea was raised in the written statement but in the course of the oral pleadings, the defendant's pleader stated that there can be no personal decree passed against the defendant, because under the deed of 1922 there is no personal liability on the defendant. This part of the case has been presented before us in two aspects. The first aspect which was emphasized on behalf of the defendant-appellant is that on a proper construction of the deed of agreement, Ex. 1, it creates a charge on the estate for payment of the maintenance allowance but does not create any personal liability against the defendant. The other aspect which was emphasized on behalf of the plaintiffs-respondents is that the defendant has been in possession of the estate during the period in suit and has appropriated the entire income to his own use without paying the maintenance allowances charged upon the said income therefore by reason of his failure to meet the liabilities he has made himself personally liable for payment thereof.

The learned Subordinate Judge has relied upon the second ground in giving a personal decree against the defendant. The terms of the agreement, Ex. 1, so far as they deal with the allowance payable to the two plaintiffs, are not very clear. The words used in para. 10 which deals with these maintenance allowances are that they will be paid from "riayasat taluka." These words stand in marked contrast with the words used in an earlier part of the same document with reference to allowances payable to Satgur Prasad in respect of which it is stated that Mahant Har Narain Das and the taluka would be liable for them. After giving our careful consideration to the terms of the instrument we find ourselves unable to hold that the words "riayasat taluka" create a personal liability on the holder of the estate. We would therefore accept the appellant's contention that the deed Ex. 1, makes the maintenance allowances in suit a charge upon the income of the estate but does not directly create a personal liability against the defendant.

We are however of opinion that the personal decree passed by the lower Court must be upheld on the second ground. It has been argued on behalf of the appellant that this ground was not clearly raised by the plaintiffs in their pleadings. It was contended that if the ground had been clearly raised, the defendant would have shown that he did not realize sufficient money from the estate during the period in suit which could enable him to pay the allowances due to the plaintiffs. We are of opinion that these arguments have no substance. It was enough for the plaintiffs to allege, as they did, that the defendant obtained possession of the estate on 15th December 1927 and has not paid a single shell to them, in support of their claim which was admittedly for a personal decree. The defendant in his written statement admitted that he obtained possession about the time alleged by the plaintiffs. If he wanted to escape personal liability on the ground that he had been unable to collect sufficient amount to meet the liability for maintenance, he should have alleged and proved it. There is no allegation, much less proof, in support of the suggestion now made by the appellant's learned counsel. It is the common case of both parties that the annual income of the taluka of which the defendant obtained possession in or about December 1927 is about Rs. 1,75,000. The belated suggestion now put forward is a preposterous one. The defendant having admittedly been in possession of the entire taluka and having enjoyed its income during the period in suit without paying the maintenance allowances which were payable out of the said income, he must to the extent of these guzara allowances be regarded as a debtor to the plaintiffs and is therefore personally liable to make them good out of the profits enjoyed by him. This view is also supported by a decision of the late Court of the Judicial Commissioner of Oudh in *Sheo Prasad* v. *Nawab Shahzaman Mirza*, *Second Civil Appeal No.* 427 *of* 1909, decided by Mr. Piggott, A. J. C., on 24th May 1910. We therefore agree with the learned Subordinate Judge that, in the circumstances of the case, the defendant is personally liable for the plaintiffs' claim.

Next it was argued on behalf of the defendant that he should have been allowed costs in respect of that portion of Bibi Rup Kunwar's claim which was dismissed by the learned Subordinate Judge.

The appellant by urging this contention has invited us to express our opinion with regard to his conduct in the case. We have no hesitation in condemning it. In the first place the defendant appropriated the whole income of this big taluka without paying the small allowance which the plaintiffs were entitled. In the second place when the plaintiffs instituted their suits, he resisted them on numerous grounds some of which can only be characterized as frivolous. Though most of these defences have deservedly failed, yet he has by this means succeeded in withholding payment of money to which the plaintiffs are justly entitled for about three and a half years. Under the circumstances we think that the learned Subordinate Judge has exercised a wise discretion in refusing the defendant any costs against Bibi Rup Kunwar.

It was also argued that the learned Subordinate Judge was wrong in making an amendment in his decree with regard to the pleader's costs. It appears that on 23rd October 1929, Mr. Tashuq Mirza who was counsel for both the plaintiffs, filed two certificates. one for Rs. 425 and the other for Rs. 25. The description of the case given in the certificate for the larger amount was that of the suit instituted by Pandit Jadunandan Prasad whereas the description in the certificate for the smaller amount was of the suit instituted by Bibi Rup Kunwar. When the attention of the learned Subordinate Judge was drawn to this he was satisfied that the descriptions given in the two certificates were due to an error and that the certificate for Rs. 425 was intended for the suit of the larger valuation, namely, that of Rup Kunwar and the certificate for Rs. 25 for the suit of the smaller valuation, that of Pandit Jadunandan Prasad. He accordingly allowed the mistake to be rectified. We are of opinion that the order made by the learned Subordinate Judge was perfectly just and correct. We must therefore overrule this contention.

Lastly, it was contended that the amount decreed to the plaintiff, Rup Kunwar in respect of kitchen expenses, cattle expenses and servants' pay was more than she was entitled to and should be reduced. This contention also has no force. The plaintiff examined her servants who proved the expenses which she had to incur under each of these heads. The learned Subordinate Judge has in fact allowed less than what was deposed to by these witnesses. His finding, if anything, errs rather in favour of the defendant than against him. These are all the contentions which were urged in support of the appeal. None of them has any substance. Both the appeals must therefore fail.

There remain the cross-objections filed on behalf of Bibi Rup Kunwar in Appeal No. 33 of 1930. The chief contention on her behalf is that she was entitled to the allowance payable under the will of Mahant Har Charan Das in addition to the maintenance provided for her in the deed of agreement of 1922. One of the grounds relied on by the lower Court is that the will and the codicil Exs. 2 and 3 were invalid for want of proper registration. We consider it unnecessary to enter into a discussion of this question because in our opinion the plaintiffs' case based on the will of Har Charan Das must fail on another ground. Pandit Sitla Prasad Bajpai who was at that time an Additional Judge in Lucknow, took a a leading part in bringing about the settlement embodied in Ex. 1. He was examined in this case as a witness on commission. He deposed that the compromise embodied in Ex. 1 replaced the will of Har Charan Das and that the allowance given to Bibi Rup Kunwar, her husband, her-daughter and the co-wife of a deceased daughter of Rup Kunwar, was intended to be a substitute for the provisions made in the will for Mt. Rup Kunwar and her children. He also stated that Rup Kunwar had consented to this. The veracity of this witness is beyond question. It was argued that the statement is inadmissible under S. 92, Evidence Act. We are of opinion that S. 92, has no application, for the simple reason that Bibi Rup Kunwar is not a party to the deed of agreement Ex. 1. It was contended that though she is not a signatory to the deed, yet she should be regarded as a party to the agreement inso far as the agreement makes provision for her maintenance. The cases of sale deeds and mortgage-deeds were referred to by way of illustration and it was pointed out that though the vendee or the mortgagee is not ordinarily a party to these deeds, yet they are regarded as parties to such instruments.

We are of opinion that the analogy is not a sound one. Sale deeds and mortgage-deeds are essentially transactions between the vendor and the vendee or the mortgagor and the mortgagee. Though according to the practice of Indian conveyancing the vendee or the mortgagee is usually not a signatory to the sale deed or the mortgage deed, yet by the nature of the instruments they must necessarily be regarded as parties to the deeds. But the case of Ex. 1 is quite different. It is essentially a deed of family settlement between the three claimants to the estate. The fact that they agreed to make some provision for certain relations or dependents does not make such persons parties to the instrument. We must therefore hold that the evidence given by Pandit Sital Prasad Bajpai cannot be excluded by reason of S. 92, Evidence Act. Relying on that evidence we must hold that Rup Kunwar was not entitled to claim the maintenance allowed under the will of Har Charan Das.

The next objection relates to the amount allowed to Rup Kunwar in respect of rations for the kitchen, upkeep of the cattle and the pay of servants. We are of opinion that the amount of Rs. 60 per mensem allowed for kitchen expenses and Rs. 40 per mensem for cattle expenses is reasonable. We can see no sufficient grounds to enhance the amounts allowed by the learned Subordinate Judge under these two heads. However we think that the pay of servants allowed at the rate of Rs. 6 per servant per month is too low. The servants examined by the plaintiff deposed that they were being paid at the rate of Rs. 12 per month. This is the usual salary for menial servants in Lucknow. It is impossible to get servants of an adult age for Rs. 6 per month. The learned Subordinate Judge however has relied upon a statement to the effect that Mt. Sheoraj Kunwar used to pay her servants at the rate of Rs. 6 per month. This was long ago and Sheoraj Kunwar was on the best terms with the holders of the estate for the time being. It might have been possible for her then to secure servants from the estates on that salary, but the relations between the plaintiff and the defendant being so strained now we have no reason to suppose that she can get servants for anything less than Rs. 12 per month. We would therefore allow her Rs. 576 instead of Rs. 288 allowed by the learned Subordinate Judge under this head.

The result therefore is that both the appeals are dismissed with costs. The cross-objections of Bibi Rup Kunwar in Appeal No. 33 of 1930 are allowed in so far that the plaintiff Rup Kunwar will be given a decree for Rs. 576 instead of Rs. 288 on account of the servant's pay for the period in suit, in other words, the total amount decreed in favour of Bibi Rup Kunwar by the learned Subordinate Judge will be increased from Rs. 2,068 to Rs. 2,376. We make no order as to costs in the cross-objections.

R.M./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 172

WAZIR HASAN, C. J. AND RAZA, J.

Ganesh Bakhsh Singh and *others*—Plaintiffs—Appellants.

v.

Ajudhiya Bakhsh Singh and *others*—Defendants—Rospondents.

First Appeal No. 29 of 1930, Decided on 19th May 1931, against decree of Pullan, J., in Original Suit No. 1 of 1929, D/- 23rd December 1929.

(a) Oudh Estates Act (1869), S. 22 (11)—Succession under S. 22 (11) to estate governed by Act is governed by terms of sanad and not by rules of Hindu law.

After Cl. (11), S. 22 of the Act is reached, the terms of a sanad and not the rules of Hindu law govern the succession under S. 22 (11) to an estate governed by the Act: 5 *I. A.* 1; *A. I. R.* 1930 *Oudh* 481; 20 *Cal.* 649 (*P.C.*); *A. I. R.* 1931 *Oudh* 327 and *A. I. R.* 1922 *P. C.* 289, *Ref.* [P 174 C 2]

(b) Practice—Admission—Issue on mixed question of law and fact framed—Evidence given—Counsel making admission during final address to Court—That question can yet be argued in appeal.

Where an issue has been framed in the trial Court on a mixed question of law and fact and evidence is given regarding it by both parties, but where at the time of final address to the Court, the plaintiff's counsel makes an admission in defendant's favour, the plaintiff in such circumstances can yet argue the same point over again in appeal. [P 174 C 2]

(c) Record of Rights—Entries in, cannot determine legal status of person whose name is entered therein.

The entries in the revenue registers cannot be given the effect of determining the legal status of the person whose name is entered in those registers. If those entries do not describe the true

legal position they are of no consequence on the question of title according to law. [P 175 C 2]

Sultan Ahmad, Radha Krishna, B. N. Roy and *Bishun Singh*—for Appellants.

Hasan Imam, Bhagwati Nath, Girja Shankar, Lakhshmi Narain, Bishambhar Dayal, Ali Zaheer and *P.L. Banerji*—for Respondents.

Judgment.—This is the plaintiffs' appeal from the decree of Pullan, J., dated 23rd December 1929. Originally there were five plaintiffs in the suit out of which this appeal arises but it appears from the memorandum of appeal that one of these plaintiffs, Jagannath Bakhsh Singh, is now arrayed among the respondents to this appeal. Ganesh Bakhsh Singh is plaintiff 1. The other plaintiffs claim to have purchased a share in the subject-matter of this litigation from Ganesh Bakhsh Singh, under a deed of sale dated 19th September 1928. In this judgment we will mention only plaintiff 1, Ganesh Bakhsh Singh as the plaintiff. In the array of the defendants Ajudhiya Bakhsh Singh alias Raghuraj Singh is defendant 1 and is in possession of the property in suit. The other two defendants had on a previous occasion claimed title to the estate now in suit and their claims were settled by a compromise between them and defendant 1. In this judgment we would refer to Ajudhia Singh as the defendant.

The property in suit is described in Sch. A, attached to the plaint with reference to the names of villages situate in the District of Rae Bareli and Unao in the province of Oudh. The schedule comprises 42 villages in the last of which, that is Akampur, only half share of the whole village is the subject-matmatter of dispute. 25 of these villages are situate within the District of Rae Bareli. The remaining 17 are now within the ambit of the Unao District. It appears from the Gazetteer of the two districts that these 17 villages originally belonged to the district of Rae Bareli but were thrown into the District of Unao some time in the year 1868-69.

After the confiscation of the proprietary rights in the soil of Oudh of all persons except six under the proclamation issued by Lord Canning on 15th March 1858, following the suppression of the Mutiny of the preceding year, the settlement of the villages in suit was made by the British Government with Jagannath Bakhsh Singh, son of Bhagwan Bakhsh Singh, in January 1859. This settlement is known as the second summary settlement and was originally intended for a period of three years. Jagannath Bakhsh Singh was then an infant of about three years of age. These facts were admitted both in the pleadings of the case and in the arguments before us: see para. 1 of the plaint and of the written statement of the dafendant. On 10th October 1859 the Governor-General issued his famous letter by which he was

"pleased to declare that every talukdar with whom a summary settlement has been made since the re-occupation of the province has thereby acquired a permanent hereditary and transferable proprietary right, viz., in the taluka for which he has engaged."

Thus Jagannath Bakhsh Singh's title to the villages in suit which was to enure for a period of three years only was converted into a permanent title. When the Oudh Estates Act, 1869, came to be passed early in that year the Governor-General's letter of 10th October 1859 was incorporated as an appendix in that Act and by S. 3 of that Act the permanency of the title was reaffirmed not only with respect to the property covered by the settlement but also with regard to the property.

"which may have been or may be decreed by the Court of an officer engaged in making the first regular settlement of the Province of Oudh."

Jagannath Bakhsh Singh was therefore the owner of an "estate" within the meaning of that expression as defined in the Act of 1869. His name was also entered in lists 1 and 2 prescribed by S. 8 of the same Act. He was thus a "talukdar" within the meaning of the same Act possessed of that estate. The portion of the estate which lies in the District of Rae Bareli is called the Simri estate and the other portion which lies in the District of Unao is called Patantadassi estate. Both these portions were described as such in list 1 of the Act. Jagannath Bakhsh Singh had also obtained a sanad in respect of the taluka of Simri (Ex. A-11) in November 1861 This is what is generally called a primogeniture sanad and by its terms is confined to the estate of Simri situate in the District of Rae Bareli.

During the lifetime of Jagannath Bakhsh Singh the management of the estate was in the hands of the Court of Wards. Jagannath Bakhsh Singh died

in November 1869 when he was between 14 to 16 years of age. He left behind him his young widow Thakurain Sheopal Kuar, and his mother, Thakurain Parson Kuar. Mutation of names in the village registers of both the districts was made in favour of Thakurain Sheopal Kuar. She died on 22nd January 1886 and on her death similar mutation of names was made in favour of Thakurain Parson Kuar. On 21st June 1900 Thakurain Parson Kuar executed a deed of transfer called tamliknama (Ex. A-80) in favour of the defendant and in pursuance of that deed the defendant's name was entered in the revenue registers in place of the name of Thakurain Parson Kuar. She died in May 1922 and that is the date which is stated in the plaint as the date on which the cause of action arose for this suit.

The plaintiff's case is that Thakurain Parson Kuar held the estates in suit under Cl. (11), S. 22, Oudh Estates Act, 1869, as originally enacted, in the right of a mother of the deceased talukdar, Jagannath Bakhsh Singh. He claims title to the estate under Cl. (10) of the same section as amended by the Act of 1910. That clause is as follows:

"Or on default of or on the death of such mother then to the nearest male agnate according to the rule of lineal primogeniture, subject as aforesaid."

Apart from several legal objections raised by the defendant to the plaintiff's title the defendant has also denied the facts on proof of which the alleged title under Cl. (10) rests. The defendant's further plea is that he has a title in himself by reason of his adoption which Thakurain Sheopal Kuar has made in April 1879. The plaintiff has therefore to prove that he is

"the nearest male agnate according to the rule of lineal primogeniture,"

and the defendant has to prove his positive case of adoption to defeat the plaintiff's title, if established.

The learned trial Judge has held that the plaintiff has failed to prove that he is the nearest male agnate according to the rule of lineal primogeniture and he has further held that the defendant has also failed to prove his alleged adoption. At the hearing of the appeal we were asked on behalf of the plaintiff to reverse the first finding and on behalf of the defendant to reverse the second finding. (Then the Court discussed some questions of fact and proceeded.) There were several questions of law raised in the pleadings of the parties. They are stated and decided in the judgment of the learned trial Judge, but as the plaintiff's case fails on the question of pedigree we do not propose to discuss or to decide any question of law except one and that is the question of limitation. In para. 26 of the defendant's written statement the plea as to limitation was stated as follows:

"That defendant 1 has been in adverse possession of the property in suit for over 12 years and has acquired an indefeasible title thereto by prescription."

Issue 8 relates to this plea and this issue was tried in the sense that whatever evidence the parties desired to produce in respect of it was produced. The learned trial Judge's treatment of this issue began with the remark that:

"It is admitted that there is no question of adverse possession in this case."

It was agreed before us that the admission referred to was an admission made by the defendant's counsel in the course of his final address to the Court. On appeal before us the learned advocate for the defendant pressed for his right to argue the plea of limitation. As there is no question of springing a surprise on the plaintiff for both parties had given evidence on this question and as the question is a mixed question of law and fact we are of opinion that the learned advocate has that right. We have accordingly allowed the question to be argued before us. The argument was presented to us in the following manner. On the death of Jagannath Bakhsh Singh in November 1869 the devolution of the estate admittedly came to be governed by the provisions of S. 22, Oudh Estates Act, as that Act stood before the amendments made in the year 1910. This being so Sheopal Kuar must be taken to have succeeded under Cl. (7) of the said section and when Sheopal Kuar died the succession fell to be regulated by Cl. (11), S. 22. Once that clause was reached the inheritance must devolve according to the conditions of the sanad. The sanad clearly excludes females and therefore Parson Kuar's possession was unlawful. Since the date of the alleged adoption of the defendant Parson Kuar held the estate on his behalf in the capacity of a guardian. At the latest from the date of the tamliknama

that is, 21st June 1900 the defendant has himself held the estate and he has held it adversely to the rightful heir whose title to enter into possession arose immediately after the death of Sheopal Kuar.

The plaintiff's case is that his present claim is governed by Art. 141, Sch. 1, Lim. Act, 1908, and under that article the time commenced to run from the date of Parson Kuar's death. It is not disputed that the onus of satisfying us that the suit is within the time prescribed by law lies on the plaintiff. If the defendant's argument that the conditions of the sanad regulated the devolution of the estate after the death of Sheopal Kuar is correct it would follow that under the aforementioned article the time against the plaintiff began to run when Sheopal Kuar died. According to this view the plaintiff's suit is clearly barred by time. The plaintiff however argues that Parson Kuar's possession was not unlawful as she was entitled to succeed to the estate under the old Cl. (11), S. 22, Oudh Estates Act, 1869, according to Hindu law, and therefore under Art. 141 time began to run when Parson Kuar died. On that argument the suit is within time. The sole question therefore for decision is as to whether the conditions of the sanad or the rules of the Hindu law governed the succession when Cl. (11) was reached after the death of Sheopal Kuar. Our answer to this question is that the terms of the sanad governed the succession and not the rules of the Hindu law. In support of the argument a series of cases decided by their Lordships of the Judicial Committee were cited before us. It is true that all those cases were cases of list 2 as the present case is and it is also true that the Hindu law or the family custom was held to govern the succession under Cl. (11), but no question as to the applicability of the sanad arose in those cases except in one case which is distinguishable.

We will refer to only two of such cases, *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (1) and *Narindar Bahadur Singh* v. *Achal Ram* (2). It appears to us that whatever room for argument might have been left before, the recent decision of their Lordships of the Judicial Committee in *Badri Narain Singh* v. *Harnam Kuar* (3) is conclusive on the point. This Court had had occasion to decide this question recently in two cases. One of us was a party to both the decisions and the other to the latter only. Those cases are: (1) *Abadi Begam* v. *Mohammad Khalil Khan* (4). The other case is *Dal Bahadur Singh* v. *Har Baklish* (5). The grounds of our opinion are fully stated in the first mentioned case and it will serve no useful purpose to repeat them here. We still adhere to the view we had taken in those cases.

The question of limitation was argued before us from a different point of view also. Assuming that Art. 144 and not Art. 141 governed the present case we were asked to hold that neither Parson Kuar's nor the defendant's possession prior to Parson Kuar's death was adverse to the rightful heir. In this connexion we were referred to the nature of the entries in the village registers as against the name of Parson Kuar made when her name was entered in those registers after the death of Sheopal Kuar. These entries no doubt indicate that they were made on the basis of Parson Kuar's right of inheritance. We were also referred to several other papers and official correspondence in which Parson Kuar was described as a "talukdar." On the basis of this description it was argued that she held the estate lawfully and not unlawfully. From the latter class of documents we are unable to draw the inference that the legal characteristics of her right to possess the estate were intended to be indicated by such a description. We think that it means only the person in possession of the taluka. As regards the former class of documents the entries in the revenue registers cannot be given the effect of determining the legal status of the person whose name is entered in those registers. If those entries do not describe the true legal position they are of no consequence on the question of title according to law. Parson Kuar's own declarations as to the nature of her possession are certainly of great importance. In the preceding portion of this judgment we have referred to Parson Kuar's applications in which she alleged

(1) [1873] 5 I. A. 1=1 C. L. R. 318=3 Sar. 763 (P.C.).
(2) [1893] 20 Cal. 649=20 I. A. 77 (P.C.).
(3) A. I. R. 1922 P. C. 289=68 I. C. 1000=49 I. A. 276=25 O. C. 313=44 All. 449 (P.C.).
(4) A. I. R. 1930 Oudh 481=132 I. C. 753=6 Luck. 282.
(5) A. I. R. 1931 Oudh 327=132 I. C. 785.

that the rightful owner of the estate was the defendant and that she held the estate in the capacity of a guardian. This certainly does not mean that she held it for her lifetime in the right of a Hindu female and the reversion on her death was to devolve on a person who could not be ascertained until after the happening of that event.

As regards the possession of the defendant it was argued that he acquired it in virtue of the transfer made by Parson Kuar under the tamliknama of 21st June 1900 (Ex. A-80) and as Parson Kuar's transfer could subsist only for her lifetime the defendant's possession was adverse only from the date of Parson Kuar's death. The argument obviously involves the assumption that Parson Kuar held the estate lawfully for her lifetime. This assumption we have already negatived. According to us Parson Kuar being a trespasser could confer no title by means of this transfer on the defendant. We must therefore hold that the defendant's possession was also adverse certainly from the date of the tamliknama if not from an earlier point of time.

In relation to the question of the applicability of the sanad there is another point in controversy between the parties. The sanad (Ex. 11) on the face of it relates only to the taluka of Simri in the District of Rae Bareli and therefore does not cover by its terms the taluka of Patantadassi in the District of Unao. On behalf of the plaintiff it was argued that if the sanad applied at all the bar of limitation could affect the suit in respect of the taluka of Simri only. On behalf of the defendant it was contended that by the effect of S. 3, Oudh Estates Act, 1869, the condition of the sanad relating to inheritance would govern the succession to the Unao property also.

It is not necessary for us to decide the controversy because the appeal wholly fails on the question of pedigree. We dismiss the appeal accordingly. As to the costs we uphold the order of the trial Judge in so far as the costs in his Court are concerned. As regards the costs of the appeal the plaintiffs-appellants shall bear their own costs and pay only one set of costs of the defendants-respondents.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 176

SRIVASTAVA, J.

Nageshar Prasad Dube—Plaintiff—Applicant.

v.

Bakridi and *another* — Defendants — Opposite Parties.

Civil Revn. Appln. No. 4 of 1932, Decided on 17th February 1932, against order of Sub-Judge, Sultanpur, D/- 15th October 1931.

(a) Limitation Act (1908), Arts. 75 and 80 — Money-bond providing for payment by four annual instalments—In case of default option to recover whole amount—Suit is governed by Art. 75 and not by Art. 80.

A money bond provided for payment of the principal amount by four annual instalments and that in case of default in payment of any instalment the obligee would have the option to recover the whole amount together with interest. The plaintiff alleged that only the first instalment had been paid and sued to recover the remaining three instalments.

Held : that the bond was one payable by instalments of the nature referred to in Art. 75 and was not therefore governed by the general Art. 80. [P 177 C 1]

(b) Limitation Act (1908), Art. 75 — To claim benefits of Art. 75 obligee must prove waiver of provision entitling him to sue on first default—Waiver may be inferred from circumstances—No hard and fast rule can be laid down—Some distinct act or forbearance on plaintiff's part must however be proved.

In order to claim the benefit of Art. 75 it is necessary for the obligee to show that he has waived the benefit of the provision entitling him to sue on an earlier default and that he bases his claim on the subsequent defaults in respect of which there is no waiver. It is not possible to lay down a hard and fast rule as to what would or would not constitute a waiver. The waiver may be effected in a variety of ways and may be inferred from various circumstances. It must however depend upon some definite act or forbearance on the plaintiff's part.

A money bond provided for payment of the principal amount by four annual instalments and in case of default of any instalment the obligee was to have the option to recover the whole amount with interest and the obligee alleged that the first instalment has been paid up and sued to recover the remaining three instalments basing his cause of action on the defaults which occurred in case of each of the last three instalments.

Held : that plaintiff has waived the option which he had under the terms of the bond to claim the whole amount on occurrence of the second default; and the case was governed by Art. 75 : 4 *I. C.* 17, *Foll.* [P 177 C 2]

R D. Sinha—for Applicant.

Hakimuddin Siddiqi — for Opposite Parties.

Order.—This is an application for revision under S. 25, Small Cause Courts Act. It arises out of a suit based on a money bond dated 19th April 1926. The

principal amount was made payable in four annual instalments on Jeth Sudi Purnimashi of the years 1927, 1928, 1929 and 1930. It was further provided that in case of default in payment of any instalment the obligee would have the option to recover the whole amount together with interest. The plaintiff's case was that he had been paid only the first instalment. He therefore sued to recover the remaining three instalments. It was stated in para. 3 of the plaint that the cause of action for the unpaid instalments arose on 3rd June 1928, 22nd June 1929 and 11th June 1930. The lower Court held that the alleged payment of the first instalment had not been proved. He accordingly held that the cause of action for the suit accrued on the date of default in payment of the first instalment and the suit was barred by Art. 80, Lim. Act.

It is contended on behalf of the plaintiff that the suit was not governed by Art. 80 but by Art. 75, Sch. 1, Lim. Act, and that the plaintiff should be deemed to have waived the benefit of the provision entitling him to sue for the whole amount on the happening of the default in payment of an annual instalment. He therefore claims that the present suit in respect of the last three instalments which were to be paid within the three years preceding the institution of the suit was within time. The learned counsel for the defendants has rightly conceded that the bond was one payable by instalments of the nature referred to in Art. 75 and that it was therefore not governed by the general Art. 80. It is however strenuously contended by him that the plaintiff did not set up any case of waiver in his plaint and that the allegations in the plaint were inconsistent with the plea of waiver now set up. It is true that in order to claim the benefit of Art. 75 it is necessary for the obligee to show that he has waived the benefit of the provision entitling him to sue on an earlier default and that he bases his claim on the subsequent default in respect of which there is no waiver. It is not possible to lay down any hard and fast rule as to what would or would not constitute a waiver. As observed in *Abinash Chandra Bose* v. *Bewa* (1) the waiver

(1) [1909] 4 I. C. 17.

"of such condition may be effected in a variety of ways and may be inferred from various circumstances. It must however depend on some definite act or forbearance on the plaintiff's part."

Paragraph 3 of the plaint to which reference has been made above seems to me to show clearly that the plaintiff did not base his claim on the provision entitling him to institute a suit on the occurrence of the first default. If he had intended to base the suit on that provision it would have been enough to say that the cause of action accrued in his favour on 3rd June 1928 when the second instalment remained unpaid. The very fact that the cause of action has been based on the defaults which occurred in case of each of the last three instalments shows that the plaintiff placed reliance on each of the defaults and did not avail himself of the provision which gave him the option to sue for the whole amount on the happening of the first default. I do not overlook the fact that the plaintiff pleaded payment of the first instalment and was unable to prove it to the satisfaction of the lower Court. The only effect of it is that it is not possible to say that the plaintiff waived the benefit of the provision in respect of the first instalment. But for the reasons stated above it seems to me clear that while it was possible for the plaintiff to base his claim on the option, which he had under the terms of the bond to claim the whole amount on occurrence of the second default, he did not choose to base his claim on this option, but has instituted the suit for the three unpaid instalments basing his cause of action on each of the said defaults. There is no merit in the contention raised by the defendants to defeat the plaintiff's claim for the unpaid instalments. Taking all the circumstances into consideration I think the plaintiff should be deemed to have waived the benefit of the provision which entitled him to sue for the whole amount on the occurrence of the first default. It is not denied that the claim in respect of the last three instalments, if limitation is computed from the date on which the instalments accrued due, is within time. I therefore allow this application, set aside the order of the lower Court and decree the plaintiff's suit with costs.

R.M./R.K. *Application allowed.*

A. I. R. 1932 Oudh 178

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Ram Sarup Singh—Appellant.

v.

Gaya Prasad and *others*—Respondents.

First Appeal No. 42 of 1931, Decided on 25th January 1932.

(a) Registration Act (1908), Ss. 34 and 35—Statement by counsel on behalf of client that his client does not object to registration of document but reserves his right to challenge its validity amounts to admission as to its execution.

A statement made by counsel before the District Registrar on behalf of the executant of certain documents that his client does not object to the registration being made of the documents provided that it is distinctly understood that he makes no admission as to the validity of the execution, implies admission as to the execution of the documents, although the right to challenge their vaildity is reserved. [P 179 C 1]

(b) Limitation Act (1908), Art. 132—Right of foreclosure can be controlled by contract contrary to provisions of Transfer of Property Act (1882), S. 67.

Section 67 allows the enforcement of the right to foreclose to be controlled by any contract contrary to the provisions of the section.

Mortgagees were entitled to possession immediately after execution of deed. They were however not let into possession. According to a clause in the mortgage deed the mortgagor had no power to repay the mortgage money during the period of five years following the execution of the deed and the mortgagee had the right to recall the mortgage money and to sue for foreclosure only in the event of the mortgagors's default in redeeming the mortgage on the expiry of the five years.

Held: that the rights of redemption and foreclosure being co-extensive, the period of limitation began to run after the period of five years. [P 179 C 2]

(c) Transfer of Property Act (1882), Ss. 98 and 68—Anomalous mortgage—Rights and liabilities of parties are to be determined according to contract between parties and not by S. 68.

A mortgage which is a combination of three mortgages, usufructuary, simple, and mortgage by conditional sale amounts to an anomalous mortgage, and under S. 98 rights and liabilities of parties are to be determined by their contract as evidenced in the mortgage deed and S. 68 does not apply to such a case. [P 179 C 2]

(d) Hindu Law—Alienation — Necessity — Interest—Mortgage executed for legal necessity—High rate of interest—Burden of proof is on mortgagee.

Where a mortgage is executed for legal necessity, the onus of proving the necessity for the high rate of interest stipulated in the mortgage deed is on the mortgagee. [P 180 C 1]

H. Husain, *Brijnath Shargha* and *Lakshmi Narain*—for Appellants.

A. P. Sen and *Raj Narain Shukla*—for Respondents.

Judgment.—This is the defendants' appeal from the decree of the Subordinate Judge of Unao, dated 22nd December 1930. The suit, out of which this appeal arises, was founded on a deed of mortgage dated 23rd August 1917 (Ex. 1) and a deed of further charge of even date in relation to the same mortgage, both executed by one Jugraj Singh, since deceased, (Ex. 2). Jugraj Singh was the father of defendants 1 to 4 and husband of defendant 5. It was agreed in the Court below and again before us that the property mortgaged under the deeds mentioned above was the ancestral property of Jugraj Singh and his sons, and that Jugraj Singh could not make a valid mortgage of such property without legal necessity or unless the deeds were executed for antecedent debts. The trial Court found that the deeds in suit were executed for legal necessity and for payment of antecedent debts. This finding is not challenged in appeal before us except in the matter of the rate of interest, to which we will advert hereafter.

The decree of the Court below was assailed on two grounds: (1) that the plaintiffs' suit is barred by limitation; and (2) that the deeds of 23-8-1917 were invalid for want of proper registration. In agreement with the Court below we reject both these grounds of attack. On the question of registration the facts are as follows:

On 20-9-1917 Gaya Prasad, plaintiff 1, presented the original deed of mortgage (Ex. 1) for registration before the Sub-Registrar of Hasanganj, who admittedly had the territorial jurisdiction to register it. The deed of further charge (Ex. 2) was presented before the same Sub-Registrar on the 8-10-1917 for registration. This presentation was in accordance with the provisions of S. 32 (a), Registration Act, 1908. The Sub-Registrar however on 13-11-1917 refused to register them presumably on the ground that the executant of the documents did not admit their execution: vide S. 35 (1) (a), Registration Act. Thereupon Gaya Prasad instituted proceedings under S. 73 of the same Act before the District Magistrate of Lucknow. On 15-12-1917 Jugraj Singh, the executant of the two documents, with his counsel, appeared before the said Registrar and the counsel made the following statement:

"His client does not object to registration being made of the documents . . . . . provided that it is distinctly understood that he makes no admission as to the validity of the executions."

The counsel for Gaya Prasad agreed to registration on that understanding. The District Registrar then passed the following order:

"The parties have come to an agreement as recorded above. The Sub-Registrar will register the documents in cases 7, 8 and 9 and it will be understood that Jugraj has made no admission as to the validity of the execution in any of the three cases."

This order must be taken to have been passed by the Registrar under the provisions of S. 75 (1), Registration Act. The endorsement as to registration was consequently made on the documents. It may here be parenthetically mentioned that the mortgagees had as a part of the same transaction agreed to lease the mortgaged property in favour of Jugraj Singh and Jugraj Singh on the same date executed a kabuliyat in favour of the plaintiffs (Ex. A-1). This kabuliyat was also registered under the order of the District Registrar dated 15th December 1917 above referred to.

The argument in appeal is that the District Registrar had no jurisdiction to order registration unless he found that the documents had been executed as required by S. 75 (1), Registration Act. We are of opinion that there is no force in this contention. The admission made by his counsel on behalf of Jugraj Singh clearly implied admission as to the execution of the three documents though the right to challenge validity of the documents was reserved.

The second ground of defence is equally without force. It is argued that on the terms of the deed of mortgage (Ex. 1) the mortgagees were entitled to enter into possession immediately on the execution of the deed and as they admittedly were never let into possession the right to sue for the mortgage money arose on the happening of that contingency under S.68, Cl. (c), T. P. Act. Thus, the argument proceeds, the mortgage money had become payable within the meaning of S. 67 of the same Act, which gave rise to the mortgagees' right to obtain a decree for foreclosure. The present suit having been brought more than 12 years after the money sued for had become due under Art. 132, Sch. 1, Lim. Act, is barred by time.

The specific relief claimed in the present suit is one of foreclosure and it was agreed that on the terms of the mortgage in suit the plaintiffs are entitled to such a relief. The suit therefore is of the nature contemplated by S. 67, T. P. Act. That section however allows the enforcement of the right to foreclose to be controlled by any contract contrary to the provisions of the section. According to Cl. 5, Ex. 1, the mortgagor had no power to repay the mortgage money during the period of five years following the execution of the deed and according to Cl. 7 the mortgagees had the right to recall the mortgage money and to sue for foreclosure only in the event of the mortgagor's default in redeeming the mortgage on the expiry of the five years. The combined effect of the two clauses is that neither the mortgagor had the right to repay the mortgage money and to redeem the mortgaged property nor the mortgagees had the right to recall the mortgage money and to sue for foreclosure before the expiry of five years. This is consistent with the general principle that the two rights are co-extensive. It is agreed that the present suit is amply in time if limitation is calculated from the first date after the expiry of the period of five years. Another answer to the defendants' contention is that the mortgage of 23rd August 1917 (Ex. 1) is an anomalous mortgage. It is a combination of three mortgages, usufructuary, simple and mortgage by conditional sale. Cl. 1, Ex. 1, prescribes for ordinary incidents of a usufructuary mortgage. Cl. 7 creates a mortgage by conditional sale and Cl. 9 has the elements of a simple mortgage. According to S. 98, T. P. Act, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed when the mortgage is an anomalous mortgage. We cannot therefore apply the provisions of S. 68, T. P. Act, to this case. According to the contract contained in the deed of mortgage, as we have already explained, the right to sue for foreclosure in lieu of the mortgage money arose in favour of the mortgagees only after the expiry of the period of five years fixed by the preamble and Cl. 1 of the deed of mortgage.

The last argument advanced on behalf of the defendants-appellants was that no legal necessity has been established for the contract contained in the deed of further charge (Ex. 2) to pay interest at such a high rate as Rs. 2 per cent per mensem compoundable half-yearly on

default of payment of interest at the rate of 10 annas per cent per mensem every six months. It was not disputed that the onus to establish such a necessity rests on the mortgagees. That onus has clearly not been discharged. The lower Court is of opinion that interest at 1 per cent per mensem is a fair and commercial rate of interest. We agree with this opinion. We accordingly order that the plaintiffs are entitled to simple interest at the rate of Re. 1 per cent per mensem only on the deed of further charge and in this respect only we modify the decree of the Court below. The rest of the appeal is dismissed with costs.

R.M./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 180

WAZIR HASAN, C. J. AND KISCH, J.

(*Raja Syed*) *Ahmad Ali Khan Alawi*—Plaintiff—Applicant.

v.

Secy. of State — Defendant — Opposite Party.

Civil Revn. No 39 of 1931, Decided on 9th December 1931, against order of Land Acquisition Officer, Lucknow, D/- 17th September 1930.

(a) Land Acquisition Act (1894), S. 18—Order refusing to make reference to Court is judicial order and subject to High Court's revisional jurisdiction — Civil P. C. (1908), S. 115.

If the order of the Land Acquisition Officer is an order of a judicial character in that event the order must be construed as an order of a Court and subject to the revisional jurisdiction of the High Court, and an order refusing to make a reference to the Court of the District Judge, under S. 18 is a judicial order whatever may be the ground of the order : 32 *Cal.* 605 (*P. C.*), *Foll* ; *A. I. R.* 1923 *Bom.* 290, *Diss. from.* ; (*Case law referred*). [P 181 C 1]

(b) Land Acquisition Act (1894), S. 18 (a) (b)—Land Acquisition Officer cannot refuse to make reference even if application, in his opinion, is time-barred.

The Land Acquisition Officer has no jurisdiction to refuse to make the reference even if in his opinion the application is not in time under Cl. (a) or Cl. (b) or sub S. 2, S. 18. He should express that opinion and refer the matter to the Court for determination. The section nowhere provides that if the application contravenes Cl. (a) or Cl. (b) the Land Acquisition Officer shall reject the application. These clauses are placed in the section by way of proviso to the substantive enactment contained in sub S. (1), S. 18 of the Act and relate to the form of the application and do not have the effect of taking away the right given by the substantive enactment to an interested person who has not accepted the award of requiring that the matter be referred for the determination of the Court. [P 181 C 1]

A. P. Sen—for Applicant.

H. K. Ghose, Govt. Advocate—for Opposite Party.

Judgment.— This is an application under S. 115, Civil P. C., from an order of the Land Acquisition Officer of Lucknow, dated 17th September 1930.

It appears that the applicant is the owner of the village of Mohammadpur Garhi and an area of land within that village was acquired under the Land Acquisition Act, 1894, in connexion with the construction of a railway line. Under the provisions of Part 2 of the said Act an award was made by the Land Acquisition Officer as to the amount of compensation to be awarded to the applicant in respect of his lands so acquired. The applicant did not accept the award and made an application under S. 18, Land Acquisition Act, 1894, requiring that the matter be referred for the determination of the Court, i. e., the Court of the District Judge, Lucknow. The learned officer has refused to make the reference asked for on the ground that the applicant's application under S. 18 was barred by limitation. The ground of the application before us is that the Land Acquisition Officer has acted illegally and with material irregularity in the exercise of his jurisdiction by refusing to make the reference to the Court of the District Judge of Lucknow. Against the hearing of this application a preliminary objection is taken by the learned Government Advocate to the effect that the Land Acquisition Officer was not a Court subordinate to this Court and therefore an application under S. 115, Civil P. C., from the order of that officer is not maintainable. It will be seen as this judgment proceeds that the decision of this objection will be a decision on the merits of the application.

In support of the objection our attention was drawn to the definition of the expression "Court" in S. 3, Cl. (d), Land Acquisition Act, 1894 and it was broadly argued that the order of the Land Acquisition Officer in refusing to make a reference under S. 18 of the Act is not a judicial order. Reliance was placed on a decision of the High Court of Bombay in the case of *Balkrishna Daji Gupte* v. *The Collector, Bombay Subarban* (1).

(1) A. I. R. 1923 Bom. 290 = 73 I. C. 354 = 47 Bom. 699.

We are of opinion that the preliminary objection must be rejected. It appears to us that the definition of the expression "Court" in S. 3 of the Act is wholly irrelevant for the purpose of determining the jurisdiction of this Court under S. 115, Civil P. C. The Act deals with the functions of the "Collector" and of the "Court" and with a view to indicate what those two expressions mean as employed in the body of the Act they have respectively been defined in S. 3. The construction of the word "Court" which we are called upon to determine in this case is the construction that should be put on it within the meaning of S. 115, Civil P. C.

It is agreed that there is no general definition of the word "Court" in the statutes. The case law has proceeded on the line that if the order of the Land Acquisition Officer is an order of a judicial character in that event the order must be construed as an order of a Court and subject to the revisional jurisdiction of the High Court. We are of opinion that this is the right way of determining the question. We entertain little doubt that an order refusing to make a reference to the Court of the District Judge under S. 18, Land Acquisition Act, is a judicial order whatever may be the ground of the order. In this particular case the ground was that the application was barred by time. It appears to us that on a proper construction of S. 18 the final determination of the question as to whether the application is barred by time or not must be made by the Court of the District Judge. The Land Acquisition Officer has no jurisdiction to refuse to make the reference even if in his opinion the application is not in time under Cl. (a) or Cl. (b), sub-S. 2, S. 18, Land Acquisition Act. He should express that opinion and refer the matter to the Court for determination. The section nowhere provides that if the application contravenes Cl. (a) or Cl. (b) the Land Acquisition Officer shall reject the application. These clauses are placed in the section by way of a proviso to the substantive enactment contained in sub-S. (1), S. 18 of the Act and relate to the form of the application and do not have the effect of taking away the right given by the substantive enactment to an interested person who has not accepted the award of requiring that the matter be referred for the determination of the Court. That this is the interpretation which has been placed by the Local Government, the second party interested in these cases is clear from the note added to R. 436 framed by the Local Government.

As to the decision of the High Court of Bombay in *Balkrishna Daji Gupte* v. *The Collector, Bombay Suburban* (1), all we need say is that with great respect we do not agree with the view expressed in that case generally, but so far as the matter before us is concerned even that decision professes not to decide it: see the observation of Crump, J., at p. 706. We construe the observations of their Lordships of the Judicial Committee in the case of *Ezra* v. *Secy of State* (2), as an authority for the view which we are taking. Their Lordships say:

"The objection is based and depends upon the theory that the inquiry by the Collector was a judicial proceeding, and that the rules of judicial proceedings apply. The argument of the appellant starts from the word 'award' (which is used to describe the conclusion of the Collector), and has nothing else to support it. When the sections relating to this matter are read together, it will be found that the proceedings resulting in this "award" are administrative and not judicial; that the "award" in which the inquiry results is merely a decision (binding only on the Collector) as to what sum shall be tendered to the owner of the lands: and that if a judicial ascertainment of value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court."

According to this pronouncement the proceedings culminating in an award under Part 2 of the Act are administrative and not judicial, but if an ascertainment of value is desired by the owner he can obtain it by requiring the matter to be referred by the Collector to the Court and these proceedings would be judicial. This was the view taken by a Bench of the High Court at Calcutta in *The Administrator General of Bengal* v. *The Land Acquisition Collector, 24 Parganas* (3), by the old Chief Court, Punjab, in *Secy. of State* v. *Jiwan Bakhsh* (4) and by the High Court at Patna in *Saraswati Pattack* v. *The Land Acquisition Deputy Collector of Champaran* (5). It appears that the old Judicial Commissioner's Court of Oudh was also inclined to the same view: *Hari Das Pal* v. *The Municipal Board, Lucknow* (6). Lastly we

(2) [1905] 32 Cal. 605=32 I. A. 93 (P. C.)
(3) [1908] 72 C. W. N. 241.
(4) [1916] 67 P. R. 1916=36 I. C. 213.
(5) [1917] 2 Pat. L. J. 204=39 I. C. 650.
(6) [1914] 16 O. C. 374=22 I. C. 652.

have the decision of the High Court at Madras in the same direction: *T. K. Parameshwara Aiyar* v. *Land Acquisition Collector, Palghat* (7). We accordingly allow this application, set aside the order of the Land Acquisition Officer dated 17th September 1930 and direct him to refer the matter to the determination of the Court. There shall be no order as to costs.

K.N./R.K. *Application allowed.*

(7) [1919] 42 Mad. 231=49 I. C. 659.

* A. I. R. 1932 Oudh 182

KISCH, J.

Arthur John Mackinley—Appellant.

v.

M. D. Mackinley and *another*—Respondents.

Divorce Case No. 7 of 1931, Decided on 1st February 1932.

*** (a) Divorce Act (1869), S. 34—Petition by husband for dissolution of marriage on ground of adultery claiming damages against adulterer — Questions to be considered in awarding damages are what loss husband has sustained and whether or not such loss has been occasioned by action of adulterer—In determining these questions Court should have regard to conduct of husband and how far he may by his own conduct have contributed to his wife's wrong doing.**

The object of the damages to be awarded to the husband on proof of his wife's adultery is in no sense punitive. The means of the adulterer have nothing to do with the question. The only questions that the Court can take into consideration are what loss the husband has sustained and whether or not such loss has been cast on the husband by the action of the adulterer. In determining these questions the Court must take into consideration the conduct of the husband and how far he may by his own conduct have contributed to his wife's wrongdoing.

M, a husband, filed a petition for dissolution of his marriage with *D*, on the ground of her adultery with *K*, claiming damages to the extent of Rs. 25,000 against *K*. The heavy damages were claimed on the ground that *K* was the cause of the indifference of *D* towards him and the breaking up of his home and that owing to the knowledge of the misconduct of *D* with *K* he received such a shock that his health failed and as a consequence he lost service. It was found that *K* was not responsible for *M's* wife leaving his protection, that the loss of *M's* employment was not due to any action of *K* and that *M's* own character and conduct were responsible for his wife leaving him and the consequent breaking up of his home. The only thing against *K* was that he had taken a woman whom he knew to be a married wife of another under his protection. His intentions were found to be all along honourable.

Held: that only a nominal sum of Rs. 500 by way of damages should be awarded to the petitioner: *Keyse* v. *Keyse & Mawell*, 11 *P. D.*, 100; *A.I.R.* 1925 *Cal.* 585; *A.I.R.* 1927 *Bom.* 594 and *A.I.R.* 1931 *Oudh* 259. *Rel. on.* [P 185 C 1, 2]

(b) Divorce Act (1869), S. 43—Suit by husband for dissolution of marriage and custody of child—Benefit of child should be paramount consideration in deciding question of custody.

In a suit by husband for dissolution of his marriage on ground of his wife's adultery, and custody of the child, no doubt prima facie the innocent party is entitled to the custody of the children of the marriage. But no hard and fast rule could be laid down on the subject. The first duty of the Court is to consider what is for the benefit of the children, and the interests of the children should be the paramount consideration. *Symington* v. *Symington*, 2 *Scotch & Divorce A. C.* 415; *Stark* v. *Stark and Hitchins*, (1910) *P. D.* 190; *D'Alton* v. *D'Alton*, 4 *P. D.* 91 and *Phillip* v. *Phillip*, 41 *L. J. P. & M.* 89, *Rel. on.* [P 185 C 2, P 186 C 1]

Moti Lal Saksena—for Petitioner.

H. K. Ghosh and *A. Hoon*—for Respondents.

Judgment.—This is the petition of Arthur John Mackinley for dissolution of his marriage with Marie Dhelia Mackinley on the ground of her adultery with Captain A. P. Keolan, Executive Officer, Cantonments, Cawnpore. The petitioner claims Rs. 25,000 damages against the co-respondent. These heavy damages are claimed on the ground that the co-respondent was the cause of the indifference of the respondent towards the petitioner and the breaking up of the petitioner's home, and that when the petitioner came to know of his wife's misconduct he received such a shock that his health failed him and as a consequence he had to give up his post as a Permanent Way Inspector on the Bengal North Western Railway, thus ruining his future prospects. The petitioner also claims the custody of the one child of the marriage, a daughter born on 30th November 1925.

The respondent and the co-respondent admit the adultery, entitling the petitioner to a decree for dissolution of marriage. They both deny however that the co-respondent had anything to do with the breaking up of the petitioner's home, the respondent alleging that owing to her husband's ill-treatment she had left his house on several occasions, that she left his house on the last occasion in October 1927 and went to live with her parents in Lahore, that it was not until July or August 1928 that she saw the co respondent for the first time on some official matter and that it was only in October of that year that they began to

meet. In September 1929, when her parents were no longer able to support her, she accepted the co-respondent's protection and has been living with him ever since as his wife, a son being born to them shortly after the institution of the present proceedings. The co-respondent accordingly denies liability to pay any damages, and the respondent prays for the custody of her daughter who has been living with her ever since she left her husband on the ground that their separation would be detrimental to the health of both of them.

On the pleadings the main points that arise for decision by this Court are (1) to what damages, if any, is the petitioner entitled as against the co-respondent, and (2) whether the respondent should be given the custody of the child of the marriage.

The facts established by the evidence produced by the parties are that the petitioner and the respondent became engaged in about April 1924 when the petitioner was about twenty-two years of age and the respondent sixteen. The engagement however was objected to by the petitioner's mother on whom he was partly dependent for support. In February or March 1925 the petitioner seduced the respondent in the Lawrence Gardens, Lahore, after a dance at the Railway Institute. After this incident the petitioner left Lahore and went to Mussoorie for fear of the consequences. The respondent found that she was with child, and when she could no longer conceal her pregnancy, she informed her parents of what had taken place. A lawyer was consulted, and as a result of a telegram sent by the lawyer the petitioner returned to Lahore where he was married to the respondent on 15th July 1925. At that time the petitioner held no appointment, but a month or so after the child was born he obtained an appointment as an Assistant Permanent Way Inspector on the Bengal North Western Railway at Saharsa on Rs. 75 per month. After some eight months he was transferred as Permanent Way Inspector on Rs. 100 to Jarwal Road. On 10th March 1927 the respondent taking the child with her left her husband's house and went to her parents in Lahore who at that time were running a small cinema at Lahore. The petitioner instituted a suit for restitution of conjugal rights against his wife, her mother and one Mr. Prout, the manager of the cinema at Lahore, in the Court of the District Judge, Gonda, and also made an application for the guardianship of the child. A decree for restitution and an order for guardianship were passed ex parte by the District Judge of Gonda on 18th July 1927. Subsequently the petitioner proceeded to Lahore to put the order of guardianship into execution and obtained delivery of the child. The respondent could not bear being separated from the child and returned with the petitioner to Jarwal Road. As the respondent had received no notice of the application for guardianship her mother proceeded to Lucknow to make inquiries into the matter and the respondent joined her there. On 21st September 1927 the parties appeared before the District Judge of Gonda and intimated that they had come to an agreement under the terms of which the petitioner was to have his certificate of guardianship of the child cancelled and the respondent was not to leave the petitioner again unless he ill-treated her. The District Judge made an order accordingly on that date. After the passing of this order a Mrs. Rica Woods, a friend of the respondent's family accompanied the respondent and her child to the petitioner's house at Jarwal Road. Mrs. Woods left suddenly after three or four days, and a couple of weeks later the respondent taking the child with her again left the petitioner's house and went to her parents in Lahore. After that she never returned to the petitioner.

None of the above facts are seriously disputed. The petitioner's case is that the married life of the petitioner and the respondent had been a very happy one and the respondent's estrangement from him was due to the co-respondent. The respondent's case is that the petitioner never had any affection for her having been forced to marry her against his will and that he had constantly ill-treated her. It was owing to his ill-treatment that she left his house on the first occasion, and owing to his further ill-treatment that she left his house for good and that she did not meet the co-respondent till many months after she had left the petitioner's house on the last occasion. In order to come to a decision on the question of damages it is necessary to consider where the truth lies.

The petitioner has not only failed to prove that the co-respondent had anything to do with his wife leaving him, but his allegations on the subject are demonstrably false. In the petition he alleged that the co-respondent was the cause of the respondent's indifference towards him and the breaking up of the petitioner's home, and he repeated the statement in his evidence in the witness-box. The co-respondent, however has proved by the production of the Government Gazettes that he proceeded out of India on leave from Burmah on 27th January 1927, that he remained on leave out of India for one year and took over charge of the post of Executive Officer, Lahore Cantonments on 16th January 1928. The respondent left the petitioner's house for the last time early in October 1927, and it is therefore clear that the co-respondent had nothing to do with her leaving the petitioner. The evidence of the respondent and co-respondent is to the effect that in July or August 1928 the respondent saw the co-respondent on two occasions in his official capacity in connexion with the respondent's parents seeking house accommodation in the Lahore Cantonment but that they did not meet socially until October 1928, that it is from that month that feelings of affection developed between them, that in April 1929 when the respondent was left destitute by the failure of her father's business the co-respondent began to give her financial assistance and sent her and her child to Simla in 1929 as the child was in poor health and that from September 1929 they began to live together. No attempt has been made by the petitioner to cast doubt on any of these statements and I can see no reason whatever to disbelieve them. The petitioner has gone the length of making a statement in the witness-box that he either knew to be false or had made no attempt to verify, namely, that the co-respondent was the Executive Officer of the Lahore Cantonment at the time when the child was made over to him in compliance with the order of the District Judge of Gonda in the month of August 1927. (Here his Lordship discussed the evidence on the petitioner's allegation that it was the action of the co-respondent that caused him to lose his post and found that the co-respondent was not responsible for the same and proceeded to discuss further evidence as regards the happiness or otherwise of the married life.) Taking all the circumstances into consideration it is clear to me that allowing for exaggerations in the respondent's statement her evidence that it was the petitioner's cruelty towards her that caused her to leave his house on both occasions must be accepted as true and that the petitioner's statement that their married life was uniformly happy until March 1927 cannot be accepted.

When the learned counsel for the petitioner realized that the petitioner had failed to prove his allegations that the co respondent was responsible for the breaking up of the petitioner's home and for his losing his employment on the railway he fell back on the contention that but for the appearance of the co-respondent on the scene, there might have been a reconciliation between the husband and wife resulting in the home being remade.

Admittedly the petitioner did make efforts through a Roman Catholic priest at Lahore to get his wife to return to him, and though she was unwilling to do so at first at the time when her father got into financial difficulty and could no longer support her, she decided to go back to him. According to her version when she wrote to her husband that she wanted to return she received from him a telegram telling her not to. According to the petitioner's version he had written to her that he was ready to take her back, but having subsequently discovered her intimacy with the co-respondent he sent her a telegram refusing to take her back. Neither the telegram nor the letter was summoned from the respondent. When in the witness-box the petitioner stated that he had with him a copy of the letter which he addressed to his wife on 8th July 1928. The respondent denies having received such a letter. The petitioner alleges that she must have received it because it was enclosed in a letter to the priest. No attempt has however been made to summon the priest as a witness.

This document, which was one of importance for the petitioner's case, was not filed on the date fixed for the filing of documents, and even when the petitioner was in the witness box, his counsel did not ask that it should be placed on the record. It is obvious that the Court cannot place full reliance on the petitioner's

statement with regard to his refusal to take his wife back when no serious attempt has been made to produce the evidence which it is alleged would have supported it. In this connexion it may be noted that it was not until two full years after his alleged telegram that the petitioner instituted the present proceedings. On the other hand the respondent has not produced the telegram that she alleges she received from the petitioner refusing to take her back. For these reasons the circumstances and the date of the final rupture between the petitioner and the respondent cannot be definitely determined though it is clear from the evidence, including the petitioner's own statements that in July 1928 he had no sufficient ground to believe that his wife had been guilty of any misconduct with the co-respondent.

The matters that have to be considered in assessing the amount of damages, if any to be awarded to a husband on proof of his wife's adultery with the co-respondent are well established. The object of the damages is in no sense punitive. The means of the co-respondent have nothing to do with the question. The only questions that a Court can take into consideration are what loss the petitioner has sustained, and whether or not such loss has been cast on the petitioner by the action of the co-respondent In determining these questions the Court must take into consideration the conduct of the husband and how far he may by his own conduct have contributed to his wife's wrongdoing. These points are established by a large number of English cases and they have all been brought in the well-known case of *Keyse* v. *Keyse & Mawell* (1) to which a reference is frequently to be found in the decisions of the Courts of India, *Thomas* v. *Thomas* (2), *Premchand Hira* v. *Bai Gulal* (3) and *George Arthur* v. *Anna Marguerite Hearsey* (4).

In the present case the petitioner has failed to prove that the co-respondent was in any way responsible for his wife leaving his protection. He has also failed to prove that the loss of his employment was due to any action of the co-respondent. The petitioner's own character and conduct are responsible for the petitioner's wife leaving him and the consequent breaking up of the petitioner's home. The petitioner knew that, apart from the precarious assistance that her parents could give her, the respondent had no means to support herself and her child. The only thing that can be said against the co-respondent is that he took a woman whom he knew to be a married woman under his protection, although in doing so all the circumstances lead me to believe his statement that it was sympathy for her past unhappiness and her present destitution that first attracted the co-respondent towards her and that his intentions have from the beginning been strictly honourable. In these circumstances it appears to me that only a nominal sum by way of damages should be awarded to the petitioner. I accordingly award the petitioner Rs. 500 as damages.

With regard to the custody of the child it is no doubt true, as has been contended by the learned counsel for the petitioner, that prima facie the innocent party is entitled to the custody of the children of the marriage. The Courts however have always declined to lay down a hard and fast rule on the subject. In *Symington* v. *Symington* (5), a case before the House of Lords, the Lord Chancellor expressed himself on the subject in the following terms :

"It appears to me that the Act of Parliament has given the Court the widest and the most general discretion, and has purposely done so; and I think it must be the duty of the Court to consider all the circumstances of the particular case before it—the circumstances of the misconduct which leads to a separation no doubt—the circumstances of the general character of the father—the circumstances of the general character of the mother and, above all, it should be the duty of the Court to look to the interest of the children, and carefully to weigh the comparative advantages or disadvantages of giving the custody of all or of any of them to the one parent or to the other. I am at a loss to conceive how any general rule upon such a subject can be laid down. Certainly I should prefer to ask your Lordships to act, not upon any general rule, but upon the circumstances of the case now before us.

In *Stark* v. *Stark and Hitchins* (6), the Court of appeal laid down that :

"the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to

(1) 11 P. D. 100.
(2) A.I.R. 1925 Cal. 585=86 I.C. 1018=52 Cal. 379 (F.B.).
(3) A.I.R. 1927 Bom. 594=105 I.C. 871=51 Bom. 1026.
(4) A.I.R. 1931 Oudh 259=132 I.C. 773.
(5) 2 Scotch & Divorce A.C. 415.
(6) [1910] P. 190=79 L.J. P. 98=101 L.T. 770 =26 T.L.R. 194.

the custody of her daughter assuming her to be under sixteen. The Court ought not to lay down a hard and fast rule on this subject. The statutory power conferred upon the Court ought . . . . . to be exercised discretionally according to the particular circumstances in each case in which its interference is invoked."

It is well established that the first duty of the Court is to consider what is for the benefit of the children and that the interests of the children should be the paramount consideration : *D'Alton* v. *D'Alton* (7), *Phillip* v. *Phillip* (8) : see also *Symington* v. *Symington* (5).

In the present case there cannot to my mind be one moment's hesitation as to which of the parties should be entrusted with the custody and education of the child until she is of age. As will be seen from what has been stated above the petitioner has cut a very sorry figure in the proceedings. He is a man who has no regard for truth. He has not been able to retain the various jobs that he obtained since he left the railway service and he is now out of work. He is at present dependent on his mother whose income has been shown to be barely sufficient for her own support. It is in the evidence of the respondent, which finds some corroboration in a letter (Ex. 16) written by her to Mrs. Woods on 13th June 1930 before the present proceedings were started and produced by the petitioner, that the petitioner offered to give her evidence to divorce him and let her keep the child if the co-respondent would pay him Rs. 12,000, and that on consulting a lawyer he advised her to have nothing to do with it as it was of the nature of blackmail. There is nothing in the present proceedings that gives me any cause to doubt the truth of this statement of the respondent. Since his child was taken from him shortly after the order of guardianship was cancelled he has made no attempt to get her back or to see her and from 1927 he has also shown no token of his affection by writing to her or sending her any little gift. The child is living with her mother and away from the petitioner since the age of two and is now six years old. The petitioner is a stranger to her. The child is a girl of tender years and needs her mother's care. The proceedings throughout show that her mother is extremely devoted to her. There is little doubt that it would be a great shock to the child to be taken away from her mother. The co-respondent also regards her as his own daughter and he is willing and able to provide for her maintenance and education. He intends to marry the respondent as soon as the law allows him to do so. Apart from the irregular union of the respondent with the co-respondent which owes its origin to the petitioner's own conduct, there is nothing to suggest that anything can be said against the respondent's moral character. There can be no doubt whatever that it is for the benefit of the child physically, morally and materially that she should remain with her mother. It is contended on behalf of the petitioner that he belongs to the Church of England while the respondent is a Roman Catholic, that the child has been baptized in the Church of England and he desires that she should be brought up in that faith. The child is still a Protestant and the co-respondent is also a Protestant. His intention is to marry the respondent as soon as the law allows him to do so. In the circumstances the question of religion does not appear to enter into the matter. The custody of the child will accordingly be given to the respondent.

I am satisfied that there has been no collusion in this case. The petitioner is granted a decree nisi for the dissolution of his marriage with the respondent. He must apply for a decree absolute after the expiry of six months. The petitioner is granted Rs. 500 damages against the co-respondent. These damages will be paid to the petitioner after the decree has been made absolute. The custody of the child is given to the respondent who must give facilities for the petitioner to have access to her once a quarter, if he so desires. The co-respondent will pay the petitioner's costs including Rs. 250 as pleader's fee.

P.N./R.K. *Order accordingly.*

(7) 4 P. D. 91.
(8) 41 L. J. P. & M. 89.

A. I. R. 1932 Oudh 186

SRIVASTAVA AND NANAVUTTY, JJ.

Emperor

v.

Ratan—Accused.

Criminal Appeal No. 33 of 1932, Decided on 22nd February 1932, against order of Sess. Judge, Bara Banki, D/- 9th November 1931.

(a) Penal Code (1860), Ss. 302 and 304—Murder or culpable homicide — Distinction between culpable homicide and murder explained.

If the act of the accused is done with the intention of causing such bodily injury, as the offender knows to be likely to cause the death of the person to whom the harm is caused, or the act is done with the intention of causing bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, the accused is guilty of murder under S. 302, I. P. C., and not of culpable homicide not amounting to murder under S. 304, I. P. C., unless his case is covered by any of the exceptions to S. 300, I. P. C. : 1 *Bom.* 342, *Foll.*

[P 189 C 2]

(b) Penal Code (1860), S. 302—Sentence—Accused aged 25 — Deceased father-in-law refusing to send wife of accused — Transportation for life held sufficient.

Where the accused aged 25 murdered his father-in-law at night while the father-in-law was sleeping in front of his house by lathi blows because the wife of the accused was not sent to the accused as per his demand, only transportation for life was inflicted under S. 302, I. P. C.

[P 189 C 2]

C. H. Thomas, Govt. Advocate—for the Crown.

Zafar Husain—for Accused.

Judgment.—This appeal has been filed on behalf of the Local Government under S. 417, Criminal P. C., against the judgment of the Sessions Judge of Bara Banki acquitting the accused Ratan Chamar of an offence under S. 302, I. P. C., but convicting him of the minor offence under S. 304, I. P. C. and sentencing him to seven years' rigorous imprisonment.

The facts out of which this appeal has arisen are as follows :

The accused Ratan Chamar, aged 25, was married some three or four years ago to Mt. Chhedana, the daughter of the deceased Chhote Chamar. She is a girl of about twelve years of age. She had been to the accused's house three times during the last three or four years, but on each occasion she had run away and come back to her father's house. The last time that she fled from her husband's home and returned to her father's house was about six days before the date of the occurrence. Two days before the commission of the murder the accused asked the deceased Chhote to send his daughter to him. Chhote refused to do so saying that as the girl was still too young he would not send her to her husband's home for another two years at least. The accused threatened to kill Chhote some time or other. On the night between 18th and 19th June 1931 Chhote Chamar was sleeping on a cot at the door of his house under a nim tree. There is a jungle to the north and east of Chhote's house. Near the cot of Chhote Chamar was sleeping his nephew Nanhu on a separate cot. When Chhote was attacked by his son-in-law, the accused Ratan Chamar, his nephew Nanhu hearing the cry of his uncle woke up and threw himself on the body of his uncle in order to protect the latter from the beating that he was receiving. In doing so the brave nephew himself received injuries. Nanhu's mother, Mt. Janaka, P. W. 4, and Mt. Chhedana, P. W. 7, the wife of the accused, also came out of the house on hearing the cry of Chhote Chamar. All these persons were eyewitnesses to the attack on Chhote by his son-in-law Ratan Chamar. They depose that Ratan beat Chhote with lathi blows while three other associates of his were standing near by also armed with lathis. The injuries on the deceased Chhote, an old man of about 50 years of age, were manifold as deposed to by the Civil Surgeon of Bara Banki.

They consisted of a compound fracture of the left arm above the elbow. There were three contused wounds on the arm. There was a contused wound on the front of the left leg on the upper part and another contused wound on the same leg. There was a contused wound deep down to the scalp on the back of the top of the head. There was a fracture of the left fourth rib at its junction with the costal cartilage. There were fractures of the left fifth, sixth, seventh, eighth and ninth ribs on the left side between the anterior axillary line and the nipple line, there was also fracture of the front part of the right tenth rib. There was a bruise on the right temple. The brain was slightly congested. Blood was present in both pleurae. The spleen was torn in two places and the left kidney was also injured. Death, in the opinion of the Civil Surgeon, was due to internal haemorrhage from the rupture of the spleen and left kidney caused by the fracture of the ribs due to violent lathi blows. After giving this merciless beating to his father-in-law, the accused Ratan left the place with his three companions informing the women of the household that if Chhote survived this beating he would come back again and kill him outright. The prosecution witnesses depose that they recognized the accused by his voice also besides

recognizing him by his figure in the dark. Bhawani P. W. 5 and Gokul P. W. 6 also came on the scene shortly after Ratan had left the place. Shortly after the occurrence the deceased Chhote, as well as Mt. Janaka and Nanhu, told these witnesses that Ratan Chamar had beaten his father-in-law. The report of the occurrence was made in thana Kursi, ten miles from the scene of occurrence, by Chaukidar Ram Dayal, at 10 a. m. on the morning of 19th June 1931. P. W. 8 Lochan afterwards went to make a report at the thana that Chhote had passed away. Chaukidar Ram Dayal, on his return from the thana, hearing the news of the death of Chhote, proceeded to the village to keep watch over the dead body. Head Constable Abdul Rashid prepared the inquest report and sent the body of Chhote Chamar to headquarters for post mortem examination. The accused Ratan was arrested on the following day, 20th June 1931, in his own village.

The accused alleged in his statement before the Sessions Judge that he was at his own house on the night of the occurrence and was arrested at his own house and that he had been falsely implicated by the relations of his father-in-law. He has examined no witnesses in his defence.

The learned Sessions Judge has, in the main, accepted the evidence of the prosecution witnesses and has convicted the accused Ratan of an offence under S. 304, I. P. C., and sentenced him to undergo rigorous imprisonment for seven years. The accused has filed no appeal against his conviction and sentence for an offence under S. 304, I. P. C. We have examined the evidence of the prosecution witnesses and are satisfied that the charge of causing the death of his father in law Chhote by beating him with a lathi has been fully proved against the accused Ratan Chamar.

The only question for determination in this appeal is as to the nature of the offence committed by the accused. The learned Sessions Judge has treated this matter in a very casual manner at the end of his judgment and has merely stated, without giving any sufficient reason, that the case does not appear to fall within any of the four clauses to S. 300, I. P. C. and that the intention of the accused was nothing more than to cause such bodily injury as was likely to cause death within the meaning of S. 304, I. P. C. For the guidance of subordinate Courts we propose to deal with this matter at some length. The distinction between culpable homicide punishable under S. 304, I.P.C., and murder, punishable under S. 302, I. P. C., has been very ably set forth by Melvill, J., in *Rex* v. *Govinda* (1) at pp. 344-46. In that case the learned Judge said:

"For convenience of comparison the provisions of Ss. 299 and 300, I, P. C.....may be stated thus:

Section 299.

A person commits culpable homicide, if the act by which the death is caused, is done.

(a) With the intention of causing death:

(b) With the intention of causing such bodily injury as *is likely* to cause death.

(c) With the knowledge that .....the act is likely to cause death.

Section 300.

Subject to certain exceptions culpable homicide is murder, if the act by which the death is caused is done:

(1) With the intention of causing death.

(2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the *person to whom the harm is caused.*

(3) With the intention of causing bodily injury to any person such bodily injury *being sufficient in the ordinary course of nature to cause death.*

(4) With the knowledge that the act so *imminently dangerous that it must in all probability cause death* or such bodily injury as is likely to cause death.

"I have underlined (italicized) the words which appear to me to mark the differences between the two offences. (a) and (1) show that where there is an intention to kill, the offence is always murder. (c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.

"The essence of (2) appears to me to be found in the words which I have underlined (italicized). The offence is murder, if the offender *knows* that the *particular person injured*, is likely, either from peculiarity of constitution or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death.

(1) [1876] 1 Bom. 342.

"There remains to be considered (b) and (3), and it is on a comparison of these two clauses that the decision of doubtful cases . . . . . .must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury *is sufficient in the ordinary course of nature* to cause death. The distinction is fine, but appreciable. It is much the same distinction as that between (c) and (4) already noticed. It is a question of the degree of probability."

Applying the test set forth above to the facts of the present case we hold that it is clear from the innumerable injuries inflicted on an old man of 50 years of age that the offence of Ratan Chamar falls within Cls. (2) and (3), S. 300, I. P. C., namely that the act of the accused Ratan was done with the intention of causing such bodily injury, as the offender knew to be likely to cause the death of the person to whom the harm was caused, or that the act was done with the intention of causing bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. In fact from the remark made by the accused himself before he left the scene of occurrence, it was clear that he himself thought that he had done for his father-in-law and, that if somehow or other he survived this thrashing he could come again to kill him outright. Six ribs of the deceased were fractured. The spleen was torn in two places. The left kidney was also injured. There was a wound on the back of the head and there was a com pound fracture of the forearm besides other bruises and injuries. Death supervened within a few hours after the infliction of these injuries. This case therefore clearly falls under S. 302, I. P. C.

The learned counsel for the accused has failed to bring the acts of the accused within any of the 5 exceptions to S. 300, I. P. C., which would reduce the offence of the accused from murder to culpable homicide not amounting to murder. Excep. 1 lays down that culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation causes the death of any person by mistake or accident. The facts of the present case do not fit in with this exception. The accused may have been offended with his father-in-law for not sending his wife Mt. Chhedana to his house. There is no allegation that the accused had any altercation with his father-in-law about the sending of his wife to his house. The accused, in his own statement before the Magistrate and Judge, has alleged that he never went to his father-in-law's house to ask for the return of his wife. The prosecution evidence shows that the accused went at midnight to the house of his father-in-law accompanied by three other persons armed with lathis and that he belaboured his aged father-in-law whilst the latter was asleep outside and lying helpless on his cot. Exceps. (2) and (3), S. 300, I. P. C., relate to offences committed in the exercise of the right of private defence or by a public servant acting for the advancement of public justice. These exceptions have absolutely no applicability to the facts of the present case. Equally inapplicable is Excep. (4), S. 300, I. P. C, because in this case nobody alleges that there was a sudden fight between the father-in-law and the son-in-law and in the heat of passion upon a sudden quarrel the death of the father-in law was caused. Excep. (5) is also inapplicable to the present case.

In our opinion this was a clear case of murder punishable under S. 302, I. P. C., and the learned Sessions Judge of Bara Banki was clearly in the wrong in acquitting Ratan Chamar of that offence and convicting him only of the lesser offence under S. 304, I. P. C.

We therefore allow this appeal, set aside the acquittal of the accused under S. 302, I. P. C., as also his conviction and sentence under S. 304, I. P. C., and in lieu thereof convict him of an offence under S. 302, I. P. C., and taking into account all the circumstances of the case we think that the ends of justice will be met if we inflict the lesser of the two punishments that can be legally inflicted for an offence under S. 302, I. P. C. We accordingly sentence Ratan Chamar for an offence under S. 302, I. P. C., to transportation for life.

W.D./R.K. *Appeal allowed.*

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A. I. R. 1932 Oudh 190

KISCH, J.

Nabi Ahmad Khan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 15 of 1932, Decided on 15th February 1932, against order of Asst. Sess. Judge, Lucknow, D/- 22nd December 1931.

Penal Code (1860), S. 84—It is not every degree of unsoundness of mind that will oust ordinary procedure of criminal Courts—Procedure in cases of lunacy at time of trial and at time of commission of offence is different and leads to different consequences—Criminal P. C. (1898), S. 465.

It is not every degree of unsoundness of mind that will oust the ordinary procedure of the criminal Courts. The circumstances under which the special procedure applicable to lunatics will come into play are clearly laid down in the Penal Code and the Criminal Procedure Code. The exception in favour of a person who was a lunatic at the time of the offence is contained in S. 84, I. P. C., and the procedure applicable to a person who is insane at the time of the trial is laid down in S. 465, Criminal P. C. The procedure in the case of lunacy at the time of the trial and lunacy at the time of the commission of the offence are entirely separate matters leading to different consequences and these two matters must not be confused together. The first point that a Court has to decide when an accused person is brought before it who is suspected or alleged to be a lunatic, and before the Court can even proceed with the trial for the offence alleged to have been committed, is whether the accused person appears to the Court to be of unsound mind and consequently incapable of making his defence. [P 190 C 2; P 191 C 2]

H. G. Walford—for Appellant.

Govt. Advocate—for the Crown.

Judgment.—In the case out of which this appeal arises Nabi Ahmad Khan Pathan aged 30 of Bareilly District has been convicted by the Assistant Sessions Judge of Lucknow of an offence under S. 307, I. P. C, and has been sentenced to five years' rigorous imprisonment.

On 27th July 1931 the accused entered the room of the Head Assistant to the Director of Public Health and demanded to see the list of passed candidates of the last year's examination for the post of Sanitary Inspector at which examination he had been a candidate. He was informed by the Head Assistant that it was against the office rules to show the list, but that he could be shown the Gazette. The accused thereupon jumped on to the table at which the Head Assistant was sitting and stabbed him on the left shoulder blade near the neck with a butcher's knife having a blade eight or nine inches long. The Head Clerk of the office raised an alarm and gave the accused a push causing both the Head Assistant and the accused to fall down and in the melee the Head Assistant received another injury from the knife, probably accidentally, in the left side. The accused got up and ran away, but was caught by a peon and the bloodstained knife was found in his pocket. The stab received by the Head Assistant on the shoulder near the neck was four and half inches deep and it was a matter of some surprise to the Civil Surgeon that he escaped with his life.

The accused admitted throughout the proceedings that it was he who had stabbed the Head Assistant and he himself has not appealed. The present appeal has been preferred at the instance of the accused's relatives. Even now it is not contested that it was the accused who committed the assault on the Head Assistant. The grounds taken by the learned counsel who has appeared to support the appeal are that the accused was insane at the time when he committed the offence and also at the time of the trial, that no proper opportunity was given to the relatives of the accused to prove this and that as a result of his not having been properly defended he has been sentenced to five years in jail whereas at most he ought to have been detained in a lunatic asylum pending His Majesty's pleasure.

Now it is not every degree of unsoundness of mind that will oust the ordinary procedure of the criminal Courts. The circumstances under which the special procedure applicable to lunatics will come into play are clearly laid down in the Penal Code and the Criminal Procedure Code. The exception in favour of a person who was a lunatic at the time of the offence is contained in S. 84, I. P. C. which lays down that

" nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

The procedure applicable to a person who is insane at the time of the trial is laid down in S. 465, Criminal P. C. This section lays down that

" if any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury for the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or

Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case and the jury, if any, shall be discharged."

Section 471 of the same Code further lays down that when it is found that the accused committed the act of which he is charged, but must be acquitted on the ground of lunacy, the Court shall

"order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Local Government."

It will thus be seen that the procedure in the case of lunacy at the time of the trial and lunacy at the time of the commission of the offence are entirely separate matters leading to different consequences and these two matters must not be confused together. The first point that a Court has to decide when an accused person is brought before it who is suspected or alleged to be a lunatic, and before the Court can even proceed with the trial for the offence alleged to have been committed, is whether the accused person appears to the Court to be of unsound mind and consequently incapable of making his defence. In the present case on 4th August 1931, a week after the occurrence and before the inquiry had started in the Court of the Committing Magistrate, the adoptive father of the appellant made an application to the Court stating that he was of unsound mind. As a result the Superintendent of the Jail was asked to keep the appellant under observation and to give his opinion. Major Sheikh, I. M. S., the Suprintendent of the District Jail, Lucknow, kept the appellant under observation from 8th to 28th August 1931. His report is on the record, Ex. 16. After setting out all the facts noted by him he gave his opinion in the following terms :

"There does exist mental defect which amounts to feeble mindedness ; but the degree of feeble mindedness could not be gauged, as no help could be got from him, although several efforts were made. His condition does not warrant to certify him as insane as he knows the nature and the quality of the act and that what he did was punishable by law. He is capable of defending himself."

After receiving this report the committing Magistrate proceeded with the inquiry and on 9th October 1931 committed the appellant to stand his trial before the Court of Session. At the instance of the Assistant Sessions Judge, to whose Court the case had been transferred for trial, Major Sheikh continued to keep the appellant under observation and on 12th November 1931 he made a report (Ex. 19) to the Assistant Sessions Judge intimating that the appellant had developed an attack of insanity during the night of 30th October 1931, that he was kept under observation from 31st October to 9th November 1931 and that he had gradually regained his previous mental condition by 9th November 1931. Major Sheikh gave his conclusion in the following terms :

"In addition to being mentally defective as stated already in previous report, he is subject to periodical superadded attacks of insanity."

Before proceeding with the trial the learned Assistant Sessions Judge called for a further report from Major Sheikh who, on the date that the trial began, namely, 18th December 1931, made a further report (Ex. 20) in which he stated that he had kept the appellant under observation from 3rd December to 18th December 1931, that his state of mind was considerably better than what was reported in his first report of 28th August 1931 and that he was "fit to stand his trial." Such was the state of affairs when the trial opened. The appellant himself made a long statement in answer to the charge which was recorded by the learned Assistant Sessions Judge and which convinced him that the appellant did not appear to be of unsound mind at the time of the trial as has been stated by the learned Assistant Sessions Judge in his judgment. The learned Assistant Sessions Judge has further remarked that when the trial commenced the appellant did not appear to be the least abnormal to him though in view of the medical reports he had the question of his lunacy fully in mind. Under these circumstances and with all the material that he had at his disposal to come to a conclusion as to the state of the appellant's mind at the time of the trial it is difficult to see how the learned Assistant Sessions Judge could have acted otherwise than to proceed with the trial. The appellant's behaviour throughout the trial only confirmed the learned Assistant Sessions Judge's opinion that the appellant fully understood the proceedings and was quite capable of making his defence.

It remains to be considered whether the appellant was entitled to the benefit of S. 84, I. P. C., as being by reason of unsoundness of mind incapable of knowing the nature of the act, or that what he

was doing was either wrong or contrary to law. On this point on a perusal of the evidence in the case and the appellant's own statement there can hardly be two opinions. Major Sheikh himself in his first report as to the mental condition of the accused has stated that he knew the nature and the quality of the act and that what he did was punishable by law. The appellant had sat for and passed the first part of the examination for the Sanitary Inspectorship and was undergoing training from March to June 1930. He sat for the second part of the examination in November 1930, but failed. He wrote two letters in February and March 1931 with a view to ascertaining the marks that had been allotted to him at that examination and was informed that the marks could not be disclosed to him, but that he would be allowed to take the examination again in the July session. He joined the class on 10th July 1931.

On 18th July 1931 the appellant came to the office of the Head Assistant to the Director of Public Health for the first time and inquired when Col. Dunn, the Director of Public Health, gave interviews. It appears that Col. Dunn was not in Lucknow and the accused refused to disclose to the Head Assistant the reason for which he desired to have an interview with Col. Dunn. On his leaving the office, the Head Assistant sent the Head Clerk to inquire the appellant's name, but the appellant gave a truculent reply whereupon the Head Assistant came out of his room and showed the appellant a notice that name and purpose of interview should be given by inquirers. The appellant says that he did not care about the notice on which the Head Assistant told him in a severe tone to leave the office. On 27th July 1931, the date of the occurrence, the accused again entered the Head Assistant's office without permission, sat down on a chair and asked the Head Assistant to show him the list of passed candidates at the last year's examination. The Head Assistant informed the appellant that it was against the office rules to show the list, but that he was prepared to show him the Gazette. Before he could get the Gazette the accused jumped on the table and stabbed the Head Assistant as has been stated above. The accused's statement was to the effect that the Head Assistant had omitted his name from the Gazette and sent a wrong copy of the result to Government Press and so he got a knife prepared and proceeded with that knife to the Head Assistant's office. He asked the Head Assistant to show him the result of the second part of the examination, and when the Head Assistant replied that this was not permissible but the result had appeared in the Gazette, he "lightly pierced the knife in his shoulder." The learned Assistant Sessions Judge has applied his mind to the question whether the appellant was insane at the time of the commission of the offence and has come to the conclusion that he was not.

It seems to me impossible to find fault with this conclusion. The fact that the appellant may have had an attack of insanity before the occurrence and another one in jail during the period between the inquiry in the committing Magistrate's Court and the opening of the trial in the Sessions Court, does not mean that it was in a fit of insanity that he committed the assault. The report of Major Sheikh (Ex. 19) shows that his attack of insanity was accompanied by all sorts of symptoms none of which appear to have been present at the time when he committed the offence, and the learned Assistant Sessions Judge is clearly right in saying that there is nothing to show that he was anything but his normal self at that time. The most that can be said is that the appellant was a man of unbalanced mind, that he had got a fixed impression that it was the Head Assistant who was responsible for his name not appearing in the list of successful candidates at the second part of the examination for the post of Sanitary Inspector and that he deliberately made preparations to avenge this fancied wrong. These considerations may, and probably did, weigh with the Court in the matter of sentence, but there is certainly no evidence of such unsoundness of mind at the time of the occurrence as would have justified the Court in giving the appellant the benefit of S. 84, I. P. C.

It has been made a grievance by the learned counsel who has appeared to support the appeal that the trial Court did not allow the counsel engaged by the appellant's relatives to appear for him. At the opening of the trial, Mr. Wahid Uddin Hyder, a barrister from Bahraich, was present, but as has been noted on the re-

cord the accused distinctly and repeatedly stated that he did not wish to employ any counsel as he had made a full statement of the facts. The counsel accordingly withdrew. On the next date another counsel Mr. Matin Uddin, an advocate of this Court, appeared, but he was only asked to watch the proceedings on behalf of the appellant's relatives, admitting that he had no locus standi to appear on behalf of the appellant himself. Mr. Matin Uddin actually did put in an application asking the Court to take action under S. 341, Criminal P. C., which was duly considered by the learned Assistant Sessions Judge.

I find therefore that there is no substance in this appeal, that the question of the appellant's mental condition has received the fullest consideration at the hands of the trial Court and that it is impossible to say that there has been any miscarriage of justice. The appeal is accordingly dismissed.

B.V./R.K. *Appeal dismissed.*

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*A. I. R. 1932 Oudh 193
Full Bench

WAZIR HASAN, C. J., RAZA, AND SRIVASTAVA, JJ.

Municipal Board, Lucknow — Defendant—Appellant.

v.

S. C. Deb—Plaintiff—Respondent.

First Appeal No. 37 of 1931, Decided on 10th March 1932, against order of Addl. Sub-Judge, Lucknow, D/- 29th November 1930.

(a) U. P. Municipalities Act (1916), S. 97—Provisions of S. 97 are mandatory.

Provisions of S. 97 are mandatory and where a Municipal contract is not under seal or signed by a proper person, it is wholly void. [P 194 C 2]

(b) Contract Act (1872), S. 65—Contract in writing void from inception—It must be held to be discovered as void when it was reduced to writing.

Where a contract in writing is void from its inception in the absence of special circumstances it must be held that it was discovered to be so on the date on which it was reduced to writing. But even if so, it would fall within the terms of S. 65 as a contract which has become void: *A. I. R.* 1923 *P. C.* 189 and *A. I. R.* 1932 *P. C.* 89, *Ref.* [P 194 C 2]

(c) Interpretation of Statutes — General and special law.

The general law of the country should be given effect to if there is no special law to the contrary. But if there is such special law then the principle *generalia specialibus non derogant* applies. [P 195 C 1]

***(d) U P. Municipalities Act (1916), S. 97—Contract with Municipal Board void under S. 97 as not being under seal—No relief can be given to person relying on such contract even on quantum meruit — Contract Act (1872), S. 65**

Generally in cases of void contracts the principle of restitution embodied in S. 65, Contract Act, would be the principle of giving relief upon quantum meruit. But where a special law creates a corporate body and that body cannot enter into a contract except under seal, no relief can be given to a person relying on a contract entered into between him and the Board, but not under seal even on quantum meruit, for a man cannot be allowed to do by indirect means what he is forbidden to do directly: *Young & Co. v. Mayor* and *Corporation of Royal Leamington Spa*, (1883) 8 *A. C.* 517, *Rel. on A. I. R.* 1926 *Oudh* 388, *Diss. from*; (*Case law discussed.*) [P 195 C 1]

(e) U.P. Municipalities Act (1916), S. 326 (3)—Applicability.

Section 326 applies to a suit against the Municipality for balance of price for goods supplied, and would be barred if brought after six months from accrual of cause of action. [P 194 C 1]

Ali Zaheer and *Mohammad Ahmad*—for Appellant.

Radha Krishna and *N. Banerji*—for Respondent.

Wazir Hasan, C. J.—The necessary facts, out of which this reference arises are as follows:

The plaintiff-respondent is the proprietor of the United Coal Co. situate at Ruttledge Road, Lucknow. The sole defendant to the suit is the Municipal Board of Lucknow. The case stated in the plaint is that on 20th March 1929 the plaintiff agreed to sell and the defendant agreed to purchase 10,000 to 12,000 tons of second class rubble coal at Rs. 2-9-6 per ton F. O. R. Colliery. This quantity was to be supplied from 1st April 1929 till 31st March 1930. The defendant signed and delivered a deed of agreement in pursuance of the terms settled upon between the parties. The plaintiff also deposited a cash security of Rs. 5,000 for the due performance of his part of the contract. The plaintiff supplied 9,545 tons 14 cwt. of coal and the defendant paid as part of the price of coal, the sum of Rs. 18,229-11-0 only. The present suit is to recover the balance of the price to the extent of Rs. 7,066-10-4, and also for the recovery of the sum of Rs. 3,742-9-4 on account of security deposit. Interest is also claimed on these two sums of money. There is a controversy between the parties as to the proper construction of the alleged agreement of 20th March 1929

(Ex. 11), but that is a matter with which we are not concerned.

The learned Subordinate Judge of Lucknow, in whose Court the suit was instituted, has given a decree to the plaintiff. The Municipal Board is now the appellant. Amongst other defences raised by the Board there were two defences which form the subject-matter of the questions referred by the Division Bench to the Full Bench for opinion. In the order of reference those questions are stated in the following words:

1. Is the contract pleaded in para. 2 of the plaint (Ex. 11) void by reason of the provisions of Ss. 96 and 97, U. P. Municipalities Act, 1916. If the answer is in the affirmative, can any relief be given to the plaintiff under the provisions of Ss. 65, 70 and 72, Contract Act?

2. Is the suit barred by limitation under the provisions of S. 326, U. P. Municipalities Act, 1916?

I will first express my opinion on the second question. In the course of arguments before us the plaintiff's learned advocate raised the contention that S. 326, U. P. Municipalities Act, is inapplicable to this case. I had great difficulty in appreciating the argument. I am of opiuion that the section is applicable to the suit. The suit would be barred under sub-S. (3), S. 326, if it is commenced otherwise than within six months after the accrual of the cause of action. The precise question for determination therefore is as to the date when the cause of action accrued. Obviously this cannot be determined without settling matters of fact on which the parties are at variance as was disclosed at the hearing of the reference. It would seem to follow that the second question referred to the Full Bench is a mixed question of fact and law. I therefore refrain from expressing any further opinion on the question than what I have just now stated.

The first question is divided into two parts. On the first part, the learned counsel for the defendant read to us S. 97, U. P. Municipalities Act, 1916, and stated that S. 96 had no bearing on this question. S. 97 is as follows:

"97 (1) Every contract made by or on behalf of a Board whereof the value or the amount exceeds Rs. 250 shall be in writing.

(2) Every such contract shall be signed:

(a) by the chairman or a vice-chairman and by the executive officer or a secretary, or

(b) by any person or persons empowered under sub-S. (2) or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the Board.

(3) If a contract to which the foregoing provisions of this section apply is executed otherwise than in conformity therewith it shall not be binding on the Board."

It was agreed that the contract on which the plaintiff relies and which is stated in para. 2 of the plaint and is embodied in Ex. 11, was a contract the value whereof exceeds Rs. 250. It was also agreed that it was reduced to writing as is evidenced by Ex. 11 and it was further agreed that it was not signed by any person specified in Cls. (a) and (b), sub-S. 2 of the section. The learned advocate for the defendant therefore contended that the contract was wholly void and illegal by reason of the provisions of sub-S. (3) and as such was not binding on the Board. For the sake of brevity the contract was treated in the course of arguments, and I propose to follow the same course in my judgment, as a contract not under seal and void as the statute required it to be under seal.

The learned counsel for the plaintiff admitted at the very threshold of his opening address that the contract in question was not under seal and that the statute, that is S. 97, Municipalities Act, was mandatory in its terms that the contract must be under seal. As regards the first part of the question, my opinion therefore is that the contract pleaded in para. 2 of the plaint and evidenced by Ex. 11 was void by reason of the provisions of S. 97, U. P. Municipalities Act, 1916.

The answer to the second part of the question is not free from difficulty. At the hearing of the reference the learned counsel for the plaintiff relied only on S. 65, Contract Act. The other sections mentioned in the question need not therefore be discussed.

I have little doubt as to the true construction of S. 65, Contract Act. The contract in question was void from its inception and in the absence of any special circumstances it must be held that it was discovered to be so on the date on which it was reduced to writing, that is 20th March 1929. But even if so it would fall within the terms of S. 65 as a contract which has become void: *Annada Mohan* v. *Gour Mohan*

Mullick (1) and *Satgur Prasad* v. *Har Narain Das* (2).

If the contract in question falls within the terms of S. 65, Contract Act, as I hold that it does, it would seem to follow from the same terms that the plaintiff is entitled to be reimbursed with the price of the coal by the defendant. The principle of restitution embodied in S. 65, Contract Act, in cases of the nature of the present suit would be the principle of giving relief upon quantum meruit. This therefore is the general law of the country and it should be given effect to if there were no special law to the contrary. But if there is such a law then the principle *generalia specialibus non-derogant* applies. It was contended on behalf of the defendant that such a special law exists in the U. P. Municipalities Act, 1916, and in particular in the provisions of S. 97 of that Act.

The Municipal Board of Lucknow and other similar Boards within the provinces are clearly creatures of statute, that is U. P. Municipalities Act (2 of 1916)—vide the definition of "Board" in S. 2 of the Act. By S. 6 of the same Act:

"it is a body corporate and by the same section it is vested with the capacity of suing and being sued in its corporate name, of acquiring, holding, and transferring property moveable and immovable, and of entering into contracts."

It follows that the liability of the Municipal Board of Lucknow as a corporate body to make a compensation to the plaintiff in the present case must arise out of the provisions of U. P. Municipalities Act, 1916, and not otherwise in matters arising out of a contract which has become void. According to express terms of S. 97, U. P. Municipalities Act, 1916, the contract on which the plaintiff relies not being under seal is not binding on the Board. In my opinion therefore the necessary conclusion to which we are driven is that where a special law creates a corporate body, and that body cannot enter into a contract except under seal, no relief can be given to a person relying on a contract entered into between him and the Board but not under seal, even on quantum meruit, for a man cannot be allowed to do by indirect means what he is forbidden to do directly.

In my opinion the decision of the House of Lords in the case of *Young & Co.* v. *Mayor & Corporation of Royal Leamington Spa* (3) is a direct and clear authority for the conclusion just now stated. In that case the question for the opinion of the Court was stated in the following words:

"Whether the absence of the common seal of the corporation in the employment of the plaintiffs under the circumstances above stated, is fatal to the plaintiff's right to recover against the corporation."

The Queen's Bench Division in the first instance answered the question in the affirmative and gave judgment for the defendants. The Court of Appeal affirmed that judgment and the House of Lords affirmed the judgment of the Court of Appeal. Lord Blackburn, in delivering his opinion in the House of Lords, quoted a long passage from the judgment of Lindley, L. J., in the Court of Appeal. The statement of law in that quotation was approved by the House of Lords. Lindley, L. J., said:

"The last point urged for the plaintiffs was, that as the contract has been performed and the defendants have the benefit of the plaintiff's work, labour and material, the defendants are at all events liable to pay for these at a fair price."

The Court of Appeal rejected this argument and the House of Lords affirmed the rejection. It was argued before us that the question of relief on quantum meruit was not considered in that case either in the Court of first instance or in the Court of Appeal nor was it considered by the House of Lords for that question was outside the scope of the precise proposition which was placed before the Court for opinion. In support of this argument reliance was placed on the following passage in the judgment of Lindley, L. J., quoted by Lord Blackburn:

"In support of this contention cases were cited to show that corporations are liable at Common law quasi ex contractu to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting and they require review and authoritative exposition by a Court of appeal. But in my opinion the question thus raised does not require decision in the present case."

In my opinion the matter excluded from consideration was altogether different and it was this: that by a rule of

(1) A. I. R. 1923 P. C. 189=74 I. C. 499=50 I. A. 239=50 Cal. 929 (P. C.).
(2) A. I. R. 1932 P. C. 89=136 I. C. 108=59 I. A. 147 (P. C.).
(3) [1883] 8 A. C. 517=52 L. J. Q. B. 713=49 L. T. 1=31 W. R. 925=47 J. P. 660.

Common law contracts entered into by corporations were required to be under seal. On that rule several exceptions were engrafted by judicial decisions. Lindley, L. J., in the quotation just now given intended to refer to that rule and to the decisions in respect of the exceptions. The case before his Lordship was not a case of the application of the rule of Common law or of the exceptions thereto and therefore the cases bearing on them were excluded from consideration. The case before his Lordship was one of construction and application of an Act of Parliament as the present case is of the construction and application of the U. P. Municipalities Act, 1916. Lord Blackburn said:

"We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than £ 50 and contracts for £ 50 and under. Contracts for not more than £ 50 need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at Common law by reason of their trivial nature. But contracts for more than £ 50 are positively required to be under seal, and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them."

These observations are wholly apposite to the present case and they clearly show that the defendant is not liable to pay to the plaintiff even on quantum meruit. That this is the true import of the decision of Lindley, L. J., and of the House of Lords in the case cited above, is clear from the judgment of Joyce, J., in the case of *Douglas* v. *Rhyle Urban District Council* (4). In that case it was held that the provisions of S. 174, Public Health Act, which required that every contract made by an Urban Council whereof the value or amount exceeds £ 50 shall be in writing and sealed with the common seal of such authority did not apply to the contract there in question. The learned Judge says :

"If the contract in question were one which was clearly made only under the powers and for the purposes of the Public Health Act, then the objection taken under S. 174 would probably be fatal, notwithstanding that the work had been done, as decided by Neville, J., in *Hoare* v. *Kingsbury Urban District Council* (5)."

He therefore followed the decision of the Court of appeal in *Lawford* v. *Billericay Rural Council* (6), and held that the plaintiff was entitled to payment upon a quantum meruit. The judgment of Neville. J., in *Hoare* v. *Kingsbury Urban District Council* (5), is in a case that did fall within S. 174, Public Health Act, 1875. Neville, J., said :

"It has been decided that sub-S. 1, S. 174, is imperative and I have been referred to no case in which a contract has been held enforceable though unsealed in respect of a contract over £ 50 in value, even though the contract has been executed by the plaintiff. It has indeed been held that where an unsealed contract of a corporation for work to be done or goods to be supplied has been fully executed by the other party, he may in certain cases recover, not on the original contract but on an implied contract to pay quantum meruit."

If I may respectfully say so the passage quoted brings out prominently and clearly the contrast between the two classes of cases. The learned Judge also refers to the argument founded on the reason and object of the statute of fraud to the effect that a statute designed to prevent fraud would be misapplied in cases where the existence of a contract was so plainly to be inferred that to allow a defendant to ride off upon the statute would be to enable him to commit a fraud under cover of the very Act designed to prevent it. The learned Judge's reply to this argument was :

"It is obvious that this reasoning is not altogether applicable to the case of an urban authority, the necessity of obtaining the seal of the authority in order to make a contract over a certain value enforceable being, it is to be inferred, imposed for the purpose of the protection of ratepayers, and the power of the urban authority to bind them being derived from the statute which requires that power to be exercised in a particular way."

At the end of his judgment the learned Judge referred to the case of House of Lords in *Young & Co.* v. *Royal Leamington Spa* (3), and founding on it dismissed the plaintiff's suit in consequence of the failure of the urban authority to affix the seal required by S. 174, Public Health Act, 1875. It will be seen that on behalf of the plaintiff in that case appeal was made to the Court to give relief on quantum meruit on the basis of an implied contract. This appeal, as I have already said, was rejected.

(4) [1913] 2 Ch. 407=109 L. T. 30=29 T.L.R. 605=57 S. J. 627.

(5) [1912] 2 Ch. 452=81 L. J. Ch. 666=107 L. T. 492=76 J. P. 401=56 S. J. 704=10 L. G. R. 829.

(6) [1903] 1 K B. 772=72 L. J. K. B 554=88 L. T. 317=51 W. R. 630=67 J. P. 245=1 L. G. R. 535=19 T. L. R. 322.

On behalf of the plaintiff reliance was also placed on the decision of the Court of Appeal in the case of *Lawford* v. *Billericay Rural District Council* (6) on which Joyce, J., had founded his decision in the case of *Douglass* v. *Rhyle Urban District Council* (4), already referred to. Now the case of *Lawford* v. *Billericay Rural District Council* (6) was a case to which the provisions of S. 174, Public Health Act, 1875, did not apply, in other words, there was no statute requiring a contract of such a corporation to be under seal. Vaughan Williams, L. J., held that the House of Lords' case, *Young* v. *Leamington Spa Corporation* (3), was not a direct authority on the matter for Lord Blackburn in his judgment distinctly leaves open the question raised in this case. I am therefore of opinion that the case of *Lawford* v. *Billericay Rural District Council* (6) is not an authority on the question under consideration.

Several decisions of the High Courts in India were also cited. I need only refer to some of them. The most direct and relevant case is *Radha Krishna Das* v. *Municipal Board of Benares* (7), and it is clearly in favour of the defendant. The decision of the Madras High Court in *Raman Chetti* v. *Municipal Council of Kumbakonam* (8), is also directly in point and in favour of the defendant. The case of *Chairman, South Barrackpore* v. *Amulya Nath Chatterjee* (9), is also in favour of the defendant although it is true that no argument seems to have been advanced for a relief on quantum meruit.

On behalf of the plaintiff reliance was placed on *Mathura Mohan Saha* v. *Ram Kumar Sahu* (10) and the following passage from the judgment of the learned Judges who decided that case was read to us :

"Consequently, the District Board are not entitled to retain the money paid by the plaintiff thereunder. It cannot be disputed that where a corporation receives money or property under an agreement, which turns out to be ultra vires or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial ; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."

In my opinion the judgment on the whole supports the defendant's contention and not of the plaintiff. At p. 820 reference was made to the House of Lords' case, *Young & Co.* v. *Royal Leamington Corporation* (3) and it was interpreted in the same sense as I have done but was distinguished on the ground that:

"In the case before us however the statutory rules do not render a seal necessary for the validity of this class of contracts, and the doctrine of part-performance may well be applied, the District Board have had the benefit of the money paid by Ramkumar Sahu and have allowed him to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract. It is worthy of note that the contract in this case is not ultra vires in the sense that it is beyond the scope of the authority of the District Board as a corporate body under any circumstances."

It will be seen that the passage relied upon by the learned counsel for the plaintiff has no bearing on a case where a seal is necessary for the validity of a contract as admittedly it is in the present case. *Mahomed Ebrahim Molla* v. *Commissioners for the Port of Chittagong* (11). In this case the learned Judges held that the agreement in question in that case being in contravention of the mandatory provisions of S. 29, Chittagong Port Act, 1914, was not enforceable. The rule of Common Law in England on the subject under consideration was stated by the learned Judges in the following terms :

"It is a rule of common law in England that, with certain exceptions, a corporation is bound by those contracts only which are made under the corporate seal. The exceptions are (i) where the contract is executed, (ii) in small matters of very frequent occurrence, and (iii) where it is impossible to affix the seal, as in cases of great urgency."

The decision of the Court of Appeal in *Lawford* v. *Billericay Rural District Council* (6), was referred to and finally the conclusion was stated as follows :

"In common law therefore in cases of executed consideration, the absence of a contract under seal does not invalidate a contract and it is unnecessary to refer to other cases cited. But where there is express statutory provision, that exception has been held not to apply even in cases of executed contract."

For the latter proposition the decision of the House of Lords in *Young & & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (3) was referred to and quotations from the judgments of Lindley, L. J., in the Court of Appeal and of Lord Blackburn in the House of Lords were made and decisions of High Courts

(7) [1905] 27 All. 592=2 A. L. J. 321=(1901) A. W. N. 111.
(8) [1907] 30 Mad 290=2 M. L. T. 294.
(9) [1907] 34 Cal. 1030=12 C. W. N. 50.
(10) [1916] 43 Cal. 790=35 I. C. 205.
(11) A. I. R 1927 Cal. 465=103 I. C. 2=54 Cal. 189.

in India were reviewed. At the end however the learned Judges said:

"We do not see however why the plaintiffs should not recover quantum meruit for the services rendered by them to the defendants."

This view seems to have been accepted without any argument on behalf of the parties concerned. The only objection raised was as to the jurisdiction of the Chittagong Court to entertain a suit for payment on quantum meruit. The case is therefore no authority for the proposition that relief can be granted by payment of quantum meruit even in cases where the contract relied upon is not under seal. The case of *Abaji Sitaram Modak* v. *Trimbak Municipality* (12) was also considered in that case but was not followed as it was not followed in the case of *Radha Krishna Das* v. *Municipal Board of Benares* (7) already referred to. I prefer to follow the latter decision. *Municipal Committee, Gujranwala* v. *Fazal Din* (13): This decision is entirely in favour of the plaintiff but with great respect I am unable to accept it as cound. The decision is based on *Lawford* v. *Billericay Rural District Council* (6). I have already discussed the latter case and I am of opinion that it does not support the view for which it is cited as an authority. On the contrary that decision is founded on the Common law rule applicable to a corporation requiring a contract by such a corporation to be under seal. It is wholly inapplicable to a case where a statute makes it mandatory that a contract must be under seal and that it is invalid without it. The learned Judges refused to follow the case of *Radha Krishna Das* v. *Municipal Board of Benares* (7) and also that of *Raman Chetti* v. *Municipal Council of Kumbakonam* (8). I have already expressed my agreement with the decision in these two cases.

The Municipal Council, Tiruvarur v. *Kannu Swami Pillai* (14): In this case the learned Judges held that though the contract in question was invalid as it did not comply with the provisions of S. 69, Madras District Municipalities Act, 1920, yet in spite of such invalidity a decree for what would be due on the basis of quantum meruit could be given. The case of *Mohammad Ebrahim Molla* v. *Commissioners for the Port of Chittagong* (11) was followed. I have already discussed the latter case and with great respect I am unable to follow the decision in the case of *Municipal Council of Tiruvarur* v. *Kanna Swami Pillai* (14).

Municipal Board, Lucknow v. *Debi Das* (15): This is the only decision of our Court and bears directly on the interpretation of S. 96, U. P. Municipalities Act, 1916. The learned Judges held that by reason of noncompliance of the provisions of that section the contract was unenforceable. They further held that the parties believed as a matter of fact that the contract was enforceable and that therefore S. 65, Contract Act, was applicable. For the reasons already stated I am unable to agree with the view that S. 65 would apply to the case before us.

The last case to which reference may be made is an unreported decision of Buckland, J., on the original side of the High Court at Calcutta in *Lakukra Coal Co., Ltd.* v. *Municipal Board, Lucknow*. A certified copy of the judgment has been placed before us. The Municipal Board of Lucknow, the defendant in the present case, was also the defendant in that case. On the authority of *Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (3), the learned Judge held that the plaintiffs in that case were not entitled to recover the value of the coal supplied on a quantum meruit. I agree with that view.

My answer therefore to the second part of the first question is in the negative.

Raza, J.—I entirely agree. I can find nothing that I may usefully add to what has been said by the Hon'ble Chief Judge in his judgment. The weight of authority is decidedly against the plaintiff. The case is perhaps a hard one; but hard cases must not be allowed to make bad law.

Srivastava, J.— My sympathies in this case were entirely with the plaintiff but after giving the matter my anxious consideration, I feel completely borne down by the weight of authority and the logic of the reasoning contained in the decided cases against him. I must therefore concur in the decision of the Hon'ble

(12) [1904] 28 Bom. 66=5 Bom. L. R. 689.
(13) A. I. R. 1929 Lah. 742=121 I. C. 187=11 Lah. 121.
(14) A. I. R. 1930 Lah. 600=127 I. C. 120=53 Mad. 952.
(15) A. I. R. 1926 Oudh 388=99 I. C. 643=1 Luck. 444.

Chief Judge to which I have nothing to add.

B.V./R.K. *Reference answered.*

A. I. R. 1932 Oudh 199
Full Bench

WAZIR HASAN, C. J., RAZA AND SRIVASTAVA, JJ.

(*Rai*) *Bajrang Bahadur Singh* and *another*—Plaintiffs—Appellants.

v.

(*Rai*) *Beni Madho Bakhsh Singh* and *others*—Defendants—Respondents.

First Appeal No. 29 of 1931, Decided on 7th April 1932, against decree of Sub-Judge, Rae Bareli, D/- 15th November 1930.

(a) Civil P. C. (1908), S. 9—Applicability—Civil P. C. is enactment of general application.

Civil Procedure Code is an enactment of general application and must be deemed to confer jurisdiction on civil Courts to try suits of a civil nature. S. 9 embodies an exception to this general jurisdiction in the following words: "Excepting suits of which cognizance is expressly or impliedly barred." [P 201 C 1]

(b) Interpretation of Statutes—General law prevails unless displaced by special law.

The general law prevails except in cases where either expressly or by necessary implication it is displaced by any special Act or law in that behalf. [P 201 C 2]

(c) U. P. Land Revenue Act (1901), Ss. 106 and 233-K—"Partition" explained — Cognizance of suit with respect to partition by civil Court is barred.

"The word "partition" as used in Cl. K, S. 233 must be understood in precisely the same sense in which it is defined in S. 106 of the Act. S. 233 read in relation to Cl. K, means that cognizance of a suit with respect to partition by a civil Court is barred. [P 201 C 2]

(d) U. P. Land Revenue Act (1901), Ss. 111, 112 and 233-K — Partition proceedings — Question as to title that could have been raised not raised — Partition completed — Parties are debarred from raising such question in civil Court.

If a question of title affecting a partition, which might have been raised under Ss. 111 and 112 of the Act during the partition proceedings is not so raised and the partition is completed, S. 233-K of the Act debars the parties to the partition from raising subsequently in a civil Court any such question of title : *A. I. R.* 1926 *Oudh* 101, *Ref.*; 23 *All.* 291, *Foll.* (*Case law discussed.*) [P 202 C 1]

(e) Civil P. C. (1908), S. 11—S. 11 is not exhaustive.

It cannot be said that the entire scope of the principle of res judicata is limited to the specific enactment contained in S. 11 of the Code: *A.I.R.* 1926 *Oudh* 101, *Ref.* [P 203 C 2]

(f) Civil P. C. (1908), S. 11—Judgment of Court having exclusive jurisdiction, when res judicata, explained.

The judgment of a Court of exclusive jurisdiction, directly upon the point is conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose : *Case of the Duchess of Kingstone*, 2 *Sm. L. C., Ed.* 6, *p.* 679, *Ref.* [P 204 C 1]

(g) U. P. Land Revenue Act (1901), S. 233-K and Chap. 7—Revenue Courts have exclusive jurisdiction to decide questions of title in partition proceedings.

The provisions of Chap. 7 of the Act and of S. 233, Cl. K not only create an exception to the general jurisdiction of the civil Courts as contemplated by S. 9, Civil P. C., but they also clearly establish the point that the Courts of Revenue have exclusive jurisdiction of determining questions of title which are raised or which might and ought to have been raised in partition proceedings except when the jurisdiction of the civil Court is invoked in accordance with Cl. (b), sub-S. (1), S. 111, Land Revenue Act. If the procedure specified in Cl. (b) is not resorted to and the Collector decides to proceed to inquire into the merits of the case his decision is final : (*Case law discussed.*) [P 204 C 1]

(h) U. P. Land Revenue Act (1901), Ss. 111 and 112 — Significance of decrees under S. 111 (3) explained.

It is enacted in S. 112 that all decrees passed under sub-S. (3), S. 111, are to be treated as decrees of a Court of civil judicature. This necessarily implies two postulates : (1) that the Court of Revenue in acting under sub-S. (3). S. 111, is a Court of civil judicature of competent jurisdiction, and (2) that the partition proceedings constitute a suit. From these premises it would follow that the Revenue Court is a competent Court to try the subsequent suit also which may be brought in a civil Court for the purpose of obtaining an adjudication of a question of proprietary title : (*Case law discussed.*) [P 204 C 1]

(i) U. P. Land Revenue Act (1901), Ss. 233-K —Questions of title affecting partition are exclusively within jurisdiction of Revenue Court.

Question of title affecting the partition are exclusively within the jurisdiction of the Revenue Court and the Land Revenue Act debars the parties to the partition from raising subsequently in a civil Court any such question of title : 130 *I. C.* 717, *Foll.* (*Case law discussed.*) [P 205 C 1]

(j) U. P. Land Revenue Act (1901), S. 233-K — Cosharer suing for declaration in civil Court that he is superior proprietor of certain plots of land—Previously these plots declared to be under-proprietary in partition proceedings — Civil suit is barred by reason of S. 233-K—Per *Wazir Hasan, C. J.*, 1 *Luck.* 318=*A. I. R.* 1926 *Oudh* 338=93 *I. C.* 378 and 6 *Luck.* 419=*A. I. R.* 1931 *Oudh* 21=129 *I. C.* 173 and 7 *O.W.N.* 1106, *Overruled*—Per *Raza, J., not overruled.*

A cosharer landlord sued for declaration in the civil Court to the effect that he was the superior proprietor of certain plots of land. In previous partition proceedings it was decided that the said cosharer had inferior proprietary rights over the said plots of land. No objection had been raised to the same by the said cosharer in the partition proceedings.

Held : that in the above circumstances the civil suit for declaration was barred by reason of S. 233-K : Per *Wazir Hasan, C. J.*, **1 Luck.**

318=A. I R. 1926 Oudh 338=93 I. C. 378 and 6 Luck. 419=A. I. R. 1931 Oudh 21=129 I. C. 173 and 7 O W. N. 1106, Overruled; Per *Raza, J., not overruled. (Case law discussed.)* [P 206 C 2]

(k) U.P. Land Revenue Act (1901), S. 111(1) — Question of proprietary title previously decided by Court of competent jurisdiction— S. 111 (1) does not bar Revenue Court's jurisdiction to decide it again.

Section 111, sub-S (1) of the Act does not create a bar of jurisdiction against the Court of Revenue to try questions of proprietary title where such questions have previously been determined by a Court of competent jurisdiction. Sub-S. (1), S. 111, is intended to give effect of res judicata to a judgment of a Court of competent jurisdiction on a question of proprietary title determined by that Court. [P 206 C 2]

(l) Civil P. C. (1908), S. 11—Rule of res judicata is necessarily rule of evidence.

The rule of res judicata is necessarily a rule of evidence. The judgment of a Court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court But a party relying on the plea of res judicata must produce in evidence the judgment on which the plea rests : 33 *Cal.* 116 (*P.C.*), *Ref.* [P 206 C 2]

(m) U P Land Revenue Act (1901), S. 233-K —Partition proceedings— No question arising as to title of proprietors, etc —One cosharer filing civil suit for declaration that he is sole owner of entire mahal—Suit is not barred by S. 233-K

Per *Raza, J.*—Where the parties are on the same side in partition proceedings and no question arises between them as to their respective title or shares, inter se, and a "mahal" or "patti" is formed in their name jointly without specification of shares and one of them subsequently brings a suit in the civil Court for a declaration that he alone is the owner of the entire mahal or patti, the suit cannot be barred by the provisions of S. 233-K : (*Case law discussed.*) [P 207 C 1, 2]

(n) U P. Land Revenue Act (1901), S. 233-K —"With respect to partition" — Term explained.

Srivastava, J.—The words "with respect to partition" are very wide. Any matter which has the effect of disturbing the area or the revenue affecting the qualities of land or the assets thereof will undoubtedly be a matter falling within the scope of S. 233 K and as such excluded from the jurisdiction of the civil Courts. [P 208 C 2]

(o) U. P. Land Revenue Act (1901), S. 111 —No decree passed under S. 111—Constructive res judicata does not apply—Civil P. C., S. 111.

Srivastava, J.—It cannot be held that when no decree has been passed under sub-S. 3, S. 111, the rule of constructive res judicata can be made applicable on the ground that the objection was one which might and ought to have been raized before the Collector. [P 209 C 1]

(p) Civil P. C. (1908), S. 11—For res judicata there must be previous decree.

Srivastava, J.—For application of the rule of res judicata it is essential that there must be a previous decree or order having the force of a decree. [P 209 C 1]

Ali Zaheer and *P. N. Chaudhry*—for Appellants.

Radha Krishan—for Respondents.

Wazir Hasan, C. J. This is a reference by a Division Bench to a Full Bench for the decision of the following two questions :

1. Is the relief of declaration prayed for by the plaintiffs in the present suit barred by the provisions of Cl K, S. 233, Land Revenue act, 1901, by virtue of the partitions of 1906 and 1910?
2. Is the jurisdiction of the Collector to Act under Cl (c), S. 111 (1), Land Revenue Act, 1901, ousted when the question of proprietary title alleged to have been decided by him in the partition proceedings mentioned above had already been determined by a Court of competent jurisdiction ?

I propose to deal first with the first question. The relief of declaration prayed for by the plaintiffs in the present suit is as follows :

"The plaintiffs pray that a declaration be made to the effect that the plaintiffs and defendant 69 are the superior proprietors of lands specified in the attached schedule and not inferior proprietors"

The reference in the question to the partitions of the years 1906 and 1910 requires some elucidation. The plaintiffs and defendant 69 or their predecessors-in-interest were cosharers with the other defendants or their predecessors-in-interest in the proprietary tenure of a joint mahal constituted of the village of Nain, pargana Salon, in the District of Rae Bareli, before 1906. The plaintiffs also held in ownership and in possession specific plots of land, the details of which are specified in Sch. A attached to the plaint. The plaintiffs' case now is that they held these lands in the right of proprietors. The defence is that the plaintiffs are under-proprietors of those lands. In the year 1906 the mahal or the village of Nain was subjected to a partition under the provisions of the Land Revenue Act then in force with the result that the mahal of Nain was divided into five mahals and the lands in question were distributed over all the five mahals. One of such new mahals was a mahal of the cosharers of the village who had not applied for partition and the plaintiffs' interest in the proprietary tenure of the village was thrown in this mahal. The partition was perfect in all respects including specific allotment of Government revenue as against every one of these five mahals. The partition of 1910 was an imperfect partition and related to the splitting up of the fifth mahal which, as

I have already described, was constituted of the shares of the non-applicants at the partition of 1903. The partition of 1910 has hardly any material bearing on the question under consideration.

The argument on behalf of the plaintiffs is that the relief for which they have prayed in the present suit does not affect the partition of 1906 or of 1910 either in the matter of allotment of revenue or in the matter of area of lands comprised within the mahal or the share of any co-sharer owning these mahals. All that they ask for, the argument proceeds, is a change in the description of the nature of the tenure in which the plaintiffs and defendant 69 held the lands in suit. The argument is emphasized by pointing to the fact that even the entry in respect of the lands in question made in the year 1903 describes these lands as rent-free and the event which has created the necessity for seeking the relief prayed for is that these lands were assessed with rent by an order of the settlement Court passed on 25th June 1929. The argument on behalf of the contesting defendants is that the adjudication of the claim made by the plaintiffs in the present suit is barred by the provisions of Cl. K, S. 233, Land Revenue Act, 1901.

There could be no doubt in my opinion that if the bar reied upon by the defendants did not exist the civil Courts will have jurisdiction to adjudicate on the question raised in respect of the plaintiffs' title to the lands in question in the present suit. This is clear from the provisions of S. 9, Civil P. C., 1908. This is an enactment of general application and must be deemed to confer jurisdiction on civil courts to try suits of a civil nature. S. 9 embodies an exception to this general jurisdiction in the following words:

"excepting suits of which cognizance is expressly or impliedly barred."

The precise point for determination therefore is as to whether the provisions of the U. P. Land Revenue Act, 1901, either expressly or impliedly exclude the jurisdiction of the civil Courts to try the present suit. I am unable to accept the argument that the provisions of the Land Revenue Act as enacted in Ch. 7, relating to partition and union of mahals should be so construed as to have the effect of excluding the general jurisdiction of the civil Courts with which they are clearly invested under the provisions, of the general law contained in S. 9 Civil P. C. I think the better opinion is that the general law prevails except in cases where either expressly or by necessary implication it is displaced by any special Act or law in that behalf. We have therefore to see whether such a special enactment or law exists in Ch. 7; and in Cl. K, S. 233 of the U. P. Land-Revenue Act, 1901.

Section 106 is the first section of Ch. 7 relating to partition and union of mahals of the Land Revenue Act. The first part of S. 106 defines "partition" as follows:

"Partition means the division of a mahal or a part of a mahal into two or more portions, each consisting of one or more shares."

I will here introduce S. 233 with reference to Cl. K. That section reads as follows:

"No person shall institute any suit or other proceeding in the civil Court with respect to any of the following matters: (K) partition or union of mahals except as provided in Ss. 111 and 112.'

It seems to me that there is no escape from the view that the word "partition" as used in Cl. K must be understood in precisely the same sense in which it is defined in S. 106 of the Act. S. 233 read in relation to Cl. K means that cognizance of a suit with respect to partition by a civil Court is barred. We have therefore to see whether the relief prayed for in the present suit is the relief with respect to "partition." As already stated "partition" according to S. 106, means the division of a mahal or a part of a mahal into two or more portions, each consisting of one or more shares. I feel no difficulty in saying that having regard to the defined sense of the word "partition" the present suit is not a suit with respect to partition. This view however does not lead to the conclusion that the relief prayed for is not barred by the provisions of the U. P. Land Revenue Act, 1901, by virtue of the partition of 1906. According to my judgment the adjudication of the plaintiffs' claim leading to the relief prayed for is barred by the general principle of res judicata contained in the provisions of the Land Revenue Act, 1901.

There is a large number of decisions of the High Court at Allahabad and of this Court bearing on the question under consideration and in this judgment I propose to refer to some of them.

Muhammad Sadiq v. *Laute Ram* (1): This is a Full Bench decision and was passed when the North-Western Provinces Land Revenue Act, 1873, was in force. It is agreed that the new Act, U. P. Land Revenue Act 1901, has made no change in the general import of the enactment though the language has been altered. The gravamen of this decision is that if a question of title affecting the partition which might have been raised under Ss. 112 and 113 of the Act, during the partition proceedings is not so raised and the partition is completed, S. 241 (f) corresponding to S. 233-K of the present Act, debars the parties to the partition from raising subsequently in a civil Court any such question of title. It seems to me that the decision is very wide in its scope and if I may respectfully say so it is right. There is no doubt that the question of title which the plaintiffs raised in the present case in respect of the lands in suit could have been raised during the partition proceedings of 1906, but admittedly it was not so raised and the result was that in the course of those proceedings, it must be held, the plaintiffs were declared to possess under-proprietary interest in those proceedings, it must be held, the plaintiffs were declared to possess under-proprietary interest in those lands and not proprietary. I had occasion to refer to this decision in my judgment in the case of *Baij Nath Singh* v. *Rajju Singh* (2), and I followed it. I expressed my opinion in the following words:

"The application for partition must be taken to have been made in virtue of the provisions of S. 107, Land Revenue Act, 1901, and as soon as it was made the Collector acquired jurisdiction over the subject-matter of the application, the subject-matter being the partition of village Hanaura. That jurisdiction was exclusive as is clear from S. 233-K of the same Act: 'No person shall institute any suit or other proceeding in the civil Court with respect to the partition or union of mahals except as provided under Ss. 111 and 112.' In the absence of any evidence to the contrary, it must be presumed that the Collector acted according to law and issued the necessary proclamation under S. 110, Land Revenue Act. The proclamation invited all such recorded cosharers in the mahal as had not joined in the application to appear before the Collector within sixty days of the date of the proclamation and to state their objections (if any) to the 'partition.' According to S. 111, sub-S. (1), such an objection may involve a question of proprietary title.

"Thus the law clearly imposes a duty upon such cosharer to put forward any ground of claim or defence involving a question of proprietary title in the matter of the partition of the mahal. It follows on general principles that if a cosharer omits to make any objection which he is required by law to make, it must be deemed that he had made it and that under Cl. (c), sub-S. (1), S. 111; it must further be deemed that the Collector had proceeded to inquire into the merits of the objection and had decided them within the meaning of sub-S. (3) of the same section. And by virtue of S. 112 a decree passed by the Collector under sub-S. (3) of the preceding section is to be regarded as a decree of a Court of civil jurisdiction.

"The rule of res judicata extends to a question which must be taken to have been decided in effect, though not in express terms. In the case of *Soorjomane Dayee* v. *Suddunud Mohappatra* (3), their Lordships of the Privy Council made the following observations : 'But even if this interpretation were not correct, their Lordships are of opinion that this clause (Cl. 2) in the Procedure Code, would by no means prevent the operation of the general law relating to res judicata founded on the principle *nemo debet bis vexari pro eadem causa*. This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to, *Gregory* v. *Molesworth* (4), in which Lord Hardwicke held that where a question was necessarily decided, in effect though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form ; and that decision has been followed by a long course of decisions the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingstone* (5).'

"The contrary view maintained by the learned counsel for the plaintiffs-respondents would place the finality of the partition proceedings as contemplated by the legislature entirely at the mercy of a cosharer. According to that view his own omission and inaction will entitle him to re-open the entire partition proceedings and the adjudication of title involved therein by a suit in a civil Court. This could not have been the intention of the law. S. 112, Land Revenue Act, 1901, gives to the decree of the Collector the character of a decree of a Court of civil judicature. This to my mind directly attracts the application of the provisions of S. 11, Civil P. C., 1908, to the decree of the Collector. Expl. 4 of that section is as follows : 'Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit'."

Another Full Bench of the same Court consisting of three learned Judges held in *Shambhu Singh* v. *Daljit Singh* (6) that where land belonging to one patti was

(1) [1901] 23 All. 291=(1901) A. W. N. 86.
(2) A. I. R. 1926 Oudh. 101=91 I. C. 583.
(3) [1873] I. A. Sup. Vol. 212=12 B. L. R. 304=20 W. R. 377=3 Sar. 285 (P.C.).
(4) 3 Atk. 626.
(5) 2 Sm. L. C., 6th Ed., 679.
(6) [1916] 38 All. 243=33 I. C. 19.

apparently by mistake and without notice to the person who claimed to be the rightful owner thereof included in another patti and made the subject of an imperfect partition, the person who claimed to be the owner of the land so dealt with was not debarred by S. 233-K, United Provinces Land Revenue Act, 1901, from suing in the civil Court to have his right to the land declared and to recover possession thereof. The learned Judges distinguished the case of *Muhammad Sadiq* v. *Laute Ram* (1) from the case before them. If the judgment in this case has the effect of abrogating the general proposition laid in the case of *Muhammad Sadiq* v. *Laute Ram* (1), with great respect, I am unable to agree with it, but on a close examination of a somewhat short judgment of Richards, C. J., it would appear that the broader question as to whether the rule of res judicata could come into play or not was neither raised nor decided. Tne learned Chief Justice laid stress on the language of S. 233-K and said that the suit before him could not be treated as a suit in respect of partition. To that extent I am prepared to agree with him. Even if the present suit is not a suit in respect of partition as I have held it is not, it is difficult to avoid the cumulative effect of the provisions of Ch. 7, Land Revenue Act, as constituting res judicata on the ground that the question of title which is now being raised by the plaintiffs might and ought to have been raised in the partition proceedings, and as it was so raised adjudication of the relief prayed for in this suit is barred. Another point on which emphasis was laid by the learned Chief Justice was that the partition proceedings related only to two pattis and in those two pattis the plaintiffs were not interested. That this may or may not be the right basis of the judgment is a matter with which I am not concerned, for in the present case no such question arises. The partition of 1906 was a partition of the whole village. As regards the decision in *Muhammad Sadiq* v. *Laute Ram* (1) the learned Chief Justice said :

"It seems to me that the plaintiff was there asking the civil Court to partition what was part and parcel of the property which could only be partitioned by the Revenue Court."

This observation, it seems to me, overlooks altogether the substance of the judgment of Sir Arthur Strachey, C. J., in the case of *Muhammad Sadiq* v. *Laute Ram* (1). The judgment is not at all based on the fact that certain trees standing on a plot of land could also form the subject-matter of partition.

Soon after the decision referred to in the preceding paragraph another Full Bench decision was given in *Kalka Prasad* v. *Manmohan Lal* (7). The same learned Judges, who formed the Bench on the previous occasion, also constituted the Bench on this occasion. I would quote the head-note :

"A person who was really entitled to one-half of a four biswa zamindari share, but was recorded only in respect of a 3¾ biswa share applied for partition of the latter share. After the date fixed for filing objections the person who was recorded in respect of the remaining one-fourth biswa share came in and asked for partition of that one-fourth biswa share. The partition was completed, but subsequently the original applicant brought a suit to recover the one-fourth biswa share. Held that the suit was not barred by S. 233-K, United Provinces Land Revenue Act (1901). . . . . nor by the rule of res judicata."

In support of the view that S. 233, Cl. K, was no bar the learned Chief Justice again laid stress on the point that the suit before him was not a suit "in respect of partition and union of mahals. On the question of res judicata he said :

"The rule of res judicata will be found in S. 11, Civil P. C. It only arises when the first Court is competent to decide the subsequent suit and that in the case before him the Court, that is the Revenue Court, never determined to try the question nor has it in fact given any decision on the point."

With due respect I am unable to agree that the entire scope of the principle of res judicata is limited to the specific enactment contained in S. 11, Civil P. C. This aspect of the question will be found to have been discussed by me in the quotation already given from my judgment in the case of *Baij Nath Singh* v. *Bahadur Singh* (2) and it will serve no usful purpose to discuss it again.

As to the competency of the first Court to decide the subsequent suit I may say with great respect, that decisions of Courts possessed of exclusive jurisdiction have the effect of res judicata irrespective of the limitation that the first Court must be competent to decide the subsequent suit. This was the second rule laid down by Sir William de Grey afterwards Lord Walsingham in the *Duchess of Kingstone's* case (5). He said:

(7) [1916] 38 All. 302=33 I. C. 86 (F.B.).

> "Secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose."

In my judgment the provisions of Ch. 7, U. P. Land Revenue Act and of S. 233, Cl. K of the same Act not only create an exception to the general jurisdiction of the civil Courts as contemplated by S. 9, Civil P. C., but they also clearly establish the point that the Courts of Revenue have exclusive jurisdiction of determiniug questions of title which are raised or which might and ought to have been raised in partition proceedings except when the jurisdiction of the civil Court is invoked in accordance with Cl. (b), sub-S. (1), S. 111, Land Revenue Act, 1901. If the procedure specified in Cl (b) is not resorted and the Collector decides to proceed to inquire into the merits of the case his decision is final. This is clear also, in particular, from the terms of S. 114 of the same Act. It is enacted in S. 112, Land Revenue Act, that all decrees passed under sub-S. (3), S. 111 are to be treated as decrees of a Court of civil judicature. This necessarily implies to my mind two postulates : (1) that the Court of Revenue in acting under sub-S. (3), S. 111 is a Court of civil judicature of competent jurisdiction, and (2) that the partition proceedings constitute a suit. From these premises it would follow that the Revenue Court to try the subsequent suit also which may be brought in a civil Court for the purpose of obtaining an adjudication of a question of proprietary title. On these grounds I am unable with greatest respect to accept the view of law taken by the learned Chief Justice in this case.

In chronological order now comes the fourth Full Bench decision of the same High Court in the case of *Bijai Misir* v. *Kali Prasad* (8). The substance of the decision of the majority of the Judges (Sir Pramada Charan Banerji, and Tudball, JJ.), is given in the head-note, which is reproduced below (Richards, C.J. dissented) :

> "Certain cosharers in a village applied for partition of their shares under S. 107, United Provinces Land Revenue Act, 1901. Notice was issued to all the recorded cosharers, as required by S. 10 of the Act, and thereupon an application was made by other cosharers, under Cl. (2) of the section, praying for partition of their shares. In that application the applicants set forth the extent of the shares which they prayed should be formed into one lot or qura Subsequently a proceeding was drawn up under S. 114 of the Act, declaring the basis upon which partition was to be effected. Some time after the partition was completed certain of the parties to the partition proceedings instituted a suit in a civil Court to recover possession of shares other than those specified in the application aforesaid upon which the partition had been based. *Held* . . . . . that the suit was barred by S. 233-K, of the Act."

The learned Judges referred to the case of *Muhammad Sadiq* v. *Laute Ram* (1) and followed it. I agree with this decision, if I may respectfully say so but I do not agree with some of the reasons stated in the judgment of Banerji, J. What is most important in this decision is the fact that the judgment of Strachey, C. J., in *Muhammad Sadiq* v. *Laute Ram* (1) was fully restored to its pedental of authority.

Lal Bihari v. *Parkali Kunwar* (9): The leading judgment in this case was given by Sir Pramada Charan Banerji ; Knox, J., agreed with him. The judgment makes no reference to the earlier Full Bench cases to which I have referred in the preceding paragraphs of this judgment. As regards this case I need only say that with great respect I do not agree with the decision. The discussion of the application of the rule of res judicata is very incomplete and the observations made thereon are met by me in the preceding portions of this judgment.

The next case to which I may refer is *Zorawar Singh* v. *Bhagwan Singh* (10). The head-note of the report is as follows;

> "The applicants for partition in a Court of Revenue asked . . that certain specified property, recorded in the name of one *D*, might be assigned to themselves. The property claimed however after the partition was completed, still remained recorded in the name of *D*. *Held* on suit in a civil Court for a declaration that the plaintiffs were the owners of the aforesaid property, that the suit was barred by S. 233-K, United Provinces Land Revenue Act, 1901. *Held also*, that the application of S. 233-K is not limited to cases in which a question of proprietary right has been determined."

Reference was made in this case, as the head-note shows, to two earlier decisions of the same Court : *Gakaran Singh* v. *Ganga Singh* (11) and *Nasir Ahmad* v. *Mohammad Sharif* (12) and from the

(8) [1917] 39 All. 469=41 I. C. 912 (F. B.).

(9) A I R. 1920 All. 21=42 All. 309.
(10) A.I.R. 1925 All. 590=89 I.C. 427=48 All. 19.
(11) A.I.R. 1920 All 229=42 All. 91.
(12) A I.R. 1924 All. 682=79 I. C. 345=46 All. 453.

judgment in the latter case the following quotation was made ;

"It seems to us that the legislature has given the Revenue Courts exclusive jurisdiction over the partition of a mahal among recorded cosharers.. ." ... There is no doubt that if the plaintiffs had framed their suit so as to confine their claim merely to damages, they might have succeeded. But they have chosen to join this claim to a claim to obtain exclusive posession of certain specified plots, which undoubtedly are the subject of the partition."

If I may say so I entirely agree with this observation and it appears to me that it makes no difference in principle that the relief i respect of the plots in question in this suit is one of declaration and not of possession.

In *Ganga Prasad* v. *Beni Prasad* (13) Sulaiman and Kendall, JJ., held that question of title affecting the partition are exclusively within the jurisdiction of the Revenue Court and the Land Revenue Act debars the parties to the partition from raising subsequently in a civil Court any such question of title: vide the head-note. The judgment in this case was delivered by Sulaiman, J. The learned Judge has considered a large number of decisions of the same Court bearing on the question under consideration including the Full Bench case of *Muhamad Sadiq* v. *Laute Ram* (1). If I may say so I agree with the view taken by the learned Judge.

Following upon the heels of the decisions referred to in the preceding paragraphs comes a decision of two other learned Judges of the same Court in *Data Din* v. *Nohra* (14). The head-note is as follows:

"Where plaintiff's suit for declaration of title did not affect the partition or union of mahals and left the integrity of the partition proceedings absolutely unaffected, *Held*, that S. 233-K Land Revenue Act was no bar to the suit".

Whether this view is right or wrong I need not say, but one thing is clear, and it is this: that the question whether the adjudication of the issue of title was or was not barred by the rule of res judicata was neither raised nor decided.

In the same volume [28 *A. L. J.*] is reported a decision of two other learned Judges of the same Court, (*Sada Sheo* v. *Ram Pieray*) (15). They held that: "where plaintiffs were parties as cosharers to a partition in which a separate patti was formed for defendant (a Hindu widow) of the property in question and they raised no objection to the formation of a separate patti, the plaintiffs were debarred under S. 233 (K). Land Revenue Act, and S. 11, Civil P. C., from filing a subsequent civil suit on account of a gift made by the defendant in favour of her daughter of the property in question."

The learned Judges followed the Full Bench decision in *Bijai Misir* v. *Kali Prasad* (8) and referred to the earlier Full Bench decision in *Muhammed Sadiq* v. *Laute Ram* (1). In substance the decision in this case is the same as I propose to give in the present case.

Another case reported is *Ram Sukh Panday* v. *Pirthi Singh* (16). In point of time this case was decided prior to the case of *Sadasheo* v. *Rampeary* (15). The judgment in this case was given by the same learned Judges who had decided the case of *Datadin* v. *Nohra* (14) already referred to. They held that a suit for a declaration that a shankalapnama executed by a Hindu widow, who had got her patti separated in a partition proceeding, does not pass any title to the donee, is not barred by S. 233-K, Land Revene Act (3 of 1901). I have nothing more to say about this decision than what I have already said with reference to the case of *Datadin* v. *Nohra* (14).

Ram Rakhi v. *Dallu Misra* (17): The view taken by the learned Judges (Mukerji and Bennet) is exactly the same as I am taking in the present case both on the construction of S. 233, Cl. K, Land Revenue Act, and on the question of res judicata. If I may respectfully say so I entirely adopt the opinion expressed by the learned Judges in this case.

I will now refer to some of the decisions of this Court including those of the late Court of the Judicial Commissioner of Oudh. In *Sanwal Singh* v. *Bhikhari* (18) Mr. (afterwards Sir Benjamin) Lindsay, J. C., held that a suit for possession by declaration that the plaintiff is entitled to a portion of land wrongly allotted to the defendants in partition by the Revenue Court does not lie in the civil Court in view of the exclusive provisions of S. 233-K, U. P. Land Revenue Act. It is clearly a matter relating to the partition of a mahal for the plaintiff's claim cannot be decreed without affecting the partition come to by the

(13) [1930] 130 I. C. 717.
(14) A. I. R. 1930 All 419=121 I. C. 825.
(15) A. I. R. 1931 All. 29=130 I. C. 382.
(16) A. I. R. 1931 All. 47=131 I. C. 527.
(17) A. I. R. 1931 All. 462=133 I. C. 468=53 All. 568.
(18) A. I. R. 1914 Oudh 248=23 I. C. 860.

Revenue Court. The learned Judicial Commissioner referred to the cases of *Jagannath Parshad* v. *Ram Dutt* (19) and *Tirbeni Sahai* v. *Gokul Prasad* (20). I agree with the conclusion.

In *Bedal Singh* v. *Mahabir Singh* (21) Messrs. Kanhaiya Lal and Daniels, A. J. C's., held that where a co-sharer claimed exclusive title to several plots of land in a village which was partitioned by the Revenue Court and he was a party to the partition proceedings but failed to apply to the Court either to exclude those plots from partition or to allot them to his mahal, some of these plots being allotted to another co-sharer, the suit in the civil Court was barred by S. 233-K, U. P. Land Revenue Act.

The decision of Mr. Lindsay in *Ram Lakhan Singh* v. *Rampal Singh* (22) was also referred to by the learned advocate for the respondents. It does not seem to me to be quite relevant to the question under consideration.

In the case of *Mt. Phuljhari* v. *Har Prasad* (23) my learned brother Raza, J., held that where the object of a suit is not to take out of a mahal any land which has been allotted to that mahal or to interfere with the share of Government revenue which has been declared payable by such mahal but what the plaintiff seeks is that he should be declared to be the owner of the patti or mahal which has been jointly recorded in the name of the parties in the partition, the suit is not barred by the provisions of S. 233-K, Land Revenue Act. My learned brother followed the case of *Lal Behari* v. *Mt. Parkali Kunwar* (9) and distinguished the case of *Baij Nath Singh* v. *Bahadur Singh* (2). Both these cases have already been referred to by me and I still adhere to the opinion expressed in the latter. On the whole I am of opinion that this case was wrongly decided and my proposal is that it should be overruled.

The decision in *Rabinath Bakhsh Singh* v. *Ahmad Ali Khan* (24), is not in substance opposed to the view which I am taking in the present case. Indeed the decision supports my view.

The case of *Ajodhia Prasad* v. *Lakhpat* (25), was also quoted on behalf of the respondents. I was a party to the judgment in that case and I adhere to the view expressed therein. On behalf of the appellants reliance is also placed on a decision of a Bench of this Court in *Chandra Bali* v. *Drigpal Singh* (26). For the reasons already stated, I find myself wholly unable to agree with the view taken in that case. I would propose that that case should also be overruled. If the declaration prayed for in the present case is granted the result would be that the proprietary interest of the plaintiffs in the mahals would be augmented and that of the defendants proportionately reduced. It would also affect the liability of the parties as to the Government revenue. It would further affect the extent of the defendants' rights in the assets of the mahals. For the reasons stated above my answer to the first question is that the relief prayed for by the plaintiffs in the present suit is barred by the provisions of the Land Revenue Act, 1901, by virtue of the partitions of 1906 and 1910.

On the second question, I am of opinion that S. 111, sub-S. (1), Land Revenue Act, does not create a bar of jurisdiction against the Court of Revenue to try questions of proprietary title where such questions have previously been determined by a Court of competent jurisdiction. I think that sub-S. (1), S. 111, is intended to give the effect of res judicata to a judgment of a Court of competent jurisdiction on a question of proprietary title determined by that Court. The provisions of sub-S. (1), S. 111 may be paraphrased thus. The Court of Revenue shall not proceed with the trial of any question of proprietary title which has already been determined by a Court of competent jurisdiction. The rule of res judicata is necessarily a rule of evidence. In the *Duchess of Kingston's* (5) case Sir William, de Grey L. C. J., said:

"From the variety of cases relative to judgments being given in evidence in civil suits these two deductions seems to follow as generally true: first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea,

(19) [1911] 14 O. C. 153=11 I. C. 531.
(20) [1911] 33 All. 440=9 I. C. 475.
(21) [1919] 22 O. C. 54=51 I. C. 554.
(22) A. I. R. 1921 Oudh 132=63 I. C. 272=24 O. C. 143.
(23) A. I. R. 1926 Oudh 338=93 I. C. 378=1 Luck. 318.
(24) A. I. R. 1927 Oudh 186=101 I. C. 870.
(25) A. I. R. 1929 Oudh 72=114 I. C. 762=4 Luck. 291.
(26) A. I. R. 1931 Oudh 21=129 I. C. 173=6 Luck. 419.

a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court."

This is clear from the provisions of S. 40, Evidence Act, 1872. In the same connexion see also the observations of their Lordships of the Judicial Committee in the case of *Mirza Kurrutulain Bahadur* v. *Nuzhatuddowla* (27). It follows that a party relying on the plea of res judicata must produce in evidence the judgment on which the plea rests. In the absence of such proof it is open, in my opinion, to the Court of Revenue to try the issue involving the question of proprietary title under Cl. (c), sub-S. (1) in the event of its not proceeding to act under either of the two preceding Cls. (a) and (b). My answer therefore to the second question is in the negative.

Raza, J.—I have had the advantage of reading the judgment of the Hon'ble the Chief Judge and my learned brother Bisheshwar Nath Srivastava. I am entirely in agreement with the view expressed by my learned brother and have to add very little to what he has said in his judgment. I would also answer the first question in the affirmative and the second question in the negative. In my opinion also the determination of question involved in the first question is not barred by the rule of res judicata. I would adopt all the reasons which have been advanced by my learned brother for that conclusion. I have again considered my decision in *Mt. Phuljhari* v. *Har Prasad* (23), and also the Bench decision in *Chandrabali* v. *Drigpal Singh* (26), to which I was a party. In my opinion these decisions should not be overruled in deciding the present case. These cases differ materially from the present case. The object of the present suit is to claim a relief which affects the partition of mahals. The plaintiffs really seek to alter the constitution of the mahals as formed by the revenue authorities. I still adhere to the opinion which I have expressed in the said decisions. The rule of law laid down by the Allahabad High Court in the cases of *Lal Behari* v. *Parkali Kuar* (9) and *Ram Sukh Pande* v. *Pirthi Singh* (16), is in my opinion a correct exposition of the law on the subject, if I may respectfully say so. Where the parties are on the same side in partition proceedings and no question arises between them as to their respective title or shares, inter se, and a "mahal" or "patti" is formed in their name jointly without specification of shares and one of them subsequently brings a suit in the civil Court for a declaration that he alone is the owner of the entire mahal or patti, I see no reason why the suit should be barred by the provisions of S. 233-K, Land Revenue Act, or the rule of res judicata. Such a suit is not in my opinion a suit "with respect to partition or union of mahals," though I agree that questions of title affecting the partition are exclusively within the jurisdiction of the Revenue Court and the Land Revenue Act debars the parties to the partition from raising subsequently in the civil Court any such question of title.

In such a suit if the plaintiff's claim is allowed the only result will be that the name of the defendant will be removed from the revenue records and the name of the plaintiff substituted in the defendant's place leaving the integrity of the partition proceedings absolutely unaffected.

Srivastava, J.—I have had the benefit of reading the judgment of the Hon'ble Chief Judge. I agree with the answers given by him to the questions referred for decision to the Full Bench. As the process of reasoning by which I have arrived at these conclusions is somewhat different, I would briefly indicate my reasons.

The plaintiffs' case as stated in the plaint is that their ancestors and defendant 69 in 1876 obtained a decree for proprietary possession of the lands in suit situate in village Nayan, from the settlement Court. They further alleged that in 1906 at the instance of the ancestors of defendants 1 to 68, a perfect partition of village Nayan took place in which six mahals were formed, five of them being in the names of the applicants for partition and the sixth one in the name of the non-applicants, namely, the ancestors of the plaintiffs and defendant 69. At this partition the plots in suit were thrown into the five mahals of the applicants for partition and were recorded as the rent free under-proprietary tenure of the plaintiffs and defendant 69 or their ancestors. In 1908 an imperfect partition of the aforesaid mahal of the non-applicants took place, but it

(27) [1906] 33 Cal. 116=32 I. A. 244=8 Sar. 239 (P.C.).

might be ignored as it has no material bearing on the questions under consideration.

In 1929 the lambardars of the five mahals obtained decrees for assessment of rent from the Court of the settlement officer against the plaintiffs and defendant 69. The plaintiffs basing their cause of action on this order of the settlement officer instituted the present suit for a declaration that the plaintiffs and defendant 69 are the superior proprietors and not the under-proprietors of the lands in suit.

The trial Court dismissed the suit on the ground that it was barred by S. 233-K, Land Revenue Act. The plaintiffs appealed and the Division Bench which heard the appeal referred the following questions for decision to a Full Bench:

(1) Is the relief of declaration prayed for by the plaintiffs in the present suit barred by the provisions of Cl. K, S. 233, Land Revenue Act, 1901, by virtue of the partitions of 1906 and 1910?

(2) Is the jurisdiction of the Collector to act under Cl. (c), S. 111 (1), Land Revenue Act, 1901, ousted when the question of proprietary title alleged to have been decided by him in the partition proceedings mentioned above had already been determined by a Court of competent jurisdiction?

Section 233-K provides that

"no person shall institute any suit or other proceeding in the civil Court with respect to . . . . . partition or union of mahals except as provided in Ss. 111 and 112."

The civil Courts have under S. 9, Civil P. C., been given jurisdiction to try all suits of a civil nature except suits of which their cognizance is either expressly or impliedly barred. S. 233-K creates a bar against the general jurisdiction possessed by the civil Courts in all matters of a civil nature. It is therefore necessary to determine the exact scope of the bar created by S. 233-K.

It is obvious that the present suit is not one under Ss. 111 and 112, Land Revenue Act, and does not therefore fall within the exception made in S. 233-K.

The answer to the first question therefore depends on the meaning to be given to the words "with respect to . . . . . or union of mahals." As there is no question of union of mahals in this case the matter is therefore further reduced to one "with respect to . . . . partition."

Partition has been defined in S. 106 as the division of a mahal or a part of a mahal into two or more portions which consist of one or more shares. In carrying out a partition under Ch. 7, U. P. Land Revenue Act, the Revenue Courts are required to allot to each portion a certain area of land as far as possible with proportionate lands of different qualities and to distribute the revenue over the several portions. The words "with respect to partition" are very wide. Any matter which has the effect of disturbing the area or the revenue affecting the qualities of land or the assets thereof will undoubtedly be a matter falling within the scope of S. 233-K and as such excluded from the jurisdiction of the civil Courts. In the present case the lands in suit were allotted to the five mahals as under-proprietary lands. If the civil Court is now to declare the plaintiffs as full proprietors of the lands in suit, the effect of it would clearly be that the contesting defendants would cease to be superior proprietors of those lands, or in other words, the area of the proprietary lands of their mahals would be diminished to that extent. It would further result in reducing the value of the assets of their mahals and also disturb the revenue for which the defendants were made liable under the partition. If the plaintiffs and defendant 69 continue to be under-proprietors they would whenever they become liable for assessment of rent, have to pay certain malikana to the proprietors of the mahal in addition to the Government revenue. In case however they are adjudged to be full proprietors by the civil Court, they would be liable only for payment of the Government revenue and the proprietors of the mahal would lose the advantage, present or prospective as the case may be of their getting the malikana dues from the plaintiffs and defendant 69. I am therefore clearly of opinion that if the plaintiffs are granted the relief claimed by them, it will undoubtedly have the effect of disturbing the partition made by the Revenue Court and is therefore barred by S. 233-K, Land Revenue Act.

Next, as regards the application of the principle of res judicata. S. 112, Land Revenue Act, provides that all decrees passed under sub-S. 3 of the preceding section shall be held to be decrees of a Court of civil judicature of the first instance and shall be open to appeal to the District Judge or High Court or the Chief Court as the case may be. In the present

case admittedly no objection was raised by the plaintiffs or defendant 69 claiming to be superior proprietors of the lands in suit. Thus there was no occasion for any proceedings being taken in accordance with S. 111. Consequently the partition Court did not arrive at any decision on the point and no decree was ever passed by it as contemplated by sub-S. 3, S. 111. I have no doubt that if such an objection had been raised and decided by the Collector under Cl. 3, S. 111, the decree of the Collector would have been regarded as the decree of a civil Court and a subsequent civil suit in respect of the same matter would have become barred by the principle of res judicata. But I find myself unable to hold that when no decree has been passed under sub-S. 3, S. 111, the rule of constructive res judicata can be made applicable on the ground that the objection was one which might and ought to have been raised before the Collector. S. 112 is in terms confined to cases in which decrees have been passed by the Collector under sub-S. 3, S. 111. For application of the rule of res judicata it is essential that there must be a previous decree or order having the force of a decree. Therefore it seems to me impossible to apply it to a case like the present in which there is no decree as contemplated by sub-S. 3, S. 111 and no order having the force of such a decree. There is also nothing in S. 111, U. P. Land Revenue Act, to incorporate S. 11, Civil P. C. or to justify the application of explanation 4 of that section to cases where no objection was raised and no decision was arrived at by the Collector.

If I may say so with respect, I am in complete agreement with the Hon'ble Chief Judge that the decisions of Courts possessed of exclusive jurisdiction have the effect of res judicata irrespective of the limitation that the first Court must be competent to decide the subsequent suit. The relevant rule laid down in the case of the *Duchess of Kingston* (28) is as follows:

"Secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner, conclusive upon the same matter between the same parties coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question though within their jurisdiction, nor of any matter incidentally cognizable, *nor of any matter to be inferred by argument from the judgment.*"

I would wish to emphasise the words which I have underlined (here italicized) which seem to show that the rule is inapplicable to matters in respect of which no controversy was raised and no express decision was arrived at. I am therefore of opinion that as the question of the superior proprietary rights of the plaintiffs was never raised under S. 111 and no decision was in respect of it nor any decree passed under sub-S. 3 of that section by the Collector, the determination of that question is not barred by the rule of res judicata. However for reasons already stated, I am of opinion that the present suit is barred by the provisions of Cl. (K), S. 233, Land Revenue Act, 1901, by virtue of the partition of 1906 and would therefore answer the first question in the affirmative. It is not necessary for me to express any opinion as regards the decisions in *Mt. Phujhari* v. *Har Prasad* (23) and *Chandra Bali* v. *Digpal Singh* (26) as the precise question decided in those cases does not arise in the present case.

As regards the second question the learned counsel for the plaintiffs appellants admitted before us that when the necessary proclamation was issued under S. 110, Land Revnue Act, the plaintiffs did not set up their alleged superior proprietary rights in respect of the land in suit and made no attempt to show that the alleged superior proprietary rights had already been determined in their favour by the settlement Court. I am in full agreement with the Hon'ble Chief Judge that in the absence of any such plea or proof, it was open to the Collector to act under Cl. (c), S. 111, (1), Land Revenue Act. I would therefore answer the second question in the negative.

B.V./R.K. *Reference answered.*

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(28) 2 Smith L. C. 13th Ed. 644.

A. I. R. 1932 Oudh 210
Full Bench

WAZIR HASAN, C. J., RAZA AND SRIVASTAVA, JJ.

Mohammad Baqar and *another*—Applicants.

v.

S. Mohammad Casim and *others* — Opposite Parties.

Civil Revn. Appln. No. 22 of 1931, Decided on 3rd March 1932, against order of Addl. Dist. Judge, Lucknow.

(a) Mussalman Wakf Act (1923)—(Per *Full Bench*)—**Mutawalli not admitting or denying wakf—District Judge has jurisdiction to take proceedings.**—(*Srivastata, J., contra*).

Per *Full Bench*:—The Court of the District Judge has jurisdiction under the Mussalman Wakf Act, 1923 to take proceedings under the same Act when the alleged wakf is not admitted or is denied by the alleged muttawali. (*Srivastava, J. contra*). [P 213 C 2]

(b) Interpretation of Statutes — Statute must be so construed as to defeat attempts to do or avoid what it has enjoined or prohibited.

To carry out effectually the object of a statute it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined and a statute is understood as extending to all such circumventions and rendering them unavailing is a cardinal principle of interpretation. [P 211 C 2]

(c) Mussalman Wakf Act (1923)—Application does not depend on attitude of mutawalli.

The application of the Act does not depend on the attitude which a muttawali may take with regard to the origin of an alleged wakf. [P 211 C 2]

(d) Mussalman Wakf Act (1923)—Duties if not voluntarily performed should be enforced.

It must be presumed that the legislature enacts laws for the purpose of their being obeyed, and in the case of disobedience to enforce obedience. For every law there must be a sanction. Under the Mussalman Wakf Act the law imposes certain duties on a class of individuals, and it must be presumed that it was further intended that the duties should be performed by those individuals and in the absence of voluntary performance, performance should be enforced. [P 212 C 2]

(e) Civil P. C. (1908), S. 4—In absence of specific provision to contrary, ordinary rules of procedure apply.

If an Act by necessary implication and having regard to the objects and purposes authorizes an inquiry it is immaterial that no specific procedure is prescribed by the Act itself. In the absence of any specific provision to the contrary in any special or local law the ordinary rules of procedure would apply. [P 213 C 1]

(f) Mussalman Wakf Act (1923)—Revision lies if requirements of S. 115, Civil P. C., are fulfilled—Civil P. C. (1908), S. 115.

If the requirements of S. 115, Civil P. C., 1908, are fulfilled a revision from an order under the Act would lie to the High Court under that section: 52 *All.* 167, *Ref.* [P 213 C 1]

(g) Interpretation of Statutes—Interpretation must follow will of legislature.

Per *Srivastava, J.*—A statute is the will of the legislature and the fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded "according to the intent of them that made it." Where there are different statutes in pari materia though made at different times or even expired and not referring to each other they should be taken and construed together as one system and as explanatory of each other. [P 216 C 1]

H. Husain and *Muhammad Husain*—for Applicants.

Khaliq-Uz-Zaman — for Opposite Parties.

Wazir Hasan, C. J.—This is an application under S. 115, Civil P. C., against the decision of the Additional District Judge of Lucknow, dated 2nd February 1931. The ground of the application is that the learned Additional District Judge has in this case failed to exercise the jurisdiction vested in him by law. The application was first heard by a Bench consisting of my learned brother Kisch, J., and myself. We then referred the following question for decision to a Full Bench:

Has the Ccurt of District Judge no jurisdiction under the Mussalman Wakf Act, 1923, to take proceedings under the same Act when the alleged wakf is not admitted or is denied by the alleged muttawali?

The circumstances are as follows:

The petition, out of which this application has arisen, purports to have been made under the provisions of S. 10, Mussalman Wakf Act, 1923. In this petition it was alleged that a 12 annas 6 pies share in the village of Maste, Tahsil Mohanlalganj, District Lucknow, was owned and possessed by one Mt. Askari Khanam; that on 1st January 1905 the said Mt. Askari Khanam had executed a will whereby she created a wakf of 3 annas 6 pies out of the aforementioned share

"for the funeral expenses and obsequies, for razanamas, haj, ziyarat, majlis and fatiha as customary in the family and for desa, Quran reading and for fatiha of other relations";

that by the said will one Mt. Fatima Begam was appointed muttawali of the said wakf; that Mt. Askari Khanam died on 10th August 1905 and the mutation of the wakf property was made in the name of Mt. Fatima Begam as muttawali; that Mt. Fatima Begam

also died in 1918 and now the opposite parties are in possession of the wakf property and that the opposite parties have not complied with the provisions of Ss. 3, 4 and 5, Mussalman Wakf Act 42 of 1923. The petitioners prayed for the following reliefs:

(a) That the opposite parties be ordered to comply with the provisions of Ss. 3, 4 and 5, Mussalman Wakf Act, 1923.

(b) That proceedings under S. 10, Mussalman Wakf Act, 1923, be taken against the opposite parties.

A further prayer was made to the effect that the opposite parties be removed from muttawaliship and some proper muttawali be appointed to carry out the provisions of the wakf. This lastmentioned prayer was eliminated from the discussion of the case before us as perhaps it was also eliminated in the Court below.

This petition was presented in the Court of the District Judge of Lucknow on 31st October 1930. In the array of the opposite parties there were five defendants but only one of them, Syed Azam Qadr, filed a written statement on 9th January 1931. Some of the defendants never appeared in the Court below and others who appeared disappeared at the later stages of the case. In the written statement filed by Syed Azam Qadr the alleged will of Mt. Askari Khanam dated 1st January 1905 was admitted but it was contended that it did not create any wakf. The petitioners then on 19th January 1931 produced in original the will of Mt. Askari Khanam, which is on the record before us. On the same date the Court framed the following issues in the case:

(1) Does Ex. 1 constitute a valid and proper Mussalman wakf? (2) Is the case cognizable by this Court in view of the fact that the contesting opposite party denies the existence of the wakf? (3) What is the value of the property in question, how much has been spent on the objects mentioned in Ex. 1? If the value of the property in question is less than the amount of the expenditure, its effect? (4) To what relief, if any are the petitioners entitled?

At the request of the counsel for the parties the Court decided that issue 2 might be disposed of first. Accordingly by the judgment in revision that issue was answered in the negative and against the petitioners.

The learned Additional District Judge has held as a broad proposition that once an alleged wakf is not admitted or denied by an alleged muttwali the hands of the Court are immediately stayed and it ceases to possess jurisdiction to take proceedings under the Mussalman Wakf Act, 1923. I am unable to accept this view as correct. It seems to me that the whole object of the Act will be defeated if the interpretation adopted by the learned Additional District Judge were held to be correct. The object of the Act is stated in the following words:

"An Act to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties."

Obviously it is a recalcitrant mutawalli to whom the Act intends to reach. How provision for the better management of wakf property which it is the object of this Act to make can be made if the jurisdiction of the Court with which it is vested by the Act is ousted as soon as the mutawali who has failed to comply with the provisions of the Act denies the alleged wakf. The result of such an interpretation would be to leave the evil rampant to remove which was the manifest intention of the Act.

"To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined . . . and a statute is understood as extending to all such circumventions, and rendering them unavailing"

is a cardinal principle of interpretation. Clearly there is no section in the Act laying down any rule to the effect that the provisions of that Act will only apply to a case where an alleged wakf is admitted by the alleged mutawalli and will not apply if it is denied or not admitted by the same.

When I examine some of the sections of the Act I am led to the conclusion that the application of the Act does not depend on the attitude which a mutawalli may take with regard to the origin of an alleged wakf. From the definition of the word "wakf" in Cl. (e), S. 2 of the Act it is clear that a wakf of the nature described in S. 3, Mussalman Wakf Validating Act, 1913, is excluded from the operation of the Act of 1923. With a view to determine whether an alleged wakf is inside or outside

the scope of the Act the Court must make some inquiry. The inquiry may be limited merely to an interpretation of the instrument creating the wakf if there is any or to the scrutinizing of the terms of an oral wakf. Further under sub-S. (3), S. 3 of the Act of 1923 even a wakf such as is described in S. 3, Mussalman Wakf Validating Act, 1913, would come to fall within the operation of the Act of 1923

"within six months of the date of the death of the person entitled to such benefit as aforesaid, or of the last survivor of any such persons as the case may be."

Here again the Act points to an inquiry on the part of the Court if necessary as to the fact whether there does or does not exist any person entitled to such benefit and if not as to the time of the death of the last of such persons. Sub-S.(2), S. 3 is as follows:

"Every such statement shall be accompanied by a copy of the deed or instrument creating the wakf or if no such deed or instrument has been executed or a copy cannot be obtained shall contain full particulars, as far as they are known to the mutawalli, of the origin, nature and objects of the wakf."

The above subsection clearly provides to my mind for an inquiry as to the origin, nature and objects of the wakf whether such wakf was made orally or by means of an instrument. Now take the case of a wakf created by means of an instrument and the instrument is produced before the Court as the present case is. I do not see how it can be reasonably contended that the Court will refuse to look into the instrument for the purpose of ascertaining the origin, nature and objects of the wakf as soon as the mutawalli does not admit the produced instrument creating the wakf. It is true that the inquiry in such cases, in the very nature of things must be a summary inquiry and will not be conclusive between the contending parties in any future controversy as regards the origin, nature and objects of the wakf but I am unable to hold that the Act excludes inquiry altogether.

Once it is held as I have just now held that S. 3 clearly provides for inquiry as to the origin, nature and objects of the wakf if necessary it would seem to follow that the Court may order a mutawalli to furnish a statement containing the full particulars specified in sub-S. (1), S. 3 of the Act.

Section 4 relates to a stage after a statement has been furnished under S. 3. Under sub-S. (1), S. 4 any person may apply to the Court for the issue of an order requiring the mutawalli to furnish further particulars or documents. Sub-S. (2) provides for an inquiry with a view to gather full information regarding the origin, nature or objects, of the wakf or the condition or management of the wakf property and for that purpose to order the mutawalli to furnish further particulars and documents. I have held that the Court after making the necessary inquiry may order a statement to be filed under S. 3. If this finding is correct it would follow that the occasion for adopting the procedure prescribed by S. 4 may also arise in a case where a statement under S. 3 has been filed in pursuance of an order of the Court for otherwise if no order can be made under S. 3, S. 4 will also become a dead letter in that event.

It must be presumed that the legislature enacts laws for the purpose of their being obeyed and in the case of disobedience to enforce obedience. For every law there must be a sanction. In this particular case the law imposes certain duties on a class of individuals and I must presume that it was further intended that the said duties should be performed by those individuals and in the absence of voluntary performance, performance should be enforced. Otherwise, it will be misnomer to call any piece of legislation a law. It will merely be an expression of pious wishes. I find however that all such elements, as I have mentioned above, exist in the Act of 1923.

Section 10 of the Act of 1923 provides for penalties for failure to comply with the requirements of the Act. This clearly implies to my mind jurisdiction in the Court to enforce compliance with the provisions of the Act. The section enacts:

"Any person who is required by or under S. 3 or S. 4 to furnish a statement of particulars or any documents relating to a wakf . . . . . shall, if he, without reasonable cause, the burden of proving which shall be upon him, fails to furnish such statement or document . . . . be punishable with fine."

In my opinion the use of both the words "by" and "under" is significant. It appears to me that the former is intended to refer to the provisions of the sections while the latter is intended to refer to

an order which the Court may pass under one or other of the sections. An order under S. 3 may be, as I have already stated, an order made after necessary inquiry calling upon the mutawalli to furnish a statement containing the particulars of the nature described in Cls. (a) to (f,) or under Cl. (g) any other particulars which may be prescribed to be incorporated in the statement.

The decision of a learned Judge of the High Court at Patna in *Ali Mohammad* v. *Collector of Bhagalpur*, *A. I. R.* 1927 *Pat.* 189, was cited before us in support of the contention that if the wakf is not admitted the jurisdiction of the District Judge under the Act is at once ousted. The main argument in support of the view taken in that case is that no procedure is prescribed in the Act for determining the question as to whether any property is wakf property and that no provision is made for appeal or revision. To my mind the argument is inconclusive. If the Act by necessary implication and having regard to its objects and purposes authorizes an inquiry it is immaterial that no specific procedure is prescribed by the Act itself. In the absence of any specific provision to the contrary in any special or local law the ordinary rules of procedure would apply: vide S. 4, Civil P. C., 1908. The absence of any provision as to appeal only indicates that the results of an inquiry under the Act are not intended to be final and conclusive. As regards revision, it appears to me that if the requirements of S. 115, Civil P. C., 1908, are fulfilled a revision from an order under the Act would lie to the High Court under that section as the revision in the present case does: see the observations of their Lordships of the Judicial Committee in a case under the Religious Endowments Act, 1863, *Balkrishna Udayar* v. *Vasudeva Aiyar* (1). The case of *Nasrullah Khan* v. *Wajid Ali* (2) was also cited by both sides. With great respect the actual point decided in that case is not however clear to me, but I am inclined to think that it supports the view which I am taking rather then the contrary view.

The view which I am now taking was also taken by my late lamented brother, Misra J., in *Shabbir Husain* v. *Ashiq Husain* (3). I was also a member of the Full Bench which decided the case just now mentioned, but I refrained from expressing any opinion on this point on that occasion. To my mind the point did not arise directly. Similarly my brother, Raza J., also did not express himself definitely on this question.

It is true that the Act does not lay down any obligation on the Court as to the limits to which it should carry any inquiry which it may wish to make and no party is entitled to compel the Court to carry inquiry up to any particular stage. Indeed the Court may refuse to enter into any inquiry on the ground that the allegations of the parties disclose a controversy fit to be determined in a regular suit; and this, in my judgment, explains the absence of any special rule of procedure. The Court is invested with a discretion but it cannot, in my opinion, refuse to look into the merits of the case and stay its hands on the sole ground that the alleged mutawalli does not admit the alleged wakf. In this particular case it appears to me that the matter was of the simplest nature. An instrument of wakf was produced which was admitted by one of the defendants, and as against the absentee defendants it could be proved by parol evidence. After that was done the Court had only to construe the instrument for the purpose of seeing whether it was a fit case to be dealt with under the provisions of the Act of 1923. My answer therefore to the question referred to the Full Bench is that the Court of the District Judge has jurisdiction under the Mussalman Wakf Act, 1923, to take proceedings under the same Act when the alleged wakf is not admitted or is denied by the alleged mutawalli.

Raza, J.—I have had the advantage of reading the judgment of the learned Chief Judge, which contains a lucid and thorough discussion of the question under consideration, if I may respectfully say so. I have to add very little to what he has said in the judgment.

I was a party to the Full Bench decision in the case of *Shabbir Husain* v. *Ashiq Husain* (3). The question which we have to decide in this case did not arise directly in that case and hence I did not express myself definitely on that

(1) A. I. R. 1917 P. C. 71=40 I. C. 650=44 I. A. 261=40 Mad. 793 (P. C.).
(2) A. I. R. 1930 All. 81=118 I. C. 717=52 All. 167.
(3) A. I R. 1929 Oudh. 225=117 I. C. 739=4 Luck. 429(F. B.).

question in giving my judgment in that case. In this case the District Judge was asked to take proceedings under S. 10, Mussalman Wakf Act (Act 42 of 1923); but he refused to do so, holding that the case was not cognizable by the Court in view of the fact that the contesting opposite party denied the existence of the wakf. The question which has been referred in this revision to the Full Bench for decision is as follows:

Has the Court of the District Judge no jurisdiction under the Mussalman Wakf Act, 1923, to take proceedings under the same Act when the alleged wakf is not admitted or is denied by the alleged mutawalli?

It is a matter of common knowledge that unscrupulous and dishonest mutawallis were not managing wakf properties properly before the passing of the Mussalman Wakf Act, 1923 (Act 42 of 1923. Wakfs were not admitted in some instances and in the majority of instances the mutawallis were making all possible attempts to defeat the objects of the wakf for improper and unlawful gain. The legislature had therefore to pass the said Act

"to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties."

The Act requires every "mutawalli" of "wakf" (as defined in S. 2 of the Act) to furnish particulars and statements of accounts, relating to wakf and provides for penalty for failure to do so. S. 10 is in the following terms:

"Any person who is required by or under S. 3 or S. 4, to furnish a statement of particulars or any document relating to a wakf, or who is required by S. 5 to furnish a statement of accounts shall, if he, without reasonable cause, the burden of proving which shall be upon him, fails to furnish such statement or document, as the case may be, in due time, or furnishes a statement which he knows or has reason to believe to be false, misleading or untrue in any material particulars or in the case of a statement of accounts furnishes a statement which has not been audited in the manner required by S. 6, be punishable with fine which may extend to Rs. 500 or in the case of a second or subsequent offence with fine which may extend to Rs. 2,000."

Any person interested in a wakf governed by the Act may bring to the notice of the Court of the District Judge that the mutawalli of the wakf has failed to comply with the provisions of the Act. When the matter is thus brought to the notice of the Court, it shall have to make an inquiry in order to enable it to pass proper orders in that connexion. The Court has been empowered to inflict penalty upon the person who is found guilty of not having complied with the provisions of the Act. The mutawalli may in his defence deny the alleged wakf or assert that there was no wakf within the meaning of the Act. The Court shall then have to see how far the defence is made out.

If the muttwali fails to satisfy the Court after due proof that the trust is not a wakf within the meaning of S. 2 (e) of the Act, he will be liable to punishment. S. 10 provides that he will have to show reasonable cause for his default. How can the reasonable cause be determined by the Court unless an inquiry is made by the Court? How can the Court determine the nature and objects of the wakf without making an inquiry? The Court of the District Judge has to administer the law as enacted in the said Act, but it cannot do so unless and until it makes the necessary inquiry. Interested persons may deny the wakf in showing cause when proceedings are taken against them under S. 10, but it is not for them but for the Court to decide whether the trust is or is not a wakf within the meaning of the Act. Wakfs should not be at the mercy of the mutawallis. If the District Judge stays his hand, the moment the wakf is denied by mutawallis the object and the intention of the legislature in making and passing the statute will, in my opinion, be defeated and the Act will become a dead letter. The Act is not a farce. It enacts law which has to be duly observed and strictly enforced in administering wakfs, with due regard to all the attendant circumstances. The District Judge has to determine the origin, nature and objects of the wakf. These are matters which are within his jurisdiction and his jurisdiction cannot be ousted simply on the plea taken by the mutawallis that there was no wakf. This loophole should no longer be open to the mutawallis and the evils sought to be remedied should not be perpetuated. It is true that there is no express provision in the Act for a regular procedure in respect of the inquriy to be made by the Court under S. 10, but that in my opinion is no ground for holding that there can be no inquiry by the Court. It appears that the Act does not provide for a regular procedure in respect of the inquiry

as it was intended by the legislature that the inquiry which was to be made by the Court in that connexion should be a purely summary inquiry and not one open to appeal. I think no provision was made for an appeal for that very reason. There will be no appeal under the Act; but there can be a revision under S. 115, Civil P. C.

I would also answer the question referred to the Full Bench in the same way as it has been answered by the learned Chief Judge.

Srivastava, J.—I have the misfortune of not being able to see eye to eye with the Hon'ble Chief Judge and my learned brother Raza, J., on the question which has been referred to the Full Bench for decision. This question is as follows:

"Has the Court of the District Judge no jurisdiction under the Mussalman Wakf Act, 1923, to take proceedings under the same Act when the alleged wakf is not admitted or is denied by the alleged mutawallis?"

The preamble of the Act shows that it was enacted

"to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties."

Section 2 gives the definitions of several words used in the Act. The definition of wakf shows that wakf alalaulad as described in S. 3, Mussulman Wakf Validating Act 1913,under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants is excluded from it. Ss. 3 to 10 embody the substantive provisions enacted for giving effect to the objects for which the Act was passed. The scheme of the Act as disclosed by these sections is that under S. 3 (1), within six months from the commencement of the Act, obligation has been imposed on every muttawali to furnish certain particulars relating to the wakf. All the particulars specified in the section are particulars required to enable the Court to exercise effective control over the administration and to make proper scrutiny of the accounts. Cl. (2) requires that the statement containing the necessary particulars shall be accompanied by a copy of the deed of wakf or failing it, full particulars of the origin, nature and objects of the wakf. In the case of wakfs created after the commencement of the Act and in the case of wakfs alalaulad, if the person entitled to benefits thereunder or the last survivor of any such person is dead, Cl. (3) of the section imposes similar obligations for the furnishing of necessary particulars and information within six months of the creation of the wakf or of the death of the person above-mentioned. S 4 provides for the publication of the particulars furnished under S. 3 and allows any person so wishing to apply for the issue of an order requiring the muttawali to furnish further particulars or documents. It is also laid down that if the Court " after making such inquiry, if any, as it thinks fit " is of opinion that any further particulars or documents are necessary, in order that full information may be obtained regarding the origin, nature or objects of the wakf or the condition or management of the wakf property, it may make an order requiring the muttawali to furnish such particulars or documents.

Section 5 provides for the filing of statements of accounts annually after the statement referred to in S. 3 has been furnished. S. 6 provides for the auditing of accounts. Ss. 7, 8 and 9 contain general provisions relating to the payment of costs of auditing, verification of statements and inspection thereof by any person with the permission of the Court. S. 10 empowers the Court to impose a fine which may extend to Rs. 500 in the case of a first offence and to Rs. 2,000 in the case of a second or subsequent offence if a mutawalli fails to furnish in due time the statements or documents referred to in Ss. 3, 4 and 5 or furnishes a statement which is false, misleading or untrue or which has not been audited in the manner required by S. 6 " without reasonable cause, the burden of proving which shall lie upon him." The remaining three sections contain only subsidiary provisions. S. 11 empowers the Local Government to make rules to carry into effect the purposes of the Act. The specific subjects mentioned in the section relating to which such rules may be made are those referred to in the earlier sections. Ss. 12 and 13 make express provision for saving the effect of any other enactment for the time being in force in British India providing for the control or supervision of religious or charitable endowments and deal with certain exceptions from the operation of the Act.

Thus it will be seen that the Act does not contain any provisions for appeal or revision against orders passed thereunder. Its main object clearly is to provide a summary method for the Court to exercise its supervision over the management of wakf properties and the accounts of the wakf funds. The reference to particulars regarding the " origin, nature and objects of the wakf " in Ss. 3 and 4 in the context in which the reference is made, in my opinion shows clearly that these particulars are required in order to enable the Court to exercise effective control over the management. In order to judge whether particular items of expenditure shown in the statements of accounts are legitimate and proper, it is essential for the Court to be in full possession of information regarding these matters. The use of the word " origin " in the context in which it has been used, cannot to my mind be indicative of any intention that the Court should embark on an extensive inquiry into the existence of the wakf if it is in question :

" A statute is the will of the legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded 'according to the intent of them that made it' : (Maxwell on the Interpretation of Statutes: Edn. 7, p. 1.)"

The Act does not contain any provision requiring the Court to enter upon an inquiry as to the existence of the wakf or whether any particular property is wakf or not. It does not lay down any procedure for such inquiry. Even S. 11 does not specifically provide that the Local Government is to make rules for this purpose. The bill as it was originally introduced in the legislature contained a chapter relating to suits of a special character but when the bill emerged from the Select Committee, the chapter was omitted. Taking all these circumstances into consideration, it is not possible to say that the omission of provisions for inquiry into the existence of wakfs was accidental. To my mind they would rather indicate the intention to confine the operation of the Act to admit wakfs :

" Probably the rules as to the exposition of one Act by the language of another is satisfactorily and most comprehensively laid down by the broad statement of Lord Mansfield that : Where there are different statutes in pari materia though made at different times or even expired and not referring to each other they shall be taken and construed together as one system and as explanatory of each other : (Maxwell on the Interpretation of Statutes: Edn. 7, p. 29.)"

It would therefore be permissible to point out that Ss. 5 and 6, Charitable and Religious Trusts Act (14 of 1920) which was passed only three years before, contain elaborate provisions regarding the procedure to be adopted when any person denies the existence of or denies that it is a trust to which the Act applies. It is difficult to think why the legislature did not embody similar provisions in the Mussulman Wakf Act, 42 of 1923, if the intention was that such inquiry should be made in proceedings under the Act.

In the course of arguments emphasis was laid by the learned counsel for the applicants that if the jurisdiction of the Court under the Act is to be excluded as soon as an alleged mutawalli denies the existence of the wakf, it would encourage evasion of the law and perpetuate the mischief which the statute intended to cure. I do not feel much impressed with this argument. In the case of public wakfs even though their existence is denied, remedy can be easily sought under the Charitable and Religious Trusts Act (14 of 1920). In the case of private wakfs or wakfs partly private and partly public to which, as held by a Full Bench of this Court in *Saiyed Shabbir Husain* v. *Shaikh Ashiq Husain* (3) the Mussulman Wakf Act is inapplicable, remedy can be had by obtaining a declaration from the civil Courts about the existence of the wakf. It is conceded that the Act being summary in its nature and there being no provision for appeal against orders passed thereunder, any decision made in the course of proceedings under the Act will not be final and will be open to question in a regular suit. If this is so, there can be no hardship if in cases where the existence of the wakf is not admitted, the Court stays its hand leaving it for the party concerned to get a declaration about the existence of the wakf, before taking proceedings under the Act. On the contrary if the contention of the applicants is to be accepted, the Court after a summary inquiry can impose a heavy fine under S. 10 and the order imposing the fine being final the alleged mutawalli will be muleted in fine for good even though he subsequently succeeds in getting it declared that no wakf

does really exist. I also think that if the legislature has not made the provisions sufficiently comprehensive to include within their scope an inquiry as to the existence of the wakf, it is not justified to characterise the plea about the non-existence of the wakf as an evasion of the Act. If the Act does not contemplate such an inquiry there is nothing underhand or dishonest about a plea of this nature. If an inquiry like this does not fall within the scope of the Act, the alleged mutawalli has every right to avoid it.

It should also be noted that the Act makes express reference to inquiry in S. 4. Under this section the Court is authorized to make an inquiry whether further particulars or documents are necessary or not. If provision is made for such an inquiry in S. 4, there is no reason why provision could not be made for such an important matter as the enquiry into the existence of the wakf, if such inquiry was in contemplation.

The applicants also placed strong reliance on the provisions of S. 10. This section provides as follows :

"Any person who is required by or under S. 3 or S. 4 to furnish a statement of particulars or any documents relating to a wakf or who is required by S. 5 to furnish a statement of accounts, shall if he without reasonable cause, the burden of proving which shall be upon him, fails to furnish such statement or document, as the case may be, in due time .... be punishable with fine etc.."

The words "without reasonable cause the burden of proving which shall lie upon him" do no doubt contemplate an inquiry but the question arises what is to be the scope of such inquiry ? It seems to me that the inquiry contemplated is inquiry as regards the reason for failure to furnish the statements or documents in due time. The opening words show that the section applies only to persons who are required by Ss. 3, 4 or 5 to furnish statements or documents. Though the meaning is not altogether free from obscurity yet reading the section as a whole and in the light of the preceding provisions it seems that the opening words presuppose that there is a wakf and therefore he is a person liable to furnish the statements or documents and the enquiry contemplated by the section is only as regards reasonable cause for failure to furnish them in due time. There being no indication of any intention that an enquiry into the existence of the wakf should be made in the substantive provisions of the Act contained in Ss. 3 to 9, it is difficult to say that it was intended to introduce such an inquiry in this indirect manner in this provision relating to penalties.

Having given my anxious consideration to the provisions of the Act, the conclusion reached by me is that the whole object of the Act was to provide a speedy method of exercising control over the management of all those wakf properties in respect of the character of which as such there was no dispute. If it had been intended that an inquiry into complicated questions of title should be undertaken in the course of proceedings under the Act, it was to be expected that the legislature would have embodied some direct provisions on the subject. I am supported in this view by the decision of the Patna High Court in *Ali Mohammad* v. *Collector of Bhagalpur*, *A. I. R.* 1927 *Pat.* 189. In this case it was held that the Mussulman Wakf Act 42 of 1923, applies only to admitted wakfs and not to properties which are denied to be wakf properties. In *Nasrullah Khan* v. *Wajid Ali* (2), their Lordships of the Allahabad High Court observed as follows:

"The learned Judge has not taken proceedings under S. 10 of the Act. Under that section he has undoubtedly the power to punish a mutawalli if without any reasonable cause the burden of proving which shall lie upon him, he fails to furnish statements of particular documents or statements of accounts. But that is purely a penal proceeding in the course of which the learned Judge may inquire as to whether the wakf is one to which the Act is applicable. But till that stage arrives, we find it difficult to hold that the Judge can hold any such inquiry and compel a mutawalli who is not admitting the applicability of the Act to file accounts. Barring S. 10 which appears wide enough to cover an inquiry, none of the preceding sections imply an investigation where the wakf itself is disputed or where the applicability of the Act to the wakf is questioned."

These observations support me in so far as the learned Judges hold that the sections preceding S. 10 do not imply an investigation where the wakf itself is disputed. The question as regards the scope of the inquiry under S. 10 did not directly arise for decision in the case. If the remarks quoted above are read as an authority for the proposition that S. 10 authorizes investigation into the existence of the wakf where it is disputed, I must respectfully dissent, for reasons already

stated from any such inference drawn from the terms of S. 10 as regards the scope of inquiry under it.

For the above reasons I am of opinion that the District Judge has no jurisdiction under the Mussulman Wakf Act 1923, to take proceedings under the same Act, when the alleged wakf is not admitted or is denied by the alleged mutawalli. I would answer the reference accordingly.

K.N./R.K. *Reference answered.*

A. I. R. 1932 Oudh 218

SRIVASTAVA, J.

Zainul Abdin—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 142 of 1931, Decided on 3rd March 1932, against order of Sess. Judge, Lucknow, D/- 12th September 1931.

Criminal P. C. (1898), S. 517—S. 517 does not apply to property not in Court or in respect of which offence is not committed.

Section 517 applies only to property produced before the criminal Courts or in its custody or regarding which an offence appears to have been committed or which has been used for the commission of any offence.

A was convicted of criminal breach of trust in respect of two Government promissory notes of the face value of Rs. 5,000, each. The Magistrate in convicting *A* ordered in his judgment that the complainant was entitled to the notes in question or to the new ones, if any, issued in lieu thereof. Subsequently it was found that the notes had been renewed at the instance of a bank before *A's* conviction and were in circulation. Complainant applied for delivery of the notes to him and his application was rejected on the ground that they could not be traced.

Held: that as the renewed notes were never produced before the Court nor were they in the custody of the Court and as the offence was not committed in relation to the renewed notes nor were they used for the commission of any offence, S. 517 did not apply and that the application had been rightly rejected. [P 218 C 2]

Gaya Prasad Shukla—for Applicant.

H. K. Ghosh, Asst. Govt. Advocate—for the Crown.

Judgment.—This is an application for revision against the order dated 12th September 1931 passed by the learned Sessions Judge of Lucknow upholding the order of an Honorary Special Magistrate rejecting the applicant's application for delivery of two Government promissory notes to him. One Anandi Prasad was convicted of an offence of criminal breach of trust in respect of two Government promissory notes of the face value of Rs. 5,000 each. The Magistrate at the end of his judgment convicting Anandi Prasad made an order that the complainant who is the applicant before me is entitled to the Government promissory notes in question or "to the new ones, if any, issued in lieu of them." Subsequently it was found that the two notes which formed the subject of prosecution had before the conviction of Anandi Prasad been renewed at the instance of the Allahabad Bank. It is not denied that the renewed notes are in circulation and it is not known who is in possession of them at the present moment. The letter of the Controller of Currency, dated 1st September 1930 referred to in the order of the lower Court, shows that no record is kept at the Public Debt office of "such transfers and delivery." Under these circumstances the Magistrate rejected the application of the applicant for the renewed notes being delivered to him remarking that it was not possible for him to do so as it was not known in whose possession they are. This order has been confirmed by the learned Sessions Judge.

The only question urged in support of the application is that the Magistrate ought to have made efforts to trace the renewed notes and when found should have handed them over to the applicant. In my opinion S. 517, Criminal P. C., has no application to the case. It applies only to property produced before the criminal Courts or in its custody or regarding which an offence appears to have been committed or which has been used for the commission of any offence. In this case it is admitted that the renewed notes were never produced before the criminal Courts nor were they in the custody of the Court. It is also not denied that no offence was committed in relation to the renewed notes nor were they used for the commission of any offence. The explanation to that section also does not help the applicant as the renewal admittedly took place at the instance of the bank who was no party to the criminal case. I can therefore see no grounds for interference with the order of the lower Court and reject the application.

K.N./R.K. *Application rejected.*

A. I. R. 1932 Oudh 219

WAZIR HASAN, C. J. AND RAZA, J.

Balram Chand — Defendant — Appellant.

v.

Radhey Lal and *another*—Plaintiffs—Respondents.

First Appeal No. 71 of 1931, Decided on 14th March 1932, against order of Addl. Sub-Judge, Bahraich, D/- 20th April 1931.

Hindu Law—Joint family—Property acquired by litigation by mortgage of ancestral property held to be joint family property.

R acquired in the right of a collateral, under a decree burdened with a liability for payment of Rs. 1,817, a two annas share and by the same litigation he obtained another decree for a four annas share, the recovery of possession being made conditional on payment by him of Rupees 3,625-2-0. Thus to obtain possession of six annas share he had to pay Rs. 5,442-2-0. To raise this sum as also to pay off a previous debt, he executed a mortgage in plaintiff's favour for Rs. 9,000 and mortgaged the four annas share. He also mortgaged the two annas share as security for payment of the loan. Part payment had been made and plaintiff sued *R's* son as *R* was since dead, for recovery of the balance by sale of the mortgaged property.

Held: that the two annas share must be treated as joint family property, for had the four annas ancestral share not been utilized by *R* as a security for the loan the decree which he had obtained in respect of the two annas share would have remained infructuous and the property would never have come into the possession of the family. [P 219 C 2]

Ram Prasad Varma—for Appellant.

Radha Krishna—for Respondents.

Order.—This is the defendant's appeal from the decree of the Additional Subordinate Judge of Bahraich, dated 20th April 1931.

The suit out of which this appeal arises was founded on a deed of mortgage dated 15th December 1921 executed by one Raj Narain, since deceased, in favour of the plaintiffs. Under this deed Raj Narain borrowed a sum of Rs. 9,000 and mortgaged a four annas zamindari share situate in the village of Hariharpur, Pargana and District of Bahraich. He also mortgaged another two annas share in the same village as a security for the payment of the loan. Interest was agreed to be paid at the rate of 9 per cent per annum compoundable half-yearly. A part of the mortgage money had been paid and the present suit was instituted against the son of Raj Narain to recover the balance due under the deed by sale of the mortgaged property.

The learned Additional Subordinate Judge has given a decree in favour of the plaintiffs for the relief prayed for and in the appeal before us the following three points were specifically raised against the decree of the learned Additional Subordinate Judge :

(1) That the Court below has erred in treating the two annas share in the village of Hariharpur as separate property of Raj Narain and charging it with the sum of Rs. 557-14-0 out of the mortgage money which debt he found not to have been incurred for legal necessity.

(2) That the Court below has erred in finding that the sum of Rs. 3,000 out of the mortgage consideration constitutes an antecedent debt borrowed by Raj Narain.

(3) That the rate of interest allowed by the Court below was excessive.

As regards the first point we are of opinion that the two annas share in question must be treated as joint family property. The evidence conclusively proves that it was acquired in the right of a collateral by Raj Narain under a litigation which he commenced in the year 1911. The decree which he obtained in respect of that share was burdened with a liability for the payment of a sum of Rs. 1,817. By the same litigation Raj Narain also obtained a decree for the remaining four annas share to which reference has already been made. The recovery of possession was made conditional in respect of this share also on payment of Rs. 3,625-2-0. It will thus be seen that the total sum of money which Raj Narain had to pay to obtain the entire six annas share came to Rs. 5,442-2-0 : vide Ex. 3. To raise this sum of money and also with a view to pay off some previous debt, he executed the mortgage in suit and satisfied the decree with the proceeds thereof. It follows that had the four annas ancestral share not been utilized by Raj Narain as a security for the loan the decree which he had obtained in respect of the two annas share would have remained infructuous and the property would never have come into the possession of the family. We are therefore of opinion that the two annas share in the village of Hariharpur must also be held to be joint family property. We accept the finding of the learned Subordinate Judge that the sum of Rs. 557-14-0 is not proved to have been borrowed by Raj Narain for legal necessity. On the other hand it has also

not been proved that he incurred this debt for any immoral or illegal purpose. The result is that the entire family assets are liable to satisfy the sum of Rs. 557-14 0. Accordingly we modify the decree of the lower Court in respect of this sum of money and in lieu thereof give a simple money decree in favour of the plaintiffs for the amount of Rs. 557-14-0. The rate of interest and other directions given by the lower Court in respect of this sum of money will hold good.

As regards the sum of Rs. 3,000 we agree with the learned Additional Subordinate Judge that it has been proved that the money was paid to one Pandey Ram Sewak out of the proceeds of the mortgage transaction for the purpose of satisfying a previous debt incurred by Raj Narain. We therefore uphold the finding of the learned Additional Subordinate Judge in respect of that sum of money.

As regards interest we see no justification to modify the decree of the Court below. It seems to us to be eminently reasonable.

For the sum of money which is a charge on and payable by the six annas share (i. e., Rs. 8,442-2-0 and interest) we allow six months' time to the appellant for payment from the date of our decree. The usual decree for sale, in respect of the six annas share in suit and in respect of the amount just now mentioned, will be prepared in accordance with the directions contained in the judgment of the Court below and in this judgment. As regards the sum of Rupees 557-14-0, together with the interest the plaintiffs will be given a simple money decree which will be realizable from the family assets by means of proceedings in execution. Except in respect of the matters indicated above the rest of the appeal is dismissed with costs.

The plaintiffs-respondents have filed cross-objections as to the rate of interest allowed by the Court below. We see no reason to interfere with the discretion exercised by that Court in that behalf. Accordingly the cross-objections are also dismissed with costs.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 220

RAZA AND KISCH, JJ.

Jagmohan Tewari—Appellant.

v.

Mahadeo Prasad and *others*—Respondents.

Execution of Decree Appeal No. 25 of 1931, Decided on 30th March 1932, against decree of Sub-Judge, Sultanpur, D/- 21st January 1931.

(a) Civil P. C. (1908), S. 48 — Effect of S. 48 is not to supersede law of limitation—Limitation Act (1908), Art. 182.

To an application for execution of a decree, Art. 182 has first to be applied and if it is found not wanting when tested by Art. 182, then S. 48 will operate as a further test. The effect of S. 48 is not to supersede the law of limitation. It is the Limitation Act (and not S. 48) which prescribes a period of limitation for execution of decrees. S. 48 only fixes an outside period after which execution of a decree, though not barred by the Limitation Act, may not be granted. [P 221 C 2]

(b) Limitation Act (1908), S. 14—Scope.

Section 14 does not help a person who is guilty of negligence, laches, inaction or bad faith. [P 221 C 2]

(c) Civil P. C. (1908), S. 151—Execution application dismissed—It should not be restored under S. 151.

A Court should not make use of the special provisions of S. 151 where a person has his remedy provided elsewhere in the Code and has neglected to avail himself of it. The Court cannot ignore the provisions of the law of limitation or of appeal by appealing to S. 151. Consequently an execution application dismissed should not be restored under S. 151 on decree-holder's application as the order dismissing the application is appealable. [P 222 C 1]

Nainullah—for Appellant.

Ghulam Imam—for Respondents.

Judgment.—This is an appeal from an order of the Subordinate Judge, Sultanpur, dated 21st January 1931, affirming an order of the Munsif, Musafirkhana, at Sultanpur dated 13th October 1930. The order in question was passed in execution proceedings. The facts of the case are sufficiently set out in the judgment of the lower Court and it is not necessary to repeat them in detail.

The first point for determination in this case is whether the application for execution is within time. The decree under execution was passed by the Sialdah Court in Bengal for Rs. 1,451 (including costs) on 30th September 1917. There is no evidence on record to show that any application for execution of the decree was made in any Court before 17th November 1924. The decree was transferred to District Sultanpur by order of the Sialdah Court dated 12th May 1926.

However no steps were taken by the decree-holders for taking out execution of the decree before 6th May 1929. The certificate and the application for execution were filed in a wrong Court at Sultanpur by the decree-holders' agent on 6th May 1929, though the decree had not been transferred for execution to any Court at Sultanpur by the District Court (i.e., District Judge, Fyzabad) as provided by the Civil Procedure Code. The decree-holders applied for execution of the decree by attachment and sale of certain immovable property of the judgment-debtor. It was found that the judgment-debtor had no property within the jurisdiction of the Munsif of Sultanpur. The application for execution was eventually dismissed by the Munsif of Sultanpur on 20th Jauuary 1930. The decree-holders appealed and then it was ordered by the appellate Court that the application should be returned to the decree-holders for presentation to the proper Court. This order was passed on 12th August 1930.

The application for execution was filed in the Court of the Munsif of Musafirkhana at Sultanpur, on 12th August 1930, but the Munsif dismissed the application on that very date as no order for transfer of the decree had been received in that Court and some necessary papers also had not been filed. The Munsif of Musafirkhana however set aside that order on the decree holder's application dated 15th August 1930. The application was thus restored ex parte by an order which purports to be an order "under Ss. 151 and 152, Civil P. C." It should be noted that the decree had not been transferred till then to the Court of the Munsif of Musafirkhana. It was on 30th August 1930 that the District Judge passed the necessary orders on the decree-holders' application for transfer of the decree for execution to the Court of the Munsif of Musafirkhana. Notice was then issued to the judgment-debtor for 11th September 1930. He filed his objections contending that the application for execution was not in order and that it was barred by 12 years and also by 3 years rule of limitation. His objections were however disallowed by the Munsif on 13th October 1930 and his appeal was dismissed by the Subordinate Judge on 21st January 1931. We have heard the learned counsel on both sides at some length. In our opinion this appeal should be allowed.

We have already stated that there is nothing in the record to show that any application for execution of the decree was made to any Court before 17th November 1924. It was for the decree-holders to show that they had kept their decree alive, but they failed to show that the decree was kept alive under Art. 182, Limitation Act. An application for execution will be out of time unless it is made within 3 years from any of the dates mentioned in Col. 3, Art. 182, Limitation Act. To an application for execution of a decree Art. 182 has first to be applied, and if it is found not wanting when tested by Art. 182 then S. 48, Civil P. C., will operate as a further test. The effect of S. 48, Civil P. C., is not to supersede the law of limitation. It is the Limitation Act (and not S. 48, Civil P. C.) which prescribes a period of limitation for execution of decrees. S. 48, Civil P. C., only fixes an outside period after which execution of a decree, though not barred by the Limitation Act, may not be granted. The lower Courts approached the question under consideration from the wrong point of view. They ought to have seen whether the decree-holders had kept the decree alive under the provisions of the Limitation Act. The question of three years limitation must therefore be decided against the decree-holders.

The next question is whether S. 48, Civil P. C., bars the decree-holders' application for execution. It is not disputed that the application for execution was filed in the Court of the Munsif of Musafirkhana more than 12 years after the date of the decree. The decree holders however claim the benefit of S. 14, Limitation Act. In our opinion they are not entitled to claim the benefit of that section in the circumstances of the present case. That section cannot help them when they are guilty of negligence, laches, inaction or bad faith. Having regard to all the facts and circumstances of the case we are not prepared to hold that they had prosecuted their application for execution in the wrong Court in good faith and with due diligence. This question also should therefore be decided against the decree-holders.

The third and last question is the question whether the learned Munsif of Musafirkhana was right in setting aside his own order dated 12th August 1930.

It is not disputed that the order in question was appealable, but no appeal was preferred from that order. We think that the learned Munsif was not right in restoring the decree-holders' application in the circumstances of the present case. In our opinion a Court should not make use of the special provisions of S. 151, Civil P. C., where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it. The Court cannot ignore the provisions of the law of limitation or of appeal by appealing to S. 151, Civil P. C. The result is that we allow this appeal, and setting aside the orders of the lower Courts dismiss the decree-holders' application for execution with costs throughout.

P.N./R.K. *Appeal allowed.*

A. I. R. 1932 Oudh 222

SRIVASTAVA AND NANAVUTTY, JJ.

Murlidhar and *another*—Defendants—Appellants.

v.

Naunihal Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 95 of 1931, Decided on 11th March 1932, against decree of Dist. Judge, Hardoi, D/- 23-12-1930.

(a) Contract Act (1872), S. 69 — Suit for redemption — Mortgagor's representative paying money to representatives of usufructuary mortgagee from original mortgagee to get possession of mortgaged property — Sum so paid can be recovered from representative of original mortgagee—Mortgage.

In a suit for redemption the representatives of the mortgagor were required to pay a certain amount of money to the representatives of the usufructuary mortgagee of a part of the mortgaged property from the riginal mortgagee before he could get possession of the property mortgaged.

Held: that the representatives of the mortgagor could recover the amount so paid from the representatives of the original mortgagee under S. 69. They were persons interested in making the payments and their case came within the meaning of the words "bound by law to pay" in S. 69 of the Act: 4 *Cal.* 369, *Ref.* [P 223 C 2]

(b) Limitation Act (1908), Art. 61—Money deposited in Court—Time runs from date of appropriation and not from date of deposit.

Under Art. 61 limitation of three years is provided from the date when money is paid. But where money is deposited in Court, time runs from the date of its appropriation and not from the date of deposit.

A deposit of money was made on 5th February 1925. There was no appropriation and the deposit was subsequently held to be invalid and insufficient.

Held: that time did not begin to run from 5th February 1925: 48 *I. C.* 336 and 36 *I. C.* 392, *Ref.* [P 224 C 1]

Ishri Prasad—for Appellant.

Radha Krishna—for Respondent 1.

Judgment.—This is an appeal against the decision, dated 23rd December 1930 of the learned District Judge of Hardoi upholding the decision, dated 31st May 1930 of the Munsif North of that place. It arises out of a suit for recovery of a sum of Rs. 600 which the plaintiffs allege to have paid on account of the defendants.

The relevant facts are briefly these; Dilsukh Rai and Lachman Prasad made two mortgages in 1862 and 1866 in favour of Nagnath, predecessor-in-title of the defendants, who are the appellants before us. On 20th June 1892 Gopal and Ram Din, sons of Nagnath, alleging themselves to be full owners of the property made a usufructuary mortgage of some of the plots which had been mortgaged by Dilsukh Rai and Lachman Prasad to their father Nagnath, for a sum of Rs. 600 in favour of Baldeo Prasad. The plaintiffs, who are the legal representatives of Dilsukh Rai and Lachman Prasad, brought a suit for redemption of the mortgages of 1862 and 1866. Defendants 4 and 5, the representatives of Baldeo Prasad, being in possession of a part of the mortgaged property, were impleaded as defendants in this suit. The trial Court held that the representatives of Baldeo Prasad were entitled to be treated as mortgagees from the owner of the property by reason of Art. 134, Lim. Act. The plaintiffs were therefore given a decree for possession on payment of Rs. 50 to the defendants-appellants, the representatives of Nagnath, and Rs. 600 to the representatives of Baldeo Prasad. This decree was confirmed on appeal by the Court of the Additional Subordinate Judge. There was a further appeal to this Court which was decided on 29th October 1926. The result of this appeal was that the plaintiffs were held entitled to redeem only one-third share in the plots; the amount payable to the defendants-appellants was reduced from Rupees 50 to Rs. 25 and the other amount of Rs. 600 payable to the representatives of Baldeo Prasad was maintained unaltered.

The plaintiffs, in pursuance of the decree of the first Court, deposited Rs. 650 for redemption on 5th February 1925 and also made an application for preparation of a final decree which was granted and a final decree was prepared

on 7th August 1926. On 16th September 1929 and 20th September 1929, the defendants-appellants filed certain objections questioning the validity of the deposit made by the plaintiffs on 5th February 1925 and of the final decree prepared on 7th August 1926. Probably, in view of these objections, the plaintiffs on 28th October 1929 made a deposit of Rs. 50 to make up the full amount of the decrees together with costs payable under the decree of the Chief Court and also made an application on the same date for preparation of another final decree on the basis of the decree passed by the Chief Court. Subsequently to this on 9th November 1929 the Court allowed the objections of the defendants-appellants and directed them to apply for restitution of the delivery of possession if they liked. Shortly after this on 17th February 1930, the Court also prepared a fresh final decree for redemption.

The plaintiffs' case was that they were not bound by the mortgage dated 20th June 1892 executed by Gopal and Ram Din sons of Nagnath; but as they were interested in redeeming their mortgages of 1862 and 1866, and were unable to recover possession without paying the money due to Baldeo Prasad's representative's under the mortgage of 20th June 1892 they were entitled to recover the amount of Rs. 600 which they had to pay under the decree passed in the redemption suit from the defendants. The defendants disputed their liability to pay the amount and also pleaded that the claim was barred by limitation. Both these pleas have been negatived by the Courts below.

It has been contended by the learned counsel for the defendants-appellants that S. 69, Contract Act, does not apply to the case as they were not bound by law to pay the sum of Rs. 600 in respect of the mortgage money under the deed dated 20th June 1892 as the mortgage was usufructuary and did not carry with it any personal liability against the mortgagors. We are of opinion that this contention has no substance. The present suit is not one between the parties to the mortgage of 20th June 1892. It is not disputed that the plaintiffs were ordered to pay Rs. 600 in respect of the mortgage of 20th June 1892 to the representatives of Baldeo Prasad before they could get possession of the property mortgaged with him. It is therefore clear that the plaintiffs were interested in making this payment in order to enable them to recover possession of the mortgaged property. It is equally clear that the persons bound to pay this money were the representatives of Gopal and Ram Din. The words "bound by law to pay" in S. 69, Contract Act, are sufficiently wide to include a case like the present. In *Mathuranath Chuttopadhya* v. *Kristo Kumar Ghose* (1), it was held that S. 69, Act 9 of 1872, was intended to include cases not only of personal liability, but all liabilities to payment for which owners of land were indirectly liable, when such liabilities are imposed upon lands held by them. We have therefore no hesitation in agreeing with the lower Court that in the circumstances of the case the plaintiffs are entitled to a decree against the defendants under S. 69, Contract Act.

Next it was argued that the present claim was barred by limitation. It is admitted that the suit is governed by Art. 61, Sch. 1, Lim. Act. This Article provides a limitation of three years from the date when the money is paid. The lower appellate Court has relied on the decisions in *Iqbal Narain* v. *Suraj Narain* (2) and *Annada Mohan* v. *Maniruddin Mahomed* (3) in support of the proposition that for the purposes of Art. 61 limitation runs not from the date of deposit but from the date of its appropriation. In the present case it is impossible to hold that the limitation commenced to run from 5th February 1925 when the sum of Rs. 650 was deposited in Court. As we have pointed out, the validity of this deposit was questioned by the defendants-appellants in their objections dated 16th September 1929 and 20th September 1929. These objections were successful and the Court held that the final decree passed on 7th August 1926 was also invalid. The result of it was that the plaintiffs had to get another final decree prepared on 17th February 1930. They also had to deposit an additional sum of Rs. 50 on 28th October 1929 to make good the full amount payable under the decree of the Chief Court. It is not denied that the amount was not withdrawn by the defendants-appellants

(1) [1879] 4 Cal. 369.
(2) [1918] 48 I. C. 336.
(3) [1916] 36 I. C. 392.

until after 17th February 1930. Under these circumstances it is perfectly clear that there was no appropriation either by the Court or by the defendants appellants until 17th February 1930. In any case the deposit on 5th February 1925 having been held to be invalid and insufficient it is not possible to say that limitation commenced to run from that date. We are therefore of opinion that the Courts below are right in holding that the present suit which was instituted on 29th October 1929 was not barred by Art. 61, Lim. Act, and was well within time.

The appeal therefore fails and is dismissed with costs. We would note that the decree being against the defendants in their capacity of representatives of the deceased Gopal and Ramdin, sons of Nagnath, it will be enforceable only against the assets of Gopal and Ramdin in the hands of the defendants-appellants.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 224

SRIVASTAVA AND NANAVUTTY, JJ.

Secy. of State—Defendant—Appellant.

v.

P. Baij Nath—Plaintiff—Respondent.

First Appeal No. 17 of 1932, Decided on 14th March 1932, against order of Addl. Sub-Judge, Unao, D/- 24th October 1931.

(a) Court-fees Act (1870), Sch. 1, Art. 1 and Sch. 2, Art. 17—Memorandum of appeal under Land Acquisition Act requires ad valorem court-fee.

Memorandum of appeal against the decision by the District Judge on a reference made to him under the Land Acquisition Act, enhancing the amount of compensation requires ad valorem court-fee under Sch. 1, Art. 1 and not Rs. 10 under Sch. 2, Art. 17 (iv). The decision of the District Judge is a decree and as such ad valorem court-fee is payable : *A. I. R.* 1927 *Cal.* 45 and *A. I. R.* 1924 *Mad.* 489, *Foll.*; 17 *I. C.* 764, *Diss. from.* [P 224 C 2]

(b) Court-fees Act (1870), S. 8—Applicability.

Where the Secretary of State does not lay claim to any amount in the land acquisition proceedings, S. 8 does not apply. [P 224 C 2]

G. H. Thomas, Government Advocate—for Appellant.

Judgment.—This is a stamp reference by the office as regards the court-fee payable in respect of the appeal. The relevant facts are that in a case under the Land Acquisition Act the land acquisition officer awarded Rs. 1205-4-4 to the respondent. On a reference made to the District Judge, the amount of compensation was enhanced. The Secretary of State for India in Council has appealed. The amount in dispute in the appeal is Rs. 893-13-6 but a court-fee of Rs. 10 only has been paid on the memorandum of appeal. The office has reported that a court-fee of Rs. 67-8-0 should have been paid on the valuation of the appeal. The learned Government Advocate contests the office report. He contends that under Art. 17 (iv), Sch. 2, Court-fees Act, a court-fee of Rs. 10 is sufficient.

We have heard the learned Government Advocate. We are of opinion that the objection raised by the office is correct and must be accepted. The contention of the learned Government Advocate is no doubt supported by a decision of the Punjab Chief Court in *Secy. of State* v. *Basawa Singh* (1). No reasons have been given in this decision for the view that a case like the present one falls under Art. 17 (iv), Sch. 2, Court-fees Act. With all deference we must dissent from that view. A contrary view has been taken by the Calcutta High Court in the *Secy. of State* v. *K. S. Banerjee* (2), and the Madras High Court in *In re. Assistant Commissioner of Labour*, *A. I. R.* 1924 *Mad.* 489. We are in full agreement with the opinion expressed in these cases. We have little doubt that the decision of the lower Court is a decree and as such an ad valorem court-fee is payable under Sch. 1, Art. 1, Court fees Act. As the Secretary of State did not lay claim to any amount in the land acquisition proceedings, S. 8, Court-fees Act, referred to by the office in support of the report, is inapplicable. We are therefore of opinion that a court-fee of Rs. 67-8-0 should have been paid on the memorandum of appeal. The appellant is allowed three weeks' time to make good the deficiency of Rs. 57-8-0.

K.N./R.K. *Order accordingly.*

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(1) [1913] 57 P. R. 1913 = 17 I. C. 764.
(2) A. I. R. 1927 Cal. 45 = 97 I. C. 140.

A. I. R. 1932 Oudh 225

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Gulab Halwai and *another*—Defendants—Appellants.

v.

Bhagwan Dass and *others*—Plaintiffs—Respondents.

Second Appeal No. 62 of 1931, Decided on 13th October 1931, against decree of Sub-Judge, Sultanpur, D/- 5th January 1931.

Evidence Act (1872), S. 34—Term "regularly kept" is not synonymous with "correctly kept"—It means they should be kept in certain fixed form.

The words "regularly kept" in S. 34 are not synonymous with "correctly kept." The words "regularly kept" only mean that the books of account should be kept in accordance with a certain fixed method or in some customary form. The form "regularly kept" has reference to the system of book-keeping, rather than to the truth or correctness of the entries in the account books: 27 *Cal.* 118 and *A. I. R.* 1928 *P. C.* 243, *Ref.*

[P 226 C 2]

Ali Zaheer, *Bishambhar Nath* and *Bhagwati Nath Srivastava*—for Appellants.

Hyder Husain—for Respondents.

Judgment.—This is a defendants' appeal against the judgment and decree, dated 5th January 1931, of the Subordinate Judge of Sultanpur, modifying the judgment and decree dated 12th February 1929, of the Munsif of that place. It arises out of a suit for recovery of the balance of the price of cloth, grain and sugar supplied to the defendants. The plaintiffs are the owners of a firm which deals in cloth, grain and sugar and carries on money-lending business. The defendants carry on a sweatmeat shop and admittedly used to make purchases from the plaintiffs' firm.

The plaintiffs' case, as disclosed in the plaint as it was amended in the lower appellate Court, is that the accounts between the parties commenced on Magh Sudi 2, Sambat 1979. This account stood in the name of Gulab, defendant 1, alone. It continued up to Jeth Sudi 1980, when the accounts were squared up. Thereafter a new account was opened in the name of both defendants. This account runs from Sawan Badi 1980 to Magh Sudi 12, Sambat 1983. At the end of this period a sum of Rs. 987-9-3 remained due to the plaintiffs from the defendants. A fresh account in the names of both defendants was opened from Baisakh Badi 7, 1984. The sum of Rs. 987-9-3 was brought forward from the defendants' old khata in this new khata. This balance of the second account was paid by Bhadon Badi 1, 1984. Rs. 631-9-6 was alleged to be the balance due on Bhadon Badi 12, 1984, in respect of the last account. This sum, together with interest thereon, total Rs. 868-12 0, was claimed from the defendants.

The defendants admitted the correctness of the last account, but denied the existence of any balance in the second account at the time when the third account was opened. They accordingly contended that they should have been given credit in the last account for all the payments made since the opening of that account and that the plaintiffs had wrongfully credited some of these payments towards the alleged balance of the second account. The plaintiffs produced their daybooks and ledgers in support of their claim and examined two witnesses, P. Ws. 1 and 2, to prove the correctness of the entries in the accounts.

The learned Subordinate Judge held that the evidence of these witnesses corroborated the entries in the acccunt-books. He was also of opinion that the account-books had been regularly kept. He modified the decree of the trial Court only in respect of an item of Rs. 45-2 0, of which no details had been entered in the accounts, and in the result gave the plaintiffs a decree for Rs. 688-2-0 on the basis of the account-books.

It has been strenuously contended on behalf of the defendants-appellants that the account-books of the plaintiffs have not been regularly kept and are not therefore admissible in evidence. The defects pointed out in the account-books are as follows :

(a) In Ex. 2, at p. 42, there is a balance of Rs. 334-13-3 stated to have been transferred to another khata. The page of the ledger is not noted and the amount cannot be traced in it. (b) At the end of one account-book there is an entry of Rs. 13,000 in respect of the profits of the firm, which seems to have been interpolated after the accounts had been inspected by the income-tax authorities. (c). In Ex. 3, the khata for Sambat 1981, at p. 91, there is an account of the defendants, the last debit entry in which is dated Sawan Sudi 10th and the last credit entry is dated Bhadon Badi 14th.

On the same page there is another account of the defendants, which opens with a debit entry of Rs. 962-10-6, dated Sawan Sudi 10th. It has also been pointed out that the entries in the day-book for 10th and 11th Sawan, 1981, have been lumped together, no balance having been struck at the end of the day on 10th Sawan. (d) In Ex. 12, p. 54: there is one entry of Rs. 200 paid by Gulab, defendant 1. In the details noted under this entry it is stated that Rs. 112-9-3 are credited in the old account and Rs. 87-8-9 in the new account. These details have been written with a different pen and appear to be a subsequent interpolation. (e) Lastly, reliance was placed on the fact that according to the statement of P. W. 1 the entries in the day-book were made from the kachcha rokars sometimes after a month or two after the entries are made in the latter.

The first two objections do not concern the defendants' account, but it is contended that as the plaintiffs have not offered any explanation in respect of them, they show that the accounts have not been regularly kept. When P. Ws. 1 and 2 were examined by the defendants they were not questioned in respect of these objections. If they had been question about them it is possible that they might have given satisfactory explanation in respect of them.

The next two objections relate to the defendants' account. P. W. 2, Thakur Din, has stated that on Sawan Sudi 10th the defendants made purchases amounting to Rs. 962-10-6 and desired a new account to be opened from that date. They undertook to square up the existing account, and for this reason the payment made on Bhadon Badi 14th which was intended to liquidate it, was credited to this account. The omission in the day-book to strike the balance on the 10th Sawan, 1981, and to make a separate entry under date 11th Sawan is admitted by the plaintiffs' learned counsel to be a mistake. As regards the fourth objection, the details noted under the entry in question no doubt appear to have been entered subsequently, but looking to the ledger, Ex. 6, at p. 62, we find that a sum of Rs. 112-9-3 has, as a matter of fact, been credited in the second account and Rs. 87-8-9 in the third account.

As regards the statement of P. W. 1 about the entries made in the day-book from the kachcha rokars, it would be enough to say, as remarked by the learned Subordinate Judge, that it simply means that sometimes such a delay occurred but it does not mean that it was generally so.

It is admitted by the learned counsel for the defendants-appellants that the account-books of the plaintiffs had been kept in the course of business. His contention however is that in view of the defects to which reference has been made, it should be held that these books of account have not been regularly kept within the meaning of S. 34, Evidence Act, and that therefore they are not relevant and must be rejected. The contention of the appellants is tantamount to this: that the words "regularly kept" are synonymous with "correctly kept." We are quite clear that the term "regularly kept" cannot be construed in this sense. We are of opinion that the words "regularly kept" only mean that they should be kept in accordance with a certain fixed method or in some customary form. The form "regularly kept" has reference to the system of book-keeping, rather than to the truth or correctness of the entries in the account-books. The books show that the dealings of the firm are as a rule entered from day to day in the day-book. They contain daily totals of the debit and credit entries and a cash balance is struck every day. These entries in the day-books are posted up in the ledger. Out of the entire accounts, ranging over a period of several years, the appellants can point only to one instance in which the balance was not struck on a particular day. Even if it were conceded that there are some minor mistakes in the accounts, we are satisfied that they are not of such a character that it could be said that the accounts have not been regularly kept. The defects may affect the value of the account-books, but cannot make them irrelevant on the ground of their not being regularly kept. The learned Subordinate Judge, after discussing the objections raised in regard to the defendants' accounts, observed that mistakes of a trifling nature would be found in every account-book and that the account-books in the present case could not be disregarded by reason of the mistakes pointed out by the defendants. This clearly means that the learned Subordinate Judge did not attach any value to

the defects pointed out on behalf of the defendants. In *Deputy Commissioner of Bara Banki* v. *Ram Prasad* (1) their Lordships of the Judicial Committee in discussion of a decision of the Bombay High Court, in which it was held that "books of account regularly kept in the course of business" mean books entered up from day to day or from hour to hour as transactions took place, remarked that they were unable to approve of this decision. They observed that it gives a much too limited meaning to :

" S. 34 ..... The time of making entries may affect the value of them, but should not, if not made from day to day or from hour to hour, make them entirely irrelevant."

In a recent case in *Narendra Nath* v. *Abdul Hakim* (2), their Lordships of the Judicial Committee remarked as follows:

" Errors in these accounts and obscurity in the mode of keeping them and of posting the amounts mentioned are more than similar errors and obscurities would be in oral testimony and present the same difficulties in drawing a conclusion ; but that conclusion, when once it is arrived at, is one of fact and no question arises of legal problems turning on the construction of legal instruments, nor does it avail to say that there is no error shown on the face of the accounts and that the system on which they have been kept and the result which they show are quite plain, for that is not to state a question of law but to disagree with the Courts in toto on a matter of fact."

We are therefore of opinion that the question as regards the value to be placed on the account-books was a matter entirely within the province of the lower appellate Court. It is not possible for us to hold that the account-books are irrelevant by reason of the errors or defects set forth above. We must therefore uphold the decision of the lower Court and dismiss the appeal with costs.

B.V./R.K. *Appeal dismissed.*

(1) [1900] 27 Cal. 118=26 I. A. 254=7 Sar. 586 (P.C.).
(2) A.I.R. 1928 P.C. 243=111 I.C. 283=55 I. A. 380 (P.C.).

A. I. R. 1932 Oudh 227

WAZIR HASAN, C. J. AND RAZA, J.

B. Ram Naresh Singh—Appellant.

v.

Chirkut and *another*—Respondents.

Second Appeal No. 34 of 1931, Decided on 2nd March 1932, against order of Sub-Judge, Sultanpur, D/- 29th October 1930.

(a) Evidence Act (1872), S. 90—Court has discretion to raise or not to raise presumption under S. 90—Effect of such presumption stated.

The wording of S. 90 shows that it is not compulsory upon any Court before whom a document purporting or proved to be 30 years old is produced to presume that the said document is genuine. The section only gives a discretion to the Court that if under the circumstances established in a case it considers proper to raise such presumption it can do so. The presumption that arises under S. 90 of the Act only extends to the genuineness of the old documents coming from proper custody; it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority. [P 228 C 2]

(b) Evidence Act (1872), S. 90—Courts should be very careful about raising presumption under S. 90 in favour of old deeds of shankalapnama produced after many years after first settlement.

The Courts should be very careful about raising any presumption under S. 90 of the Act in favour of old deeds of shankalapnama which are produced practically for the first time not at the time of settlement, but during the triai of suits in which under-proprietary rights are set up on the basis of those deeds. [P 228 C 2]

(c) Civil P. C. (1908), S. 107 and O. 41, R. 27—In appeal additional evidence should be admitted very carefully and cautiously.

The appellate Court has a discretion to admit additional evidence for substantial cause but the power given under S. 107 and O. 41, R. 27, of the Code should be exercised very sparingly by Court and grave caution should be exercised in admitting new evidence. Where there is no lacuna or a defect to be filled up or remedied and no substantial cause for taking additional evidence, the so-called additional evidence as it stands, is legally inadmissible and must be left out of consideration in disposing of the case: *A. I. R.* 1931 *Oudh* 298, *Foll.*; *A. I. R.* 1931 *P. C.* 143 and *A. I. R.* 1931 *P. C.* 175, *Ref.* [P 229 C 2]

Ali Zahir, *Ghulam Imam* and *Ganpat Sahai*—for Appellant.

Mahabir Prasad and *H. Husain*—for Respondents.

Judgment.—These two second appeals (Nos. 34 and 35 of 1931) arise out of two suits (Nos. 92 and 93 of 1929), brought by the plaintiffs against Babu Ram Naresh Singh Talukdar of Garabpur (defendant 1) for declaration of their under-proprietary rights in two holdings. One in village Bisuhi and the other in village Ananpur Bhikhaipur in the District of Sultanpur.

The plaintiffs' case was that they and defendants 2 and 3 are entitled to claim under-proprietary rights in the holdings in suit, as the descendants of one Sukh

Lal Misra. Sukhlal had two sons, namely, Ganga and Sarju. The plaintiffs and defendants 2 and 3 belong to the line of Sarju. The line of Ganga became extinct when Ram Das died childless in or about 1926. The plaintiffs allege that they are the legal representatives of Ram Das deceased. Ram Das alone was admittedly in possession of the holdings in suit. He was recorded as a mere tenant of the lands in suit in the village papers. The names of defendants 2 and 3 alone were entered in the village papers as mere tenants of the lands in suit after the death of Ram Das. Neither Ram Das nor any other descendant of Sukh Lal was ever recorded under-proprietor of the lands in suit. The plaintiffs however brought the present suits in 1929 challenging the entries in the village papers and alleging that they and their cosharers defendants 2 and 3 are entitled to claim under-proprietary rights in the lands in suit as against the Talukdar of Garabpur (defendant 1).

The plaintiffs based their title on two old shankalapnamas (Exs. 7 and 15) alleged to have been granted to their ancestor Sukh Lal in the Nawabi time by the then Talukdars of Garabpur. Ex. 7 (of Suit No. 92) is alleged to have been executed by Bakhtawar Singh Talukdar is respect of 11 bighas 5 biswas land in village Ananpur Bhikhaipur on 30th July 1835. Ex. 15 (of Suit No. 93) is alleged to have been executed by Mt. Sheo Kuar Talukdar in respect of 21 bighas 5 biswas land in village Bisuhi on 14th July 1829. It is a peculiar circumstance for which no explanation is forthcoming that no suit was brought at the time of the regular settlement for the purpose of obtaining decree establishing the existence of under-proprietary rights on the basis of the shankalapnama in question. It appears that the plaintiffs claimed under-proprietary rights by virtue of the shankalapnamas in question for the first time in the Revenue Court when they applied for correction of the entries in village papers in the year 1928. Their applications were rejected by the Revenue Court on 3rd March 1928 and then they brought the present suits in May 1929.

The plaintiffs' claim was resisted by the talukdar defendant 1, on various grounds. Defendants 2 and 3, of course, admitted the plaintiffs' claim.

Both the suits were tried together and dismissed by the learned Munsif of Sultanpur on 2nd January 1930. He found that the pedigree on which the plaintiffs relied was not proved, that the pattas (shankalapnamas) set up by the plaintiffs were not genuine, that it was not proved that the alleged pattas were granted by competent persons and that the declaratory suits brought by the plaintiffs on the basis of the pattas in question were not maintainable.

Plaintiffs 4 and 6 alone appealed and their appeals were allowed by the learned Subordinate Judge of Sultanpur on 29th October 1930. He disagreed with the findings of the learned Munsif on all the points mentioned above and decreed the plaintiffs' claim in respect of the holdings in both the villages mentioned above.

Defendant 1 has now come to this Court in second appeal. In our opinion these appeals should be allowed. The principal point for determination in these appeals is whether the shankalapnamas in question (Exs. 7 and 15 mentioned above) were genuine and valid. If this question is decided against the plaintiffs their suits must fail. The learned Subordinate Judge has presumed the shankalapnamas in question to be genuine under S. 90, Evidence Act, disregarding all the entries in the village papers from the time of the first regular settlement up to the present time and the conduct of all the persons who held the lands in suit from time to time before the institution of the present suits. S. 90, Evidence Act, lays down :

> "Where any document, purporting or proved to be 30 years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting, and, in the case of a document executed that it was duly executed and attested by the person by whom it purports to be executed and attested."

The wording of the section shows that it is not compulsory upon any Court before whom a document purporting or proved to be 30 years old is produced to presume that the said document is genuine. The section only gives a discretion to the Court that if under the circumstances established in a case it considers proper to raise such presumption it can do so. The Courts should be very

careful about raising any presumption under S. 90, Evidence Act, in favour of old deeds of shankalap which are produced practically for the first time during the trial of suits in which under-proprietary rights are set up on the basis of those deeds. The grounds on which the learned Subordinate Judge has presumed the deeds in question to be genuine do not appear to us to be good grounds but as he has presumed them to be genuine under S. 90, Evidence Act, we do not think it proper to interfere with his discretion in the matter. The deeds in question as they are may be presumed to be genuine, but the most important question to be decided is how far that presumption can go? We have examined the shankalapnamas in question very carefully. We find that the deeds in question do not purport to have been signed or even marked by the executants. There can be no question of "mark" here as it is admitted that the executants were not unable to write. "Sign" includes "mark" with reference to that person only who is unable to write his name (see S. 3 (52), General Clauses Act 10 of 1897.) As it is admitted that both Mt. Sheo Kuar and Bakhtawar Singh were able to write their names, the deeds in question must have borne their signatures but the fact is that they do not bear their signatures. There are some Hindi writings at the top of the deeds in question but these writings cannot be (or cannot take the place of) their signatures. We do not know in whose handwriting are the said Hindi writings. There is something at the top of Ex. 7 which is said to be a seal but it cannot be deciphered and there is nothing to show that Bakhtawar Singh had a seal and the deed in question bears his seal. Under these circumstances it is impossible to hold that the deeds in question were really executed by the persons by whom they are alleged to have been executed. We are not therefore, prepared to hold that the shankalap pattas in question were really granted to the plaintiffs' ancestor Sukh Lal by Bakhtawar Singh and Mt. Sheo Kuar (respectively) as alleged by them (plaintiffs.)

It is admitted that the plaintiffs failed to establish in the first Court that the grantors of the alleged shankalap pattas were competent to grant them to the plaintiffs' ancestors as alleged by them. It should be borne in mind that the question of competency was specifically raised in defence. The learned Subordinate Judge however admitted additional evidence documentary on the plaintiffs' application and held on the strength of that evidence that the grantors of the shankalap pattas in question had power to grant them to the plaintiffs' ancestor as alleged by them (plaintiffs). He has observed in his judgment as follows:

"But for the evidence now produced before me the power of the grantors could not be established and no delcaration could be granted."

The appellant contends that the learned Subordinate Judge ought not to have allowed the respondents to produce additional evidence in appeal. In our opinion this contention is well founded. As pointed out in the case of *Kazim Husain* v. *Shambhu Nath* (1), the appellate Court has a discretion to admit additional evidence for substantial cause but the power given under S. 107 and O. 41, R. 27, Civil P. C. should be exercised very sparingly by the Court and grave caution should be exercised in admitting new evidence. Where there is no lacuna or a defect to be filled up or remedied and no substantial cause for taking additional evidence, the so-called additional evidence, as it stands, is legally inadmissible and must be left out of consideration in disposing of the case. Since then we have two decisions of their Lordships of the Judicial Committee on the point under consideration.

The following observations were made by their Lordships of the Judicial Committee in the case of *Parsotham Thakur* v. *Lal Mohar Thakur* (2):

"In their Lordships opinion this additional evidence ought not to have been admitted . . . . . ,The provisions' of S. 107, Civil P.C., as elucidated by O. 41, R. 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak part of his case and fill up omissions in the Court of appeal. Turning to the provisions of R. 27, Cl. 1 (a) has no application in the present case. Under Cl. (1) (a) it is only where the appellate Court requires it (i. e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the subclause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the

(1) A. I. R. 1931 Oudh 298=132 I. C. 259.
(2) A. I. R. 1931 P. C. 143=132 I. C. 721=58 I. A. 254=10 Pat. 654 (P.C.).

evidence, as it stands, some inherent lacuna or defect becomes apparent.' This is laid down in the most positive terms by Lord Robertson in *Kessowji Issur* v. *G. I. P. Ry.* (3) He was dealing with the words of S. 568 of the Code, 1882, but they are substantially the same as those in O. 41, R. 27 of the present Code. It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Wherever the Court adopts this procedure, it is bound by R. 27 (2) to record its reasons for so doing, and under R. 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. Their Lordships regret to find that so far as the record discloses, none of these conditions was complied within the present case. Reference has been made in this connexion to certain observations contained in the judgment delivered by Mr. Ameer Ali in *Indarjit Pratab Sahi* v. *Amar Singh* (4). The question in that case was as to the power of the Board to admit additional documents which the High Court had rejected and his power is not in any way restricted or governed by the provisions of the Code. If any incidental remarks appearing in this judgment have occasioned any doubt as to the meaning of the rules above referred to, or the conditions under which the discretion of the appellate Court is to be exercised, their Lordships desire to emphasize their view that the correct practice in the matter is as they have now defined it in accordance with the plain words of the Code."

To the same effect is the decision of their Lordships of the Judicial Committee in the case of *Manmohan Das* v. *Ram Dei* (5). In that case their Lordships had discarded entirely the oral evidence which had been taken by the appellate Court in contravention of the provisions of O. 41, Rr. 27 and 29, Civil P. C.

In the cases before us the plaintiffs had applied for amendment of their plaints and for admission of the additional evidence should their applications for amendment be not granted by the Court. Their applications for amendment were not granted by the learned Subordinate Judge, but he admitted the additionallevidence (documentary) in question. It is difficult to understand what the learned Subordinate Judge meant by noting in the proceedings that the plaintiffs had applied for permission to withdraw from their suits with liberty to bring fresh suits. We find no such applications in the records of the appellate Court. It may be that he took the applications for amendment to be applications for permission to withdraw from the suits with liberty to bring fresh suit. Be it as it may, he admitted the additional evidence in question on the plaintiffs' application without recording his reasons for doing so. It appears that the applications were opposed by the contesting defendant, but they were eventually granted by the Court "for the ends of justice." The defendant also was then allowed to produce some additional evidence in rebuttal. It is clear that the additional evidence in question was not required by the Court. In our opinion the learned Subordinate Judge was wrong in admitting the additional evidence. He ought not to have allowed the plaintiffs to produce additional evidence in appeal and the additional evidence admitted by him must be entirely discarded. The additional evidence in question is legally inadmissible and must be left out of consideration in disposing of these cases. When this evidence is discarded, nothing remains to support the finding of the learned Subordinate Judge that the grantors of the shankalapnamas in question had power to grant them to the plaintiffs' ancestor in respect of the holdings in suit. The presumption that arises under S. 90, Evidence Act, only extends to the genuineness of the old documents coming from proper custody; it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority.

The result is that we allow these appeals and setting aside the decrees of the learned Subordinate Judge restore those of the learned Munsif. The appellant will get his costs from the respondents in all the Courts.

B.V./R.K. *Appeals allowed.*

(3) [1907] 31 Bom. 381=34 I. A. 115 (P.C.).
(4) A. I. R. 1923 P. C. 128=74 I. C. 747=50 I. A. 183=2 Pat. 676 (P.C.).
(5) A. I. R. 1931 P. C. 175=134 I. C. 669.

A. I. R. 1932 Oudh 230

RAZA, J.

Ajudhia Prasad Lalji—Defendant—Applicant.

v.

Dulichand Binaek Ram—Plaintiff—Opposite Party.

Civil Revn. Appln. No. 91 of 1931, Decided on 2nd March 1932, against order of Munsif, Kheri, D/- 12th September 1931.

Provincial Small Cause Courts Act (1887), S. 25—Powers are discretionary—Point not

taken in lower Court cannot be allowed in High Court.

Section 25 does not give any right of appeal on law or fact and powers conferred by the section are purely discretionary and not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Small Cause Court, and no plea which was not taken in the Court below can be allowed to be taken in revision before the High Court : 15 *O. C.* 319, *Ref.* [P 231 C 1]

Ganga Prasad Bajpai—for Applicant.

Gokul Chand—for Opposite Party.

Judgment.—This is an application in civil revision under S. 25, Small Cause Courts Act. I have heard the applicant's learned counsel at some length. In my opinion there is no substance in this revision. It should be borne in mind that S. 25, Small Cause Courts Act, does not give any right of appeal on law or fact and the powers conferred by the section are purely discretionary and not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Small Cause Court: see *Raghuraj Singh* v. *Sahib Din* (1). The applicant cannot be allowed to take any plea before this Court which was not taken in the Court below. I am not satisfied that any substantial injustice has resulted from the decree of the Court of Small Causes in this case. The Judge has tried the case carefully. I can find no ground for interference and dismiss the application with costs.

K.N./R.K. *Application dismissed.*

(1) [1912] 15 O. C. 319=17 I. C. 470.

A. I. R. 1932 Oudh 231

KISCH, J.

Mrs. Jane Julius—Applicant.

v.

Mr. Aziel Julius—Opposite Party.

Divorce Case No. 11 of 1931, Decided on 11th April 1932.

Divorce Act (1869), S. 22—Judicial separation—Cruelty and not mere disagreement between husband and wife is sufficient ground for judicial separation—To constitute cruelty there must be danger or a reasonable apprehension of danger to life, limb or health, bodily or mental.

Ordinarily an isolated assault can scarcely be held to constitute cruelty which would entitle the wife to a decree for judicial separation. To constitute cruelty there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. Cruelty, and not mere disagreement between husband and wife, is sufficient ground for judicial separation under S. 22. The fact that parties cannot agree and the wife would rather take an allowance and live apart from her husband is no ground for judicial separation and it is not the object of law to make such separation easy: *A. I. R.* 1928 *Oudh* 114, *Foll.* [P 233 C 1]

Ducking wife's head in a cistern of dirty water held not sufficient for judicial separation. [P 233 C 1]

Moti Lal Saksena—for Petitioner.

H. G. Walford and *S. D. Misra*—for Opposite Party.

Judgment.—This is the application of Mrs. Jane Julius for a decree of judicial separation from her husband, Mr. Aziel Julius, for the custody of the daughter of the marriage aged six years and for alimony which is claimed at half of her husband's salary. Mr. Julius is employed in the Telegraph Department and admits to receiving a net salary after all deductions of about Rs. 160 per mensem.

The case is a very unfortunate one. The parties were married at Benares in 1920 and in 1926 Mrs. Julius left her husband's protection. One of her grievances was that her husband had given his affection to another woman. The matter came to Court in the form of two different applications made by Mrs. Julius for maintenance under S. 488, Criminal P. C., but the matter was compromised. Mr. Julius' fault was condoned and the parties resumed cohabitation. In the next year the parties were in Agra and again Mrs. Julius left her husband's protection. They made it up after some months and resumed cohabitation. In 1929 they were in Lucknow and Mrs. Julius left her husband's protection. A committee was convened in which the padres of the Indian Christian community took part and they decided that it would be better if the parties lived apart and that Mr. Julius should give his wife a fixed monthly allowance for her maintenance. Mrs. Julius was not satisfied with the amount of maintenance fixed by the committee and brought a suit for judicial separation in this Court. After the petitioner's evidence had been recorded, Mr. Julius consented to a decree for judicial separation and intimated that he was prepared to pay a reasonable sum for the maintenance of his wife and daughter.

The Court fixed the sum of Rs. 30, for the wife and Rs. 10, for the daughter the amount to be increased when the daughter reached school-going age. This decree was passed on 7th September 1929. Friends of the parties again intervened and the parties came together after Mr. Julius had executed an agreement on 5th

December 1929 in which he took upon himself the blame for the previous differences between the parties, expressed his desire to have his child and wife back and agreed to various conditions which are set out in the document. In July 1930 Mrs. Julius left his protection again, but she returned in November 1930 and left him again in June 1931. The occasion of her leaving him on the last occasion is said by the petitioner to be that as a result of a dispute over the care of the child, who was suffering from fever, Mr. Julius lost his temper with her and after pursuing her to a godown in which she locked herself up he subsequently pursued her again and ducked her head in a tank of dirty water in the compound. She left the house and thereafter obtained possession of the child and has been living apart from her husband ever since.

The present proceedings started on an application of Mr. Julius to have the decree of this Court for judicial separation annulled on the ground that the parties had resumed cohabitation after the decree. This was allowed by the order of this Court dated 5th December 1931 and the pending application of Mrs. Julius for execution of the decree for alimony was dismissed. Mrs. Julius however was at her request allowed to treat her written statement in reply to the application for annulment of the decree as a fresh application for judicial separation on making good the necessary court-fee.

It is noteworthy that on every occasion on which Mrs. Julius left her husband's house she alleged that he had beaten her and turned her out, but that she has not been able to substantiate the allegation of her husband having offered any violence to her on any occasion with the one exception of the ducking of her head in a cistern on the last occasion. Even this is denied by the respondent, but I hold it to be proved on the evidence. In her petition she alleged that when she left her husband's house in July 1930 it was because her husband had beaten her, but in her evidence she said that he had only threatened to beat her. When she left her husband's house in Agra in 1927 she came away armed with several writings by her husband saying that he was allowing her to go which were exhibited in the former case in this Court and have also been proved in this case. Her allegations that her husband beat her and turned her out have not been satisfactorily established in any single instance, and, as has been noted above, the only action of violence that has been proved in the case is her husband's ducking her in the cistern. It was on ground other than strictly legal grounds that Pullan, J., gave a decree for judicial separation in the previous case. He has definitely held, and after perusing the whole of the evidence in that case it is impossible to see how he could have come to any other conclusion that he could not find that the respondent had been guilty of any great cruelty, but the fact appears to be merely that he and his wife cannot agree.

This is not a sufficient ground for a judicial separation under S. 22, Divorce Act. I prefer the decision of the same Hon'ble Judge in *Foster* v. *Foster* (1) in which he held that the fact that a wife would rather take an allowance and live apart from her husband is no ground for judicial separation, and that it is not the object of the law to make such separations easy. In the present case it is contended on behalf of the petitioner that when a case for judicial separation is revived on the ground that previous acts of cruelty have been condoned by the parties resuming cohabitation very slight evidence will be sufficient to establish legal cruelty sufficient to support a fresh decree, but I have already observed that the petitioner had failed to establish legal cruelty at the time of the former decree. The evidence of the witnesses produced by the petitioner in the previous case and the evidence of one of the witnesses produced by the respondent in this case, namely Mr. Robinson, are in agreement that the real cause of disagreement between the parties is known only to themselves. Mr. Julius says that it is due to disputes over money and certainly money figures very prominently in the agreement of 5th December 1929, while in applying for execution of the previous decree of this Court Mrs. Julius sought to obtain arrears of maintenance not only for the period when she was living apart from her husband, but also for the two periods aggregating 15 months during which she was admittedly living under his roof and maintained by him.

It would appear from what has been said above that the only act of cruelty

(1) A. I. R. 1928 Oudh 114=107 I. C. 184.

that the petitioner has been able to establish is the fact that her husband ducked her head in the cistern of dirty water on the day that she left her husband's house on the last occasion. The reason for the dispute that led up to this assault is common ground, namely, charges by the husband and counter-charges by the wife that the child was not being properly looked after in its illness. There is nothing to show which of the parties was right, and an isolated assault under such circumstances can scarcely be held to constitute cruelty which would entitle the wife to a decree for judicial separation. It has been repeatedly laid down that to constitute cruelty there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. The evidence produced by the petitioner in this case falls very short of satisfying this test. The abject nature of the agreement executed by Mr. Julius on 5th December 1929 and certain other documents filed in the previous case would seem to show that the petitioner has got the whip-hand of him, and it is unfortunate that the previous decree of this Court, which was hardly justified by law, has given her the impression that she can on any provocation by her husband oblige him to support her if she wishes to live apart from him. For the above reasons I am unable to grant the petitioner a decree for judicial separation and Mr. Julius has the right to the custody of his child. He is willing to take her back and she would be well advised to return to him. The petition is accordingly dismissed. No order as to costs.

B.R./R.K. *Petition dismissed.*

A. I. R. 1932 Oudh 233

SRIVASTAVA AND NANAVUTTY, JJ.

Mohammad Ayub Khan—Defendant—Appellant.

v.

Mt. Gauhar Begam and *another*—Plaintiffs—Respondents.

First Appeal No. 2 of 1931, Decided on 8th March 1932, against decree of Addl. Sub-Judge, Lucknow, D/- 23rd September 1930.

Mahomedan Law — Gift — Marzulmaut—Essential condition of Marzulmaut is that person suffering from it must be under preponderence of apprehension of death—This fact should be proved like any other fact.

An essential condition of marzulmaut is that the person suffering from it must be under a preponderance of apprehension of death, or in other words, there must be the subjective feeling in the mind of the patient that he is not going to recover. This fact is to be proved like any other fact. The statements, if any, made by the patient giving expression to his apprehensions, would no doubt constitute valuable evidence but apart from such statements, the fact can be proved in other ways. For instance, the nature of the illness and condition of the patient constitute external indicia which can afford valuable evidence on the point : 3 *C. W. N.* 57 ; 35 *Cal.* 1 (*P.C.*) ; 35 *Cal.* 271 (*P.C.*) ; *A. I. R.* 1926 *Cal.* 401 and *A. I. R.* 1929 *Lah.* 721, *Ref.*

[P 234 C 2]

Ghulam Hasan for *Iftikhar Husain*—for Appellant.

M. Ayub, *Mahomed Husain* and *P. L. Varma*—for Respondents.

Judgment.—This is a defendant's appeal against the judgment and decree dated 23rd September 1930 of the Additional Subordinate Judge of Lucknow. It arises out of a suit based on inheritance.

One Mohammad Ismail Khan a Mahomedan of the Hanafi faith who owned certain zamindari properties, died issueless on 13th August 1929. He left a sister, Mt. Gauhar Begam, plaintiff, and a brother Mohammad Ayub Khan, defendant, surviving him. The plaintiff claimed a decree for a one-third share in the zamindari properties left by the deceased Mohammad Ismail Khan.

The defendant resisted the claim on the ground that on 6th August 1929, just a week before his death, Mohammad Ismail Khan had executed a deed of wakf alalaulad in respect of his entire properties. The deed provided that Mohammad Ismail Khan himself was to be the first trustee and after him his brother Ayub Khan, defendant, and his male heirs were to be the trustees of the property. He also pleaded that according to a family custom, sisters were excluded from inheritance in competition with the brothers.

The plaintiff denied the genuineness of the deed of wakf and challenged it on several grounds, only one of which is material for the purpose of this appeal, namely, that it was executed during marzulmaut. She also denied the alleged custom about the exclusion of sisters from inheritance.

The learned Subordinate Judge held the custom of exclusion of sisters in the presence of brothers not proved. As regards the deed of wakf, he held that it was genuine, but was executed during

marzulmaut. All the other grounds set up by the plaintiff against the validity of the deed of wakf decided against the plaintiff. As a result of the finding that the deed of wakf was executed during marzulmaut the learned Subordinate Judge held that it was good only to the extent of one-third of the property and that the remaining two-thirds was available for division between the parties according to their shares in the inheritance. He accordingly decreed the plaintiff's claim for a one-third share out of two-thirds in the immovable property left by Mohammad Ismail Khan.

Thus the only question raised by the defendant-appellant is as regards the correctness of the lower Court's finding on the question of the deed of wakf having been executed during marzulmaut. Whatever obscurity or difference in regard to the interpretation of the principles governing the law of marzulmaut might have existed amongst Mahomedan jurists, the law on the subject has now been sufficiently settled by a number of judicial decisions.

In *Hassarat Bibi* v. *Golam Jaffar* (1) a Bench of the Calcutta High Court consisting of Ameer Ali and Pratt, JJ., observed as follows :

"A careful study of the principles enunciated in the most authoritative Hanafi works would show that in determining whether the donation of a person suffering from a mortal illness comes within the doctrine applicable to marzulmaut gifts, several questions have to be considered, viz. : (1) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death ? (2) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender in him the apprehension of death? (3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create on the mind of the sufferer an apprehension of death ? (4) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady ? The limit of one year mentioned in the law books does not, in our opinion, lay down any hard and fast rule regarding the character of the illness; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of a mortal illness."

In *Ibrahim Goolam* v. *Saiboo* (2), where certain deeds of gift were attacked on the ground of their having been executed during marzulmaut, their Lordships of the Judicial Committee remarked as follows :

"The law applicable is not in controversy ; the invalidity alleged arises where the gift is made under pressure of the sense of the imminence of death.

The difficulty is in applying this to the settled and conjectural problem of the mental condition of the testator in each case."

Again in *Fatima Bibi* v. *Ahmad Bakhsh* (3) their Lordships of the Judicial Committee held that where the issue is raised as to the invalidity of a gift under the Mahomedan law of marzulmaut, a right test is whether the deed of gift was executed by the donor under apprehension of death. In *Karimanissa Bibi* v. *Hamedulla* (4) Mukerji, J., after an elaborate discussion of the original texts and the decided cases, held that the crucial test as settled by the authorities was whether there was an apprehension of death in the mind of the donor. He further observed that the possession of one's senses and faculties was no index of this apprehension. In *Rashid-ud-din Khan* v. *Nazir-ud-din*, *A.I.R.* 1929 *Lah.* 721, Agha Haidar, J., held that the crux in all these cases is to find out the state of the mind of the deceased in order to ascertain whether there was such a preponderance of apprehension of death at the time of the execution of the deed in question that death seemed to him more probable than life.

Thus the law seems to be clear that an essential condition of marzulmaut is that the person suffering from it must be under a preponderance of apprehension of death, or, in other words, there must be the subjective feeling in the mind of the patient that he is not going to recover. This fact is in our opinion to be proved like any other fact. The statements, if any, made by the patient giving expression to his apprehensions, would no doubt constitute valuable evidence but apart from such statements, the fact can in our opinion be proved in other ways. For instance, the nature of the illness and condition of the patient constitute external indicia which can afford valuable evidence on the point.

Next we have to examine the evidence in the light of the law as stated above. Our task has been considerably lightened by the careful and well-balanced manner

(1) [1899] 3 C. W. N. 57.
(2) [1908] 35 Cal. 1=34 I. A. 167=4 L. B. R. 154 (P.C.).
(3) [1908] 35 Cal. 271=35 I. A. 67 (P.C.).
(4) A. I. R. 1926 Cal. 401=90 I. C. 218.

in which the question has been dealt with by the learned Subordinate Judge. It is admitted that the deceased Mohammad Ismail was seventy years old at the time of his death. It is in evidence and is not disputed that he had led a life of profligacy. Even at the time of his death he had a prostitute as his mistress and had been living in her house. It is the defendant's own case that for twelve or thirteen months preceding his death, he had been ill, but we are satisfied that the particular malady which resulted in his death commenced only a few months before his death. (After discussing the evidence regarding the death illness, their Lordships proceeded). We do not consider it necessary to discuss the evidence of each witness. The evidence was read to us at length by the counsel for the appellant. After making every allowance for exaggeration, the conclusion reached by us as a result of the examination of the entire evidence is that the condition of Mohammad Ismail Khan continued to grow worse day by day since he was brought to Lucknow ; that he was practically starving, had given up even taking medicines and had grown every weak. P. W. 4, Dawar Ali, is the Sub-Registrar who was called to register the deed of wakf on 12th August 1929. When he reached the house, he found that Mohammad Ismail was not in his senses and therefore refused to register the deed. It is true that this statement relates to the condition of Mohammad Ismail Khan a week after the execution of the deed of wakf, but the defendant Ayub Khan, in his statement as D. W. 2, has stated as follows :

"I do not remember how many times in the week from 6th to 13th August did he suffer in the same way in which he was suffering on 12th August when the registration was refused. He was in the same condition on the 9th, 10th, 11th and 12th August, with the only difference that on 12th August he was still weaker. On the 6th, 7th and 8th too his condition was the same as on the 12th with the only difference that on the 12th he was feeling still weaker."

Thus having given our careful consideration to all the evidence and circumstances of the case, we find no difficulty in agreeing with the learned Subordinate Judge that the condition of Mohammad Ismail on the date of the execution of the deed of wakf was serious, that he was and must have been under an apprehension of the imminence of death. We must therefore uphold his finding that the deed in suit was executed during marzulmaut.

The plaintiff-respondent has filed cross-objections impugning the findings given against her. The only point urged in support of the cross-objections by the learned counsel for the plaintiff was that the learned Subordinate Judge having held that the wakf deed was executed during marzulmaut and therefore could take effect only as a will, was wrong in holding that it was enforceable with regard to one-third of the property. His argument is that the deed in question being in favour of the defendant who was an heir of Mohammad Ismail under the Mahomedan law ought to be held wholly invalid. This is a new plea which was not raised in the lower Court but even on the merits we think that the contention has no force. The deed of wakf only appoints the defendant as a mutawalli after himself. The fact that the defendant as a trustee will be in a position to derive certain benefits does not make it a disposition of property in his favour. We must accordingly overrule the contention.

The result therefore is that we uphold the decision of the lower Court and dismiss the appeal and the cross-objections with costs.

B.V./R.K. *Appeal dismissed.*

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* * A. I. R. 1932 Oudh 235
Full Bench

WAZIR HASAN, C. J., SRIVASTAVA AND RAZA, JJ.

Kunwar Bahadur—Defendant—Appellant.

v.

Suraj Bakhsh — Plaintiff — Respondent.

Second Appeal No. 117 of 1931, Decided on 21st April 1932, against judgment and decree of Addl. Sub-Judge, Hardoi, D/- 28th February 1931.

*** * Evidence Act (1872), S. 91 — Money lent on pro-note — Pro-note insufficiently stamped and hence inadmissible — Creditor can recover his money in spite of S. 91 by orally proving advance—Contract Act (1872), Ss. 62 and 70—Promissory Note.**

In spite of the provisions of S. 91, it is open to the party who has lent money on terms recorded in a promissory note which turns out to be inadmissible in evidence for want of proper stamp duty to recover his money by proving orally the advance of the loan. Oral evidence to prove the terms of the contract however is inadmissible : *A. I. R.* 1924 *Cal.* 452 and *A. I. R.* 1924 *P. C.*

50, *Expl.* and *Dist.*; *A. I. R.* 1931 *All.* 183, *(F. B.), Diss. from.* [P 240 C 1]

Ali Zaheer & H. Husain—for Appellant.

H. D. Chandra—for Respondent.

Order of Reference

Wazir Hasan, C. J. and Kisch, J.—The decision of this appeal involves the determination of the question whether a person who has lent a sum of money on terms recorded in a promissory note, which being insufficiently stamped is inadmissible in evidence, can fall back on the factum of the loan and prove the loan independently of such promissory note.

The trend of the decisions of the late Court of the Judicial Commissioner of Oudh and of this Court has been that it is so open to a plaintiff to rely on the factum of the loan, if he can prove the same independently of the promissory note. In *Dwarka* v. *Idu* (1), a case of the late Court of the Judicial Commissioner of Oudh, and in *Nankhu Singh* v. *Girja Bux Singh* (2), a case of this Court, the loan was advanced and the promissory note executed at one and the same time, but nevertheless it was held that the loan could be proved aliunde when the promissory note itself has been held to be inadmissible in evidence. In *Bahadur Khan* v. *Abbu Saheb* (3), a case of the late Court of the Judicial Commissioner of Oudh, and in *Aijaz Husain* v. *Ram Sarup* (4), a case of this Court, the promissory note was obtained by way of acknowledgment of an earlier debt that would have otherwise become time-barred. In these cases it was held that the plaintiff could be allowed to fall back upon the original liability. In a recent case decided by a Full Bench of the Allahabad High Court, *Nazir Khan* v. *Ram Mohan* (5), a distinction has been drawn in this class of cases between cases where the transaction is separable from the promissory note and cases where the execution of the promissory note and the payment of the money are part and parcel of the same transaction, it being held that in the former case the debt could be proved, although the promissory note was not admissible in evidence, while in the latter case it could not and the suit must fail if the promissory note itself be inadmissible in evidence. This distinction between the two classes of cases does not appear to have been considered by this Court, and we think that it is desirable that the point should be referred to a Full Bench of this Court under S. 14 (1), Oudh Courts Act, 1925.

We accordingly refer the following question for decision to a Full Bench of this Court :—

"Whether it is open to the party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in the face of the provisions of S. 91, Evidence Act."

Opinion

Srivastava, J.—On 12th March 1927, the plaintiff advanced Rs. 700 to the defendant and obtained from him a pro-note for that amount carrying interest at two per cent per mensem. Simultaneously with the execution of the pro-note, the defendant also executed a receipt for the amount of the loan. The pro-note and the receipt both bear a one anna stamp.

The suit which has given rise to this appeal was instituted by the plaintiff to recover Rs. 1,200, due in respect of the above mentioned loan. As on the date of the execution of the pro-note, a stamp duty of two annas was payable in respect of it, the trial Court held that the pro-note was insufficiently stamped, and was therefore inadmissible in evidence. The plaintiff fell back on the receipt and the alleged payment of Rs. 700 in cash at the time of the transaction. He examined himself and two other witnesses to prove the fact of Rs. 700 having been advanced by him in cash to the defendant and that interest was agreed to be paid at Rs. 2 per cent per mensem. The defendant denied having borrowed any money and alleged that his signatures on the pro-note and the receipt had been obtained by force.

The trial Court disbelieved the plaintiff's evidence and held that he had failed to prove the alleged advance of Rs. 700 in cash and dismissed the suit. On appeal the learned Subordinate Judge disagreed with the trial Court and held the loan proved. He accordingly decreed the suit and gave the plaintiff a decree for

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(1) A.I.R. 1924 Oudh 249=74 I.C. 813=26 O.C. 361.
(2) A.I.R. 1929 Oudh 399=119 I.C. 865.
(3) A.I.R. 1921 Oudh 100=61 I. C. 203=24 O. C. 137.
(4) A.I.R. 1931 Oudh 54=130 I.C. 347.
(5) A.I.R. 1931 All. 183=133 I.C. 307=53 All. 844 (F.B.).

Rs. 1,200 with future interest at six per cent. The defendant came to this Court in second appeal. One of the contentions urged before the Division Bench which heard the appeal was that the pro-note being inadmissible in evidence and on the plaintiff's own showing the advance of the loan and the execution of the pro-note having taken place at one and the same time, the plaintiff was not entitled to prove the loan independently of the pro-note. Thereupon the Division Bench referred the following question for decision to a Full Bench:

"Whether it is open to the party who has lent money on terms recorded in a promissory note which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract in the face of the provisions of S. 91, Evidence Act."

It has been conceded on behalf of the appellant, that where the transaction of loan is a distinct and separate transaction which is separable from the pro-note the creditor can be allowed to recover on the original consideration even if the promissory note is for any reason inadmissible in evidence. He has however contended strongly that in a case like the present, where the execution of the promissory note and the payment of the consideration are part and parcel of the same transaction, if the pro-note is inadmissible in evidence, no evidence aliunde can be admitted to prove the debt. The relevant portion of S. 91, Evidence Act, is as follows:

"When the terms of a contract . . . . have been reduced to the form of a document . . . . no evidence shall be given in proof of the terms of such contract . . . . except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions here inbefore contained."

The section is based on the rule that the best available evidence must always be produced. It lays down that where the terms of contract have been reduced to the form of a document that document is the only evidence which the law will recognize in proof of the terms of the contract unless it is shown that secondary evidence is admissible. Admittedly no ground exists in the present case for reception of secondary evidence. The result therefore of the pro-note being inadmissible in evidence by reason of its being insufficiently stamped, is that no evidence can be given in proof of the terms of the contract embodied in the promissory note.

The next and, to my mind, the more important question is what are the terms of such a contract? There can be no doubt that the agreement about the money being payable on demand, and about the loan carrying interest at 2 per cent per mensem, constitute terms of the contract. It is clear that no evidence de hors the instrument can be admitted to prove these terms. However, if the plaintiff wants to prove only the fact of the loan, can it be said that S. 91 excludes evidence in respect of it? Or, in other words, does the section debar the plaintiff even from proving the fact that on 12th March 1927 he advanced Rs. 700 in cash to the defendant as a loan? The answer to the question depends on whether this fact can be regarded as a term of the contract embodied in the pro-note. In *Probat Chandra Gangapadhya* v. *Chirag Ali* (6) it was held that the consideration of the contract was different from the terms of the contract itself and that S. 91 therefore did not prevent the defendants from giving evidence of the consideration for a kabuliyat executed at an enhanced rent. In my opinion the factum of a contract is a matter quite distinct from its terms. S. 91 excludes parole evidence about the terms but not about the factum of the contract. Thus in the case of the transaction in suit I find it difficult to understand how the fact of the advance of the loan or the amount of the loan can be regarded as one of the terms of the pro-note. If it is not so, then the path of the plaintiff is clear. In the case of every loan there is a presumption of an implied contract to repay the loan. The plaintiff therefore even though he is unable to prove that the loan was payable on demand, can claim a decree for the money lent on the basis of the implied promise of repayment implicit in the loan. Of course in such a case he would be debarred from proving the rate of interest agreed upon and embodied in the pro-note.

I think it is possible to go a step further. Assuming, but not admitting, that the fact of the advance of Rs. 700 as a loan can by any strength of reasoning be regarded as a term of the pro-note, I have no manner of doubt that there is nothing in S. 91 to prevent the plaintiff from giving evidence to prove that at the time

(6) [1906] 33 Cal. 607=4 C. L. J. 320=11 C. W. N. 62.

of the transaction the plaintiff paid a sum of Rs. 700 in cash to the defendant. The mere fact of a particular sum of money having changed hands from the plaintiff to the defendant cannot in any sense be regarded as a term of the contract. If this fact is proved, it should be enough to shift the onus on the defendant to establish his right to retain the money. Unless the defendant succeeds in showing that the payment was made in discharge of any previous liability or that he is otherwise entitled to retain it, I can see no reason why the plaintiff should not be able to claim repayment of the money. On this line of reasoning also even if the pro-note is inadmissible in evidence, the plaintiff can recover the principal sum advanced by him if he succeeds in proving the fact of payment of the money to the defendants.

Turning now to the case law: there is a consensus of opinion that where there is a loan independent of the pro-note, S. 91 does not debar the plaintiff from proving the debt even though the pro-note is inadmissible. However in cases where the promissory note is executed at the time of the loan, there is considerable divergence of judicial opinion whether the plaintiff can be allowed to set up a claim independent of the note if the promissory note is not admissible in evidence. I will therefore confine myself to a discussion of cases of the latter class.

In *Farr* v. *Price* (7) an action was brought on a promissory note. The only evidence produced at the trial was the note itself which was objected to as not being properly stamped. A verdict was given for the plaintiff reserving the question of law for the opinion of the Court. Subsequently a rule was issued calling on the plaintiff to show cause why the verdict should not be set aside and a new trial held. Lord Kenyon, C. J., holding that the promissory note not being properly stamped could not be given in evidence, made the rule absolute. He then observed that

"as there were other general counts in the declaration, if the plaintiff could give other evidence of a consideration paid by him to the defendant, he would not be concluded from recovering by the fact of the defendant's having given this imperfect promissory note for it."

There is a foot-note appended to the report which runs as follows:

"Where a promissory note had been given for money lent, but when produced in Court was unstamped; Lord Kenyon, C. J., permitted the plaintiff to recover on common count for money lent by proving that when the money for which the note had been given was demanded of the defendant he acknowledged the debt. . . ."

In my opinion this case supports the view taken by me above.

In *Sheikh Akbar* v. *Sheikh Khan* (8), Garth, C. J., held that

"when the original cause of action is the bill or note itself and does not exist independently of it, as, for instance, when in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money."

The learned Judge made reference to the case of *Farr* v. *Price* (7) and observed that

"all that Lord Kenyon ruled was that if on the new trial the plaintiff could prove his claims under the common counts, that is to say, independently of the note he might recover."

With all respect the case further shows that Lord Kenyon did not think that evidence independent of the note regarding payment of consideration was inadmissible by reason of the execution of the note. In a later case *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (9), Petheram, C.J., took a contrary view, and referring to the remarks of Sir Richard Garth, quoted by me observed as follows:

"Those words taken alone may seem to indicate that when a bill or note is taken for a debt, the action must be brought upon the bill or note, and that if for any reason the document is excluded, the action must fail; but a reference to the earlier portion of the judgment shows that such was not the meaning of the Chief Justice and that when he spoke of a deposit he did not mean a loan, as he then says where money is lent and a bill or note given for the loan which is not paid at maturity, the creditor may disregard the note and sue on the original consideration."

The case of *Dula Meah* v. *Abdul Rahman* (10) was that of a bond which was proved to have been materially altered by the plaintiff. This circumstance gave rise to considerations which have no application to the present case. But reliance was placed on the following two sentences in the judgment of Rankin, J.:

(7) 1 East. 55=5 R. R. 515.

(8) [1881] 7 Cal. 256=8 C. L. R. 528.
(9) [1896] 23 Cal. 851.
(10) A. I. R. 1924 Cal. 452=81 I.C. 641.

"Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence; Evidence Act, S. 91. Moreover where there is an express promise, an implied promise will not be inferred."

I agree with the observations contained in the first sentence, but as regards the second I can see no reason why an implied promise should not be inferred when the express promise has failed and has been excluded from evidence.

The Madras High Court in *Yarlagadda Veera Ragavayya* v. *G. Ramayya* (11) and in *Muthu Sastrigal* v. *Visvanatha Pandarasannadhi* (12) have held that if the original cause of action is the note itself, no suit is maintainable independent of the note if it is found to be inadmissible in evidence. In the last of these cases it was observed that where the note is inadmissible for want of a stamp, to allow a suit as one on account for money had and received, concealing the real contract of loan which had been reduced to the form of a document would nullify S. 91, Evidence Act. With due deference the question really is whether evidence relating to money had and received is to be regarded as evidence relating to a term of the contract. This aspect of the case does not seem to have received the consideration which it deserved. On the contrary the learned Judges who decided the latter case seem to have been considerably influenced by the course of earlier decisions in their Court.

The Lahore High Court in *Chanda Singh* v. *The Amritsar Banking Co.* (13), has also held that the plaintiff cannot sue except on the instrument when the original cause of action is the instrument itself and does not exist independently of it. The point of view based upon the consideration whether the fact of payment of a sum of money can be regarded as a term of the contract does not seem to have been considered by the learned Judges who decided the case.

In the Allahabad High Court the course of decisions on the subject has not been uniform. In *Parsotam Narain* v. *Taley Singh* (14), Aikman, J., held that where money is lent on terms contained in a promissory note given at the time of the loan, if the promissory note is not admissible in evidence, the lender is not entitled to set up a case independent of the note. Stanley, C. J. and Knox, J., took a contrary view in *Banarsi Prasad* v. *Fazal Ahmad* (15). They held that in such a case, even though the promissory note was inadmissible, the evidence of the debt was admissible aliunde. The same view was taken in a later case in *Ram Sarup* v. *Jasodha Kunwar* (16) by Richards, C. J.. and Banerji, J. In the recent Full Bench decision in *Nazir Khan* v. *Ram Mohan* (5), a Full Bench consisting of Mears, C. J. and Mukerji and Young, JJ., has again reverted to the view taken by Aikman, J., in *Parsottam Narain* v. *Talay Singh* (14). In view of the reasons stated by me in the earlier part of this judgment, I find myself unable to follow this case. I can see nothing in S. 91, Evidence Act, to prevent the plaintiff from proving the fact of the payment by him of a certain amount in cash by parole evidence independent of the promissory note.

The decisions of Jenkins, C. J., in *Krishnaji Narayan* v. *Rajmal Manikchand* (17), of the Patna High Court in *Dhaneswar Sahu* v. *Ramrup Gir* (18), and of a Full Bench of the Lower Burma Chief Court in *Maung Kyi* v. *Ma Ma Gale* (19) support the view held by me. The same view was taken by the late Court of the Judicial Commissioner of Oudh in *Dwarka* v. *Idu* (1) and by our own Court in *Nankhu Singh* v. *Girja Bux Singh* (2).

Speaking with all respect, it seems to me that the cases which have taken a contrary view with reference to the provisions of S. 91, Evidence Act, have not given sufficient consideration to the question whether proof of the fact and of the amount of the loan or of payment of the consideration money is a term of the contract evidenced by the pro-note. As I venture to think that it is not so, in my opinion S. 91 does not stand in the way of the plaintiff recovering his money on proof of the advance of the money to the defendant.

(11) [1906] 29 Mad. 111=15 M. L. J. 484.
(12) [1915] 38 Mad. 660=21 I. C. 864.
(13) A.I.R. 1922 Lah. 307=66 I. C. 201=2 Lah. 330.
(14) [1903] 26 All. 178=(1903) A. W. N. 217.
(15) [1906] 28 All. 298=3 A. L. J. 25=(1906) A. W. N. 9.
(16) [1912] 34 All. 158=13 I. C. 138.
(17) [1900] 24 Bom. 360=2 Bom. L. R. 25.
(18) A. I. R. 1928 Pat. 426=111 I. C. 482=7 Pat. 845.
(19) [1919] 10 L. B. R. 54=54 I.C. 84 (F.B.).

It is quite clear that the plaintiff had no intention to evade the stamp duty. So when the appeal was being argued before us I felt that it would be a case of peculiar hardship on the plaintiff if he is debarred from getting any relief. I am glad that the conclusion which I have reached on the question of law coincides with my feelings and avoids the hardship which would otherwise arise.

The answer therefore which I would give to the question referred to the Full Bench is that in spite of the provisions of S. 91, Evidence Act, it is open to the party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the advance of the loan. It should be noted that the answer given is not exactly in the terms of the question referred by the Division Bench. As the question stands I have no doubt that in the circumstances stated in the question, oral evidence to prove the terms of the contract is inadmissible.

Wazir Hasan, C. J.—I have had the advantage of reading the judgment of my learned brother Srivastava, J., and I generally agree with him.

The pro-note in question is inadmissible in evidence by reason of S. 35, Stamp Act, 1899. I would here assume that the contract of loan cannot be proved by oral evidence because of the provisions of S. 91, Evidence Act 1872. But does the conclusion necessarily lead to the dismissal of the plaintiff's claim in its entirety? I think not.

The oral evidence which has been accepted by the lower appellate Court as true proves that the defendant came to the plaintiff's house with a blank form of pro-note. The evidence read as a whole also establishes the inference that the plaintiff paid the sum of Rs. 700 to the defendant at the latter's request. Further the fact of payment of that sum of money by the plaintiff to the defendant is established both from the evidence arising out of the receipt (Ex. 1) executed by the defendant and the finding of the lower appellate Court that the plaintiff did pay to the defendant the sum of Rs. 700. The precise question for determination therefore is whether on proof of the facts and circumstances stated above the plaintiff is entitled to a decree for the return of the Rs. 700 or not. There is a large number of cases decided in England bearing on S. 4, of the Statute of Frauds. According to that section no action can be brought upon a contract of the nature described therein unless the agreement upon which the action is brought or some memorandum or note thereof is in writing and signed by the party to be charged. Yet even in the absence of such a writing Courts of equity have granted relief on the doctrine of the performance: *Maddison* v. *Alderson* (20). Also see the leading case of *Lester* v. *Foxcroft* and the notes thereunder in White and Tudor's Leading Cases, Vol. II.

There is another class of cases equally large in number in which Common law required a contract under seal, yet in the absence of such a contract relief was granted on the grouud of promise implied by law and arising out of executed consideration: see the decision of the Court of appeal in *Lawford* v. *The Billericay Rural District Council* (21). Vaughan Williams, L. J., in his judgment in that case says:

"I want to say before I conclude that a contract to pay has been implied, after consideration executed and benefit accepted in a variety of cases in which there has been no contract under seal. Cases have arisen and been decided with regard to money had and received and goods sold and delivered as in *De Grave* v. *Monmouth Corporation* (22). That was a nisi prius decision, but it is referred to in the judgment of subsequent cases as an authority. There are also the cases of an action of indebitatus assumpsit, which frequently arose, and also of actions for use and occupation, and cases in which the tenant was suing the corporation on the basis of his position as tenant."

I am of opinion that the principle of these cases applies to the present case. I have no doubt in my mind that it is a correct proposition of law that if a person knows that money is being paid for his benefit with an expectation that it will be repaid and in those circumstances he receives the payment an action for money had and received would lie as if it were a debt: see the observations of Bowen, L. J., in *Falcke* v. *Scottish Imperial Insurance Co.* (23) at pp. 250 and 251.

(20) [1883] 8 A. C. 473=52 L. J. Q. B. 737=49 L. T. 303=31 W. R. 820=47 J.P. 821.
(21) [1903] 1 K. B. 772=72 L. J. K. B. 554=88 L. T. 317=51 W. R. 630=67 J. P. 245=1 L. G. R. 535=19 T.L.R. 322.
(22) [1830] 4 C. & P. 111.
(23) [1887] 34 Ch. D. 234=56 L. J. Ch. 707=56 L.T. 220=35 W.R. 143.

In the notes to *Lampleigh* v. *Braithwait* (24), I find the following passage:

"In equity if *A's* money is used by *B* or *B's* agent to pay *B's* debt, then *A* may recover from *B* the amount so paid [*Bannatyne* v. *MacIver* (25). *Reversion Fund Co.* v. *Maison Cosway* (26)] and it may be that the same result would be reached at law by an action for money had and received."

Pollock, C.B., in *Brittain* v. *Lloyd* (27) says:

"For it is clear, that if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount when paid is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid, and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay and does pay, makes no difference."

The law is stated in Halsbury's Laws of England, Vol. 7, p. 465, in the following words:

"Where a payment is made at the request of another a promise to repay the amount will be implied, even though the person at whose request the payment was paid has not thereby been relieved from any legal claim."

It need hardly be said that it makes no difference in principle whether the payment is made to the person who makes the request or to a third party.

It appears to me that the ground of my opinion as expressed in the preceding paragraphs of this judgment is wholly covered by the provisions of S. 70, Contract Act 1872. That section is as follows:

"Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

There is no doubt in this case that the payment of the sum of Rs. 700 by the plaintiff to the defendant at the latter's request was a lawful act and from the circumstances of the case and the evidence relied upon by the lower appellate Court the inference is inevitable that the act was not intended to be done gratuitously by the plaintiff. It follows that the defendant is bound to make compensation to the plaintiff in respect of the payment. I have assumed here that the onus of proving the negative proposition of "not intending to do so gratuitously" is on the plaintiff though I have grave doubts as to the correctness of the assumption particularly in a case where payment is made by the plaintiff at the request of the defendant and the circumstances show that the plaintiff expected repayment.

The analogy of "antecedent debt" applied in *Nazir Khan* v. *Ram Mohan* (5) seems to me with due respect wholly misleading. The expression "antecedent debt" is altogether a creature of case law and the observations of their Lordships of the Judicial Committee in *Brij Narain* v. *Mangla Prasad* (28) to the effect that to constitute a valid antecedent debt there must be antecedency both in time and in fact have no application in my opinion to a case of this nature. An oral contract of loan may be wholly or partly executed as soon as it is completed and the parties may choose to reduce it to writing after a long interval of time. But once it is reduced to writing the only evidence, admissible in proof of it is the writing. The written contract therefore wholly displaces the oral contract in so far as the manner of proof is concerned. On that reasoning and on the assumption that S. 91, Evidence Act 1872, applies it follows that no proof can be given of the contract if the writing happens to be inadmissible in law and the distance of time between the oral contract and the writing will make no difference. Another case may be of an oral contract of loan followed by a written contract after an interval of a day or two. In either case in my opinion if S. 91, Evidence Act 1872, is applicable oral evidence is not admissible in proof of the contract.

My answer to the question is that oral evidence in proof of the terms of the pro-note is not admissible but relief can be given to the plaintiff for the return of the sum of Rs. 700 on the ground stated above.

Raza, J.—I have had the advantage of reading the judgments of the Hon'ble

(24) 1 Sm. L. C. 13th Edn. 157.
(25) [1906] 1 K. B. 103=75 L. J. K. B. 120=94 L. T. 150=54 W. R. 293.
(26) [1913] 1 K. B. 364=82 L.J.K.B. 512=108 L.T. 87=57 S. J. 144.
(27) 14 M. & W. 762=15 L. J. Ex. 43.
(28) A. I. R. 1924 P. C. 50=77 I. C. 689=51 I.A. 129=46 All. 95 (P.C.).

Chief Judge and my learned brother, Srivastava, J.

I am of the same opinion. I can find nothing that I may usefully add to their judgments.

I agree that the question referred to the Full Bench has to be answered in the way that my learned brother, Srivastava, J., has stated in his judgment.

R.K. *Reference answered.*

A. I. R. 1932 Oudh 242

RAZA AND SRIVASTAVA, JJ.

Gokaran and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 132 of 1931, Decided on 1st March 1932, against order of Dist. Magistrate, Bahraich, D/- 14th August 1931.

****(a) Criminal P. C. (1898), S. 439—Limitation — No limitation is prescribed — Revision filed after period allowed for appeal—Applicant should explain delay.**

There is no rule of law that a revision must be filed within the period allowed for an appeal. But the Judge may regard that period as a standard of reasonable time within which applications for revision should ordinarily be filed. When an application for revision has been made after the expiry of that period, the Court should ask the applicant to give reasons for the delay and if those reasons are not sufficient the Court can dismiss the application. [P 242 C 2]

***(b) Criminal P. C. (1898), Ss. 256 and 262 (1)—Summary trial in warrant case—No charge framed—Further cross-examination cannot be claimed as of right.**

In summary trial of a warrant case, an accused is not entitled to claim as of right, the opportunity of recalling prosecution witnesses for further cross-examination when no formal charge is framed and he is not required to plead in respect of it: *A. I. R.* 1926 *Bom.* 226, *Rel. on*; *A. I. R.* 1927 *Mad.* 78, *not Foll.* [P 243 C 2]

(c) Criminal P. C. (1898), S. 256 — Noncompliance does not vitiate trial and can be cured by Criminal P. C., S. 537—(*Obiter*).

The provisions contained in S. 256 are merely directory and are not provisions relating to the mode of trial, but only lay down a rule of procedure, and therefore a noncompliance of these provisions is no more than an irregularity in procedure which can be cured by S. 537: *A.I.R.* 1927 *All.* 217 and *A.I.R.* 1926 *Lah.* 155, *Rel. on.* [P 244 C 1]

R. F. Bahadurji—for Applicants.

G. H. Thomas—for the Crown.

Order. — This case was referred by one of us to a Bench in view of the conflict in the decisions of some of the High Courts on the questions of law arising for determination in it.

The applicants were tried summarily and convicted on 15th July 1931 of offences under Ss. 506 and 143, I. P. C. by a Magistrate of the First Class in the Bahraich District. The applicants made an application in revision against the order of the trial Magistrate, which was dismissed by the District Magistrate of Bahraich on 14th August 1931. The present application for revision was filed in this Court on 7th November 1931.

A preliminary objection has been raised by the learned Government Advocate that the application having been filed more than 60 days after the order of the learned District Magistrate is barred by limitation. Reliance has been placed on a decision of this Court in *Naim Ata* v. *Emperor* (1) in support of the objection. This case seems to have been very much misunderstood. Instances have come to our notice in which applications for revision have been thrown out summarily by the subordinate Courts on the ground that they were not filed within the period of limitation allowed for an appeal without the applicants being allowed even the opportunity to give their explanation for the delay.

We would wish to take this opportunity to explain that the case does not seem to us to be intended to lay down any hard and fast rule to the effect that applications for revision cannot be entertained if filed after the period allowed for an appeal. There can be no doubt that the admission or nonadmission of an application for revision under S. 439, Criminal P. C., is a matterentirely within the discretion of the revisional Court. If an application for revision is made after unreasonable delay, that alone can be a sufficient ground for the Court to reject the application. Though we are not aware of any practice of this Court or of the late Judicial Commissioner's Court to refuse to admit applications for revision made after the period of limitation prescribed for an appeal, yet it would not be unreasonable to regard the pericd prescribed for limitation in the case of appeals as a standard of reasonable time within which applications for revision should ordinarily be filed. All that Pullan, J., seems to us to have intended to lay down in *Naim Ata* v. *Emperor* (1) was that when an application for revision has been made after the expiry of the period allowed for

(1) A. I. R. 1930 Oudh 401=126 I. C. 895=31 Cr. L. J. 1012.

an appeal the Court should ask the applicant to give reasons for the delay and if those reasons are not sufficient the Court can dismiss the application. The application in the present case was made nine days after the period prescribed for an appeal. We are satisfied with the explanation given for this delay of nine days, and would therefore proceed to dispose of the application on its merits.

It is pointed out by the learned counsel for the applicants that when the prosecution evidence was closed, the applicants applied for an opportunity to further cross-examine the witnesses for the prosecution whose evidence had been recorded, but this opportunity was refused to them by the trial Magistrate. It was contended that the Magistrate was bound to follow the procedure prescribed by S. 256 (1), Criminal P. C. It was argued that this violation of an express provision of law as to the mode of trial constitutes an illegality which vitiates the trial. The learned District Magistrate disallowed this contention on the ground that the Magistrate's failure to comply with the provisions of S. 256, Criminal P. C. amounts to no more than an irregularity in procedure, and was cured by S. 537, Criminal P. C., inasmuch as the applicants had already cross-examined the prosecution witnesses at length and there is nothing to show that the irregularity in question had occasioned any failure of justice. The two questions therefore which arise for determination are: (1) whether the Magistrate trying the case summarily is bound to follow the procedure prescribed by S. 256 and to allow the accused a further opportunity for cross-examining the prosecution witnesses if they wish to do so, and (2) if so, whether the defect can be remedied by S. 537, Criminal P. C.

On the first question it was pointed out on behalf of the applicants that S. 262 (1), Criminal P. C., provides that in the case of a summary trial

"the procedure prescribed for warrant cases shall be followed in warrant cases, except as hereinafter mentioned."

It was also pointed out that as the present case was a warrant case, the Magistrate was bound to give the applicants opportunity to further cross-examine the prosecution witnesses as prescribed by S. 256, Criminal P. C. The question is not altogether free from difficulty as is evident from the conflict in the decided cases on the point. The terms of S. 262 as quoted above show that as a general rule the procedure prescribed for warrant cases shall be followed in those cases, even though the trial is summary. It is also clear that the section contemplates exceptions to this general rule. One of these exceptions is to be found in S. 263 which provides that in cases like the present where no appeal lies, the Magistrate need not record the evidence of the witnesses or frame a formal charge. The result therefore is that the provisions of S. 254 relating to the framing of the charge in warrant cases were inapplicable to the present case. S. 255 provides that the charge framed under the previous section shall be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make. S. 256 lays down that if the accused refuses to plead or does not plead, or claims to be tried, he shall be required to state whether he wishes to cross-examine any of the prosecution witnesses, whose evidence has been taken. In a case like the present where no charge is framed it is obvious that there is no occasion for the charge being read and explained to the accused and his being asked whether he is guilty or he has any defence to make in the terms of S. 255. It follows that the opening words of S. 256, namely:

"if the accused refuses to plead, or does not plead, or claims to be tried,"

can have no application to such a case. We are therefore of opinion that the accused is not entitled to claim, as of right, the opportunity of recalling prosecution witnesses for further cross-examination when no formal charge is framed and he is not required to plead in respect of it. We are in full agreement with the opinion expressed by Madgavkar, J. in *Umaji Krishnaji* v. *Emperor* (2), on this point. It is not possible for us to improve upon the reason given by him in the following words:

"The charge gives clear notice of the mind of the Court prima facie on the materials as they exist and in case the charge suggests to the defence any other witnesses or any further questions that right is given. Where there is no such charge, the defence has no other materials than it already possessed and the need to recall witnesses does not exist."

(2) A. I. R. 1926 Bom. 226=93 I. C. 159=27 Cr. L. J. 431.

In re Raju Achari (3) Jackson, J., dissented from the opinion expressed by Madgavkar, J., in the case referred to above. It would be enough to say that we find ourselves unable to agree with his opinion.

In view of the opinion formed by us on the first question the second question does not arise. We are however inclined to agree with the opinion expressed in *Emperor* v. *Chhajju* (4) and *Ghasiti* v. *Emperor* (5), that the provisions contained in S. 256, Criminal P. C., are merely directory, and are not provisions relating to the mode of trial, but only lay down a rule of procedure, and therefore a noncompliance of these provisions is no more than an irregularity in procedure which can be cured by S. 537, Criminal P. C.

The accused in the present case had as a matter of fact, cross-examined the prosecution witnesses when they were produced at length. The case was a very petty one and the sentence passed was not appealable. It is not therefore possible to say that the Magistrate's refusal to recall the prosecution witnesses for cross-examination has in fact occasioned any failure of justice.

We can therefore see no cause to interfere and dismiss this application,

W.D./R.K. *Application dismissed.*

(3) A. I. R. 1927 Mad. 78=99 I. C. 44=28 Cr. L. J. 12=50 Mad. 740.
(4) A. I. R. 1927 All. 217=99 I. C. 1029=28 Cr. L. J. 229=49 All. 316.
(5) A. I. R. 1926 Lah. 155=93 I. C. 72=27 Cr. L. J. 408=6 Lah. 554.

A. I. R. 1932 Oudh 244

RAZA AND KISCH, JJ.

Buddhu Lal and *another*—Plaintiffs—Appellants.

v.

Ram Sahai and *others*—Defendants—Respondents.

Second Appeal No. 171 of 1931, Decided on 4th April 1932, against decree of Sub-Judge, Malihabad, Lucknow, D/- 16th March 1931.

(a) Provincial Insolvency Act (5 of 1920), S. 28 (2) and (4)—Property acquired by adjudicated insolvent also vests in receiver—Hence transfer of such property is void—Provincial Insolvency Act (1920), S. 53.

Words of S. 28 are imperative. The Act makes no difference between property belonging to the insolvent when the order of adjudication is made and the after-acquired property mentioned in Cl. (4). All the property of the insolvent vests in the Court or receiver as soon as the order of adjudication is made. Transfer of after-acquired property made by insolvent is therefore a nullity. The deeds of such transfers being void, those who base their title on such deeds have no locus standi to maintain a suit as they acquire no title to the property by such transfers: *A. I. R.* 1927 *P. C.* 108; 31 *Mad.* 493; *A. I. R.* 1924 *All.* 341 (*F.B.*) and *A. I. R.* 1926 *Rang.* 179, *Rel. on.* [P 245 C 2]

(b) Civil P. C. (1908), S. 151—Questions affecting case in limine.

A Court has inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. [P 246 C 1]

(c) Practice—Second Appeal—New ground cannot be raised.

Where the question of possessory title is neither raised in the lower Courts, nor in the memo of appeal, it cannot be allowed to be raised in second appeal. [P 246 C 1]

Radha Krishna and *R. K. Bose*—for Appellants.

Hyder Husein and *L. S. Misra*—for Respondents.

Judgment.—These three Second Appeals (Nos. 171 to 173 of 1931) arise out of two suits which were instituted in the Court of the Munsif, (South) Lucknow on 31st May 1930.

The facts relevant to these appeals may be very shortly stated. The dispute in these cases relates to a building in Husainganj, Lucknow. It appears that there is a Shiwala (Hindu temple) between the northern and southern portions of the building. The plaintiffs base their title on two sale deeds executed by one Kamal Lal, son of Ram Lal of Gaya, on 12th September 1929. They brought two suits for possession of the property on the basis of the sale deeds against three persons, namely Ghasitey, Durga Prasad and Ram Sahai. The plaintiffs' claim was resisted by the defendants on various grounds. The learned Munsif decreed the plaintiff's claim in both the suits on 15th December 1930, and awarded Rs. 25 as damages also to the plaintiffs against Durga Prasad, defendant 2, in Suit No. 134/124 of 1930. The defendants appealed and their appeals were allowed by the learned Subordinate Judge of Malihabad at Lucknow on 10th March 1931. The plaintiffs have come to this Court in second appeal.

The crucial question in these cases is the competency of Kamal Lal to transfer the property in suit to the plaintiffs after he had been adjudged an insolvent and the property had vested in the insolvency Court. The learned Munsif held that though Ram Lal and Kamal Lal

were adjudged insolvents in 1919 and their property, including the property in suit had vested in the insolvency Court, Kamal Lal was competent to sell to the plaintiffs the property of which he had become divested by order of adjudication. The learned Subordinate Judge took a different view. He held that by the order of adjudication the whole right, title and interest of the insolvent became vested in the insolvency Court; and the insolvent, who had no saleable interest or title left in him, could not pass any title to the plaintiffs. The sale deeds were therefore void and the plaintiffs did not acquire by their purchase any title to the property and had no locus standi to maintain the suits for possession of the property.

In our opinion the judgment of the learned Subordinate Judge is quite correct. The view taken by the learned Subordinate Judge is supported by the following authorities : *Sundarappa Ayar* v. *Arunachella Chettiar* (1), *Gobind Ram* v. *Kunj Behari Lal* (2) at p. 401 (*of* 46 *All.*) and *Ma Phaw* v. *Maung Ba Thaw* (3). The view of the Rangoon High Court finds ample support in the decision of the Privy Council in *Kalachand Banerji* v. *Jagannath Marwari* (4) in the following words :

"The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the receiver already appointed and he alone was entitled to deal with the equity of redemption. The alternative in the section applicable to vesting in the Court was no doubt inserted to provide for the case of a receiver not being appointed at the same time as the adjudication of insolvency was made and to foreclose an argument that vesting was suspended until the actual appointment of a receiver. . . . . The Court only acts through a receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of the acquisition or devolution, whatever the date of the receiver's actual appointment. . . . . That the rights of a secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent, is of course plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it and he and not the insolvent has the sole interest in the subject-matter of the suit. To him therefore must be given the opportunity of redeeming the property."

The law appears to be clear on this point. Under S. 16 (2), Act 3 of 1907 :

"On the making of an order of adjudication the whole of the property of the insolvent, save in so far as it includes such particulars (not being his books of account) as are exempted by the Civil Procedure Code, or by any other enactment for the time being in force, from liability to attachment and sale in execution of a decree shall vest in the Court or in a receiver as hereinafter provided . . . . . "

Under Cl. (4) of the same section :

"All such property as may be acquired by or devolved on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver . . . . . "

Section 28, Cls. (2) and (4), Act 5 of 1920, corresponds to S. 16, Cls. 2 and 4, Act 3 of 1907. The words of the section are imperative. The Act makes no difference between property belonging to the insolvent when the order of adjudication is made and the after-acquired property mentioned in Cl. (4). All the property of the insolvent vests in the Court or the receiver as soon as the order of adjudication is made. It follows therefore that from the date of the order Kamal Lal and Ram Lal ceased to have any interest in the property. The property was taken away from them and became vested in the Court so that after such vesting Kamal Lal ceased to be the owner of the property in law and dealings by him with respect thereto became void. The transfer in question made by him must be held to be a nullity and has no existence in the eye of the law. The sale deeds in question have therefore been rightly held by the learned Subordinate Judge to be void. The plaintiffs who base their title on the deeds in question have no locus standi to maintain the suit when they acquired no title to the property by purchase.

The appellants contend that the plea relating to Kamal Lal's insolvency was not taken in the first Court and should not therefore be accepted in dismissing the plaintiffs' suits. It is true that though the defendants had in their defence questioned the title of Kamal Lal and his competency to transfer the property in suit they had not specifically pleaded that the transfer was void as it was made by an undischarged insolvent but the fact remains that they had taken the plea in the first Court in the course of arguments and that Court had allowed

(1) [1908] 31 Mad. 493=18 M. L. J. 487.
(2) A. I. R. 1924 All. 341=83 I. C. 403=46 All. 398 (F.B.).
(3) A. I. R. 1926 Rang. 179=97 I. C. 221=4 Rang. 125.
(4) A. I. R. 1927 P. C. 108=101 I. C. 442=54 I. A. 190=54 Cal. 595 (P.C.).

the question to be argued and had given its decision on that point. The question was fully discussed at the hearing of the suits in the first Court and also at the hearing of the appeals in the lower appellate Court. There is nothing to show that any objection was taken to the plea in question being argued and decided in the lower appellate Court. In fact the lower appellate Court had heard arguments on that ground of appeal only and had not heard arguments on any other point involved in the appeals. The plaintiffs were not in any way taken by surprise and the materials on record were quite sufficient to enable the Court to give a decision on the question under consideration. The question under consideration has throughout been understood to be a question of law. It should also be borne in mind that the Court has an inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. Under these circumstances we think it is now too late for the plaintiffs to contend that the plea in question should not have been accepted by the lower appellate Court in disposing of the appeals.

The appellant's learned counsel has drawn our attention to the fact that the learned Subordinate Judge has not considered the question of damages which were awarded to the plaintiffs by the first Court against Durga Prasad, defendant 2. We have examined the record for the purpose of deciding that question. The plaintiffs' witnesses Husaini (P. W. 9) and Buddhu Lal (P. W. 10) have given evidence on that point. We are not satisfied with their evidence which appears to be vague and inconsistent and does not establish that any bricks or iron sheets were removed or taken away by defendant 2. We are not prepared to hold on their evidence that defendant 2 is liable for the damages claimed.

The appellants' learned counsel attempted to raise the question of possessory title in arguing the appeals before us, but no such plea was taken in the lower Courts. The memorandum of appeal also does not raise any such question. It appears that the whole object of these suits was to have the question of title decided and the defendants' possession was not denied. The plaintiffs cannot therefore be allowed to raise the question of possessory title in second appeal. The result is that the appeals fail and must be dismissed. No case has been made out to disturb the judgment of the learned Subordinate Judge. We dismiss all the three appeals with costs throughout.

B.R./R.K. *Appeals dismissed.*

A. I. R. 1932 Oudh 246

WAZIR HASAN, C. J. AND KISCH, J.

Mohd. Amir Mirza Beg—Judgment-debtor—Appellant.

v.

Gauri Nath and *others*—Defendants—Respondents.

Execution Decree Appeal No. 45 of 1931, Decided on 2nd March 1932.

(a) Civil P. C. (1908), S. 11 — Execution proceedings—Judgment-debtor not appealing against order on application by decree-holder—He cannot raise same objection (of limitation) in subsequent application for execution.

Where a judgment-debtor does not appeal from an order passed on an application for execution by the decree-holder and allows it to become final it debars him from raising the same objection as to limitation, which he had raised on the previous application and that order acts as res judicata in a subsequent proceeding by the decree-holder applying for execution. [P 247 C 1]

(b) Civil P. C. (1908), S. 11—Case law conflicting—Decision on point of law does act as res judicata.

Where the case law on a certain point is conflicting and the lower Court's conclusion is in agreement with certain decided cases it cannot be said that the conclusion on that point reached by the lower Court is wrong. And it does consequently operate as res judicata: *Cases Referred.* [P 247 C 1]

M. L. Tiwari—for Appellant.

Radha Krishna—for Respondents.

Judgment.—This is the judgment-debtor's appeal arising out of execution proceedings and from the order of the Subordinate Judge of Sitapur, dated 4th May 1931. The only point urged in support of the appeal is that the application for execution in pursuance of which these proceedings have arisen is barred by the 12 years' rule of limitation provided by S. 48, Civil P. C.

There is no doubt, and it is agreed, that it would be so barred but for the effect of an order made on a previous occasion by a Court of competent jurisdiction between the same parties on 11th December 1924. If that order has the effect of res judicata against the contention now urged the appeal must be dismissed. We are of opinion that it has such an effect. The order was passed when the 12th application for execution

was made by the decree-holder. Against that application objection as to the bar of limitation was taken by the judgment-debtor on the same ground on which it is taken now. The Subordinate Judge of Sitapur held that it was not so barred by reason of the provisions of Ss. 15 and 20, Limitation Act, 1908. The judgment-debtor did not appeal from that order and there is no doubt that it has become final between the parties. As such we think that it debars the judgment-debtor from raising such objection again as he has done in the present instance.

It was urged that as the order was a decision on a point of law and as that decision was wrong there is no res judicata. We are unable to accept this argument in the form in which it is put. A Bench of this Court has recently decided in the case of *Ganeshi Lal* v. *Imtiaz Ali* (1) that the bar of limitation provided by S. 48, Civil P. C., is not controlled by the provisions of S. 15, Limitation Act. On the other hand, there is another decision of the same Court in *Dhan Dei* v. *Kashmiri Bank Ltd., Fyzabad* (2), which lays down a different point of view. There is a decision of the late Court of the Judicial Commissioner of Oudh in *Mohammad Abdul Karim* v. *Newaz Singh* (3) which supports the view taken in the latter case. In this state of case law we cannot affirm the proposition advanced before us that the order dated 11th December 1924 was necessarily a wrong order. The appeal fails and is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1931 Oudh 351=132 I. C. 257.
(2) A. I. R. 1932 Oudh 69=134 I. C. 878.
(3) [1910] 13 O. C. 303=8 I. C. 377.

A. I. R. 1932 Oudh 247

SRIVASTAVA AND NANAVUTTY, JJ.

Ausan Singh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 17 of 1932, Decided on 8th March 1932, against order of Sess. Judge, Hardoi, D/- 13th December 1931.

(a) Criminal P. C. (1898), S. 162 — Statement to police by prosecution witness cannot be admitted in evidence to convict accused—Accused can use it for cross-examining that witness.

A statement made before the police by a prosecution witness can be utilized solely by the accused for the purposes of cross-examination and for discrediting the testimony of that Crown witness. Such a statement made before the police officer is not evidence upon which the conviction of an accused person can be founded. [P 248 C 1]

(b) Penal Code (1860), Ss. 304 and 149—Riot causing death of person—Accused ringleader of one faction — Sentence of transportation for life reduced to one for ten years' rigorous imprisonment.

The accused had been a ringleader of one of the parties causing a riot during which one person had been killed. The guilt of the accused had been proved beyond any reasonable doubt.

Held: that the sentence of transportation for life was excessive and should be reduced to rigorous imprisonment for ten years. [P 248 C 2]

Jagannath Prasad Chaudhri and *P. N. Chaudhri*—for Appellants.

H. K. Ghose—for the Crown.

Judgment. — Ausan Singh, Munshi Singh, Kesho Singh and Tikam Singh have appealed against the convictions and sentences passed upon them by the learned Sessions Judge of Hardoi in a case of riot and murder.

We have heard the learned counsel for the appellants as well as the learned Government Advocate and perused the evidence on the record. It is not denied by the learned counsel for the appellants that a serious riot did take place in which Raghubar lost his life; and it is further admitted that Ausan Singh and Munshi Singh were present at the time of the occurrence.

The learned Sessions Judge of Hardoi has written a very detailed and exhaustive judgment and the only comment we wish to offer upon it is that in his desire to be scrupulously fair to the accused the learned Judge has been overstrict in his criticizms of the evidence of the prosecution witnesses and has thus furnished a very useful handle to the learned counsel for the appellants to attack his judgment with the help of the very strictures passed by the Judge himself upon the prosecution witnesses.

We will first take up the question of the guilt or innocence of the two appellants Kesho Singh and Tikam Singh. The medical evidence shows that there was only one contused wound on the top of the head of the deceased Raghubar and there were two other incised wounds and that death was due to shock and haemorrhage from these three injuries. The evidence of Naurang Singh and Bhupat has for the most part been disbelieved by the learned Sessions Judge. The evidence of Durga is in our opinion not very reliable in view of his own state-

ment in the Court of the committing Magistrate that he knew nothing about these two accused Kesho Singh and Tikam Singh. The prosecution witnesses Bhagwan Singh and Sobha Ram do not implicate these two appellants Kesho Singh and Tikam Singh in the Court of the Sessions Judge, and it was a serious mistake on the part of the learned trial Judge to utilize the statements made by these witnesses before the investigating police officer in the course of the police investigations and to take them into consideration as substantive evidence. A statement made before the police by a prosecution witness can be utilized solely by the accused for the purposes of cross-examination and for discrediting the testimony of that Crown witness. Such a statement made before the police officer is not evidence upon which the conviction of an accused person can be founded. This being the state of the evidence of the prosecution witnesses, we are clearly of opinion that the guilt of these two appellants Kesho Singh and Tikam Singh has not been brought home to them and in view of all the circumstances of the case we think it just and fair to give them the benefit of the serious doubts that we entertain as regards their participation in this riot. We accordingly allow the appeals of Kesho Singh and Tikam Singh, set aside the convictions and sentences passed upon them by the lower Court and acquit them of the offences charged.

We next turn to discuss the case of the other two appellants Ausan Singh and Munshi Singh. Munshi Singh is the nephew of Ausan Singh. Both Munshi Singh and Ausan Singh received injuries in the course of this riot and their presence at the time of the commission of the riot is admitted by themselves. We do not believe the story of these accused that they acted in the right of self-defence of person. No such case has been established upon the evidence adduced by these two appellants. The evidence of Dwarka, P. W. 15, Naurang Singh, P. W. 12, and Durga, P. W. 11, fully proves to our satisfaction the guilt of these two appellants. It is true that there is no mention in the first report of Ausan having made use of any spear (balam). It is also true that there are only two incised wounds on the person of the deceased Raghubar whilst three persons Ram Prasad, Mahraj Singh and Ausan Singh are said to have used spears. Whether Ausan Singh did actually hit the deceased Raghubar with a spear and caused him one of the injuries which proved fatal to Raghubar or not, the fact remains that he was the ringleader of one party and was primarily responsible for this serious riot which ended in the death of Raghubar. The guilt of Ausan Singh and Munshi Singh has been established to our satisfaction beyond any reasonable doubt. The sentence of transportation for life passed upon Ausan Singh for the offence under S. 304, I. P. C., read with S. 149, I. P. C., seems to us to be excessive in the circumstances of the case and we would accordingly reduce that sentence of transportation for life to rigorous imprisonment for ten years. We would maintain the other sentences passed upon this appellant under Ss. 148 and 307, I. P. C., as all those sentences are made to run concurrently with the sentence for the offence under S. 304/149, I. P. C., and as they do not appear to us to be excessive. As regards Munshi Singh, the learned Sessions Judge has, in awarding sentence upon this accused, taken into consideration his age and the fact that he is a nephew of the principal offender Ausan Singh and in our opinion the sentences passed upon Munshi Singh by the learned Sessions Judge are very reasonable and if anything, err on the side of leniency; we would therefore maintain intact all the sentences passed upon Munshi Singh by the learned Sessions Judge.

The result is that we allow the appeals of Kesho Singh and Tikam Singh, acquit them of the offences charged and order their immediate release. We uphold the convictions and sentences passed upon Munshi Singh and dismiss his appeal. We uphold the conviction of Ausan Singh for the offences charged against him, but in respect of the offence under S. 304/149, I. P. C., we reduce his sentence from transportation for life to ten years' rigorous imprisonment, and we confirm the convictions and sentences passed upon him in respect of the other offences. To this extent this appeal is allowed; for the rest it stands dismissed.

B.V./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 249 (1)

WAZIR HASAN, C. J. AND RAZA, J.

Hukum Chand Kasliwal and *another*—Applicants.

v.

Radha Kissen Moti Lal Chamaria and *others*—Opposite Parties.

Civil Misc. Appln. No. 537 of 1931, Decided on 26th November 1931.

Civil P. C. (1908), O. 45, R. 7—After expiry of time for giving security under R. 7 Court cannot extend time.

Where a certificate for leave to appeal to the Privy Council has been granted but where though both the periods of time prescribed by O. 45, R. 7 have expired the security under O. 45, R. 7 (1) (2) has not been furnished and where after the expiry of this period the applicants apply to extend the time to furnish the required security, the Court has no jurisdiction to extend such time: *A. I. R.* 1927 *Bom.* 217, *(F.B.), Diss. from*: *A. I. R.* 1923 *Oudh* 50; *Oudh P.C. Appeal No.* 1 *of* 1931, *Rel. on., A. I. R.* 1922 *All.* 43; *A.I.R.* 1924 *Mad.* 44; *A.I.R.* 1927 *Rang.* 20 and *A. I. R.* 1929 *Pat.* 431, *Ref.* [P 249 C 1, 2]

S. C. Das—for Applicants.

H. K. Ghosh and *K. P. Misra* — for Opposite Parties.

Order.—In these cases certificates for leave to appeal to His Majesty in Council from a decree of this Court were granted on 15th September 1931. Both the periods of time prescribed by R. 7, O. 45, Civil P. C. 1908, have expired, but the security required by Cl. (2), sub-R. (1) has not been furnished by the applicants. The applications before us have been made with a prayer that time may be extended to furnish the required security. The question which has arisen for decision is as to whether the Court has power to extend the time. In support of the applicants' contention reliance is placed on a Full Bench decision of the High Court at Bombay in *Nilkanth Balwant* v. *Satchitanand Vidya Narsinha Bharati* (1). The decision in that case is contrary to the uniform practice of this Court. The point was expressly decided so far back as 1922 by the late Court of the Judicial Commissioner of Oudh in *Ashiq Ali* v. *Arjumununnissa* (2). and the interpretation placed on R. 7 in that case has been accepted as correct and acted upon by the Chief Court also. The latest decision of our Court was given in the case of *Tirbhawan Dut* v. *Someshwar Dutt* (3). The appellant who failed to obtain an extension of time in the case just now mentioned afterwards made an application before their Lordships of the Judicial Committee for special leave to appeal. The leave was granted but in granting the leave their Lordships of the Judicial Committee did not indicate that the interpretation which this Court had placed on the language of R. 7 (1), O. 45, Civil P. C., was incorrect. Indeed the whole of our order is quoted in the order in Council dated 23rd July 1931.

The view which we now take and have taken on previous occasions is supported by the decisions of High Courts at Allahabad: *Ram Dhan* v. *Prag Narain* (4); at Madras: *Kachi Reddi* v. *Saki Reddi*; *A. I.R.* 1924 *Mad.* 44; at Rangcon: *J. N. Surty* v. *T. S. Chettyar Firm*, *A. I. R.* 1927 *Rang.* 20; and at Patna: *Kamala Kanta Singh* v. *Bindhu Mukhi Dassi*; *A. I. R.* 1929 *Pat.* 431. Except the Bombay case to which reference has already been made there is no reported case of any other High Court, so far as we are aware in support of the interpretation sought to be placed by the applicants in these cases. Accordingly we hold that we have no jurisdiction to extend the time for giving security and dismiss these applications with costs. The certificates granted to these applicants will be cancelled.

B.V./R.K. *Order accordingly.*

(1) A. I. R. 1927 Bom. 217=101 I. C. 555=51 Bom. 430 (F.B.).
(2) A. I. R. 1923 Oudh. 50=70 I. C. 937=25 O. C. 254.
(3) Privy Council Appeal No. 1 of 1931 Decided on 26th March 1931.
(4) A. I. R. 1922 All. 43=65 I. C. 249=44 All. 216.

A. I. R. 1932 Oudh 249 (2)

KISCH, J.

Ujagar Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 6 of 1932, Decided on 10th February 1932, against order of Sess. Judge, Hardoi, D/- 23rd December 1931.

(a) U. P. Excise Act (1910), S. 50 — Non-recording of reasons for suspecting presence of articles offending against Excise Act before search though irregularity does not vitiate proceedings.

The non-recording of reasons for suspecting the presence of articles, in respect of which an offence against Excise law has been committed,

before searching the premises, although an irregularity is not one that vitiates the proceedings. [P 250 C 2]

(b) U. P. Excise Act (1910), Ss. 50 and 53 — Sub-Inspector coming to know of illicit distillation going on in two places in village and proceeding with Head Constable and searching one premises himself and Head Constable searching another — There is no irregularity.

If a Sub-Inspector deputes the Head Constable from the police station to conduct a search without a warrant without going to the place himself, the search and arrest might be unlawful under Ss. 50 and 53. But where the Sub-Inspector comes to know that illicit distillation is going on in two places in a village, the object of the search might be frustrated if the two premises are not searched simultaneously. Consequently where the Sub-Inspector proceeds to the village with the Head Constable and searches one of those premises himself while the Head Constable searches the other, such a procedure does not constitute an irregularity or at any rate such an irregularity as would justify interference in revision when there has been no miscarriage of justice. [P 250 C 2]

S. C. Das and *J. N. Banerji*—for Applicant.

H. G. Walford—for the Crown.

Judgment. — In this case the applicant has been convicted by a First Class Magistrate of Hardoi under S. 60 (f) and S. 63, United Provinces Excise Act 1910, and has been sentenced to six months' rigorous imprisonment under the former section and to three months' rigorous imprisonment under the latter section, the sentences to run concurrently. On appeal the learned Sessions Judge of Hardoi maintained the convictions, but reduced the sentence under S. 60 (f) to three months' rigorous imprisonment. As far as the facts are concerned there is no doubt from the evidence that articles for the manufacture of illicit liquor and a certain quantity of illicit liquor were found in the applicant's house. It is contended on behalf of the applicant that the conviction of the applicant is vitiated for certain technical reasons. In the first place it is argued that the actual search and arrest without a warrant, having been carried out by a Head Constable and not by the Sub-Inspector in charge of the police station, was unlawful under Ss. 50 and 53, Excise Act. In the second place it is argued that the police acted irregularly in not recording their reasons for suspecting that the articles in question were in the applicant's house. In the third place it is argued that the search was irregular inasmuch as two respectable witnesses of the locality were not called to witness the search, but two witnesses from a village some miles away were brought as search witnesses. Lastly it is argued that as the younger brother of the applicant lived in the same house it cannot be said that the articles in question were in the possession of the applicant.

All these points were raised before the learned Sessions Judge and in my opinion they have been adequately dealt with by him. It has been held in a number of cases that the nonrecording of reasons for suspecting the presence of articles in respect of which an offence against the excise law has been committed before searching the premises, although an irregularity, is not one that vitiates the proceedings. In the present case the Sub-Inspector who was taking action in the case explained that he did not record his reasons for want of time. The calling of witnesses from a certain distance has also been satisfactorily explained by the fact that the witnesses of the locality were likely to be favourably disposed towards the applicant and unwilling to give evidence against him. The articles recovered show that distillation had been going on shortly before the search and the Courts below were no doubt right in holding that it was impossible for the applicant not to have been aware that illicit distillation was going on in his house, or of the presence of the articles in question therein, and that such distillation was in fact going on with his knowledge and consent.

The only point that requires a little consideration is the point raised with regard to the authority of the Head Constable to conduct the search. If the Sub-Inspector had deputed the Head Constable from the police station to conduct a search without a warrant without going to the village himself there might have been some force in the contention raised. In the present case the circumstances were peculiar. The Sub-Inspector had come to know that illicit distillation was going on in two places in the village and the object of the search might have been frustrated if the two premises were not searched simultaneously. He accordingly proceeded to the village with the Head Constable and searched one of those premises himself while the Head Constable searched the other. I am unable to hold that such a procedure in the circum-

stances of the case constituted an irregularity, or at any rate such an irregularity as would justify interference in revision, when there has clearly been no miscarriage of justice. In the last place it is argued that the sentence passed upon the applicant should be reduced to the period of 31 days' rigorous imprisonment which he has already undergone. I have given this matter my careful consideration, but it seems to me that the learned Sessions Judge has already reduced the sentence to the minimum that could be considered adequate for the offence and I am not prepared to reduce it further. The application is accordingly dismissed. The applicant will surrender to his bail and serve out the remainder of his sentence.

P.N./R.K. *Application dismissed.*

A. I. R. 1932 Oudh 251 (1)

SRIVASTAVA, J.

Emperor

v.

Ram Udit and *others*—Accused.

Criminal Ref. No. 3 of 1932, Decided on 22nd February 1932, made by Sess. Judge, Gonda.

Criminal P. C. (1898), S. 439 — Order of acquittal made without jurisdiction can be set aside—Consent cannot confer jurisdiction.

An acquiescence or even consent cannot invest a Court with jurisdiction of which it is not otherwise possessed. The powers of the Court under S. 439 are very wide and though it cannot convert an order of acquittal into one of conviction yet there is nothing to bar the setting aside of order of acquittal when the order is one wholly without jurisdiction. [P 251 C 2]

G. H. Thomas—for the Crown.

S. S. Chaudhri—for Complainant.

Moti Lal Saksena—for Accused.

Judgment.—This is a reference by the learned Sessions Judge of Gonda recommending that the order passed by the Court of Bench Magistrates acquitting the accused of an offence under S. 506, I.P.C. be quashed and retrial by competent Court ordered. The petition of complaint on which the prosecution was started stated that the accused had quarrelled with the complainant and threatened to kill him. The Sub-divisional Magistrate of Utraula in whose Court the complaint was filed transferred the case to the Court of Bench Magistrates of Balrampur. The accused were charged by the Bench Magistrates under S. 506, I. P. C. but were acquitted. It has been pointed out by the learned Sessions Judge that the petition of complaint as well as the evidence led on behalf of the prosecution show that the accused had threatened the complainant with death. The offence is therefore triable only by a Court of Sessions, City Magistrate or Magistrate of the First Class. The Bench Magistrates who were invested only with powers of Second Class Magistrates had therefore no jurisdiction to try the case. It has been argued on behalf of the accused that the complainant never raised any objection against the jurisdiction of the Bench Magistrates during the trial. It is a well settled rule that any acquiescence or even consent cannot invest a Court with jurisdiction of which it is not otherwise possessed.

It was also contended that there was no appeal by the Government and no interference should be made by this Court with the order of acquittal in the exercise of its revisional jurisdiction. The powers possessed by this Court under S. 439 are very wide. Though the Court cannot convert an order of acquittal into one of conviction yet there is nothing to bar the setting aside of the order of acquittal, when the order is one wholly without jurisdiction. I accordingly accept the reference and set aside the order of acquittal dated 29th October 1931 of the Bench Magistrates and direct that the accused should be retried of the offence under S. 506, I. P. C. by a competent Court.

P.N./R.K. *Retrial directed.*

A. I. R. 1932 Oudh 251 (2)

SRIVASTAVA, J.

Gaya Prasad—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 144 of 1930, Decided on 18th February 1931, against order of Sess. Judge, Fyzabad, D/- 24th October 1930.

(a) Criminal Trial — Circumstantial evidence — It must be reasonably inconsistent with theory of innocence.

Circumstantial evidence in order to justify conviction must be such as would unmistakably lead to the inference of guilt and be reasonably inconsistent with the theory about the innocence of the accused. [P 253 C 1]

(b) Penal Code (1860), S. 411 — Connotation of word "believe" explained.

The word "believe" in S 411 is much stronger than the word "suspect" and involves the necessity of showing that the circumstances were such that a reasonable man must have been fully convinced in his mind that the property with which he was dealing, was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired : 6 *Bom.* 402 and *A. I. R.* 1929 *Oudh* 213, *Rel. on.* [P 253 C 2]

H. N. Misra for *J. N. Misra*— for Applicant.

H. K. Ghose, Government Advocate— for the Crown.

Judgment.—This is an application for revision against the order dated 24th October 1930 of the Sessions Judge of Fyzabad upholding the order dated 3rd September 1930 passed by a Magistrate, First Class of that district convicting the applicant under S. 411, I. P. C., and sentencing him to a fine of Rs. 200 or in default of payment of the fine, to rigorous imprisonment for three months. The case for the prosecution which has been accepted by both the lower Courts is that some copper utensils belonging to one Mr. Ali Azhar were stolen by two persons, Abdul Hakim and Sabit Ali, one of whom, namely, Abdul Hakim was a servant of Mr. Ali Azhar. Both these persons were convicted under S. 454, I. P. C. Subsequent to their conviction, Gaya Prasad was tried and convicted of an offence under S. 411, I. P. C. This prosecution was due mainly to the statements made by Abdul Hakim and Sabit Ali in which they stated that they had sold the stolen utensils to the accused Gaya Prasad. When the Sub-Inspector of Police went to Gaya Prasad's shop and called upon him to produce the utensils which he had purchased from Abdul Hakim he produced five of them. He denied having received any other utensils from him. On a search being made of his house, three more utensils forming part of the stolen property were recovered.

The contention urged on behalf of the applicant is that there is no evidence to prove that Gaya Prasad received these utensils knowing or having reason to believe the same to be stolen property. It is not possible in such a case to expect any direct evidence of guilty knowledge on the part of the accused. The Courts below have relied upon certain circumstantial evidence as establishing that the accused must have had reason to believe that the utensils in question were stolen property. Besides these circumstances, reliance has also been placed on behalf of the prosecution on the direct evidence of Abdul Hakim and Sabit Ali. In the first place it is clear that these persons Abdul Hakim and Sabit Ali, were accomplices and it can seldom be safe to base a conviction upon the statement of accomplices unless there is independent evidence to corroborate it in material particulars. In the second place the evidence of Abdul Hakim and Sabit Ali, even if accepted as literally true, does not establish any guilty knowledge on the part of Gaya Prasad. All that that evidence proves is that the articles in question had been sold to Gaya Prasad by Abdul Hakim and Sabit Ali. This is not denied. The learned Government Advocate admits that this is not a case in which it could be said that Gaya Prasad knew that the utensils in question were stolen property. But he maintains that there is sufficient legal evidence to prove that he had reason to believe that they were stolen property. As I have already pointed out, the evidence of Abdul Hakim and Sabit Ali does not prove that the accused Gaya Prasad had any reason to suspect, much less to believe, that they were stolen property.

Then there remains the circumstantial evidence. One circumstance on which stress has been laid is that three of the utensils Exs. 6 to 8 were recovered as a result of search and were not produced by Gaya Prasad when he was called upon by the Sub-Inspector to produce the utensils which he had purchased from Abdul Hakim. This is sufficiently explained by the fact that the Sub-Inspector when he went to Gaya Prasad's shop was accompanied by Abdul Hakim alone and the utensils which Gaya Prasad was called upon to produce by the Sub-Inspector were utensils which he had purchased from Abdul Hakim. It is in evidence that Exs. 6 to 8 were purchased by Gaya Prasad not from Abdul Hakim but from Sabit Ali. When Exs. 6 to 8 were recovered as a result of the search Gaya Prasad told the Sub-Inspector that he had purchased them from another person and when Sabit Ali was produced he at once admitted that he had purchased them from Sabit Ali. It is not therefore possible to draw any inference of guilty

knowledge on the part of Gaya Prasad from the fact that Exs. 6 to 8 were not produced by him with the other articles.

The next circumstance relied upon is that the utensils purchased by Gaya Prasad had been broken by him after the purchase in order to prevent identification. The only evidence to which my attention has been drawn on this point consists of the evidence of Mr. Ali Azhar and his son showing that the utensils were in sound condition when they were stolen. But there is absolutely no evidence to prove that they were in a sound condition and not broken at the time when they were sold to Gaya Prasad. On the contrary the statement of P. W. 4, Sheo Narain, who went to the shop of the accused soon after the utensils had been purchased by Gaya Prasad shows that they were then in the same condition in which they were found when they were handed over to or recovered by the Sub-Inspector.

A point has also been made of the fact that the utensils in question were purchased at the rate of As. 8-6 per seer whereas according to the evidence, the rate at which second-hand copper utensils are usually sold in the market is As. 12 per seer. This rate of As. 12 per seer is the ordinary market rate for old copper articles in sound condition. If the articles at the time of purchase by Gaya Prasad were not in a sound condition, then in that case a rate of As. 8-6 per seer would be quite a reasonable rate for old utensils in a damaged condition. It is not therefore possible to say that the accused purchased these utensils at an unreasonably low price.

Lastly it was pointed out that Sabit Ali and Abdul Hakim were two young men of 18 and 20 of no status and they could hardly be supposed to be owners of such articles. Assuming this to be so it might at best give rise to some suspicion but it cannot be said that it necessarily leads to the inference that the accused must have believed that the articles were stolen property. Circumstantial evidence in order to justify conviction must be such as would unmistakably lead to the inference of guilt and be reasonably inconsistent with any theory about the innocence of the accused. Further as held in *Empress* v. *Rango Timaji* (1), which was followed by my learned brother Raza, J., in *Suraj Prasad* v. *Emperor* (2),

" the word 'believe' in S. 411, I. P. C., is much stronger than the word 'suspect' and involves the necessity of showing that the circumstances were such that a reasonable man must have been fully convinced in his mind that the property with which he was dealing, was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired."

The accused is a "thathar" by profession who deals in the purchase and sale of copper and brass utensils. He purchased these articles in open market in the ordinary course of his business at a price which was not at all unreasonable. The circumstances on which reliance has been placed on behalf of the prosecution are none of them such that the accused as a reasonable man must have felt convinced in his mind that the property which he was purchasing was stolen property. In my opinion therefore the prosecution has failed to bring home the guilt to the accused. I accordingly allow the application set aside the conviction and sentence and direct that the fine if paid be refunded.

v.S./R.K. *Accused acquitted.*

(1) [1881] 6 Bom. 402.

(2) A. I. R. 1929 Oudh 213=118 I. C. 759=30 Cr. L. J. 969.

A. I. R. 1932 Oudh 253

KISCH, J.

Nathoo Singh—Plaintiff—Appellant.

v.

Kalloo and *another* — Defendants — Respondents.

Second Appeal No. 209 of 1931, Decided on 29th February 1932, against order of Sub-Judge, Rae Bareli, D/- 6th May 1931.

Limitation Act (1908), Art. 132—Mortgage money to be repaid monthly by instalments—In default of three consecutive instalments mortgagee to have option either to recover immediately or to wait until mortgage period expires—Default made—Limitation runs from date of third default.

Where a mortgage deed provides that the mortgage money should be repaid within four years by certain monthly instalments and further provides that in case three consecutive instalments remain unpaid the mortgagor should either cancel period of repayment and recover entire amount due to him or should wait until

expiry of fixed period, if three consecutive instalments are not paid, the starting point of limitation under Art. 132 begins to run from the date of the third consecutive default and not from when the period of four years expired : *A. I. R.* 1929 *Oudh* 536, *Expl.* and *Foll.* [P 254 C 1]

R. B. Lal—for Appellant.
Siraj Hasan—for Respondents.

Judgment.—This appeal arises out of a suit for foreclosure of a mortgage executed by the defendants in favour of the plaintiff which has been dismissed by both the Courts below as time barred under Art. 132, Sch. 1, Lim. Act. The mortgage was for Rs. 90 and was executed on 2nd October 1916. It provided that the mortgage money should be repaid within four years which period expired on 2nd October 1920. It further provided that the amount of the debt was to be paid off by instalments of Rs. 3 per month, and if these instalments remained unpaid for three consecutive months, the creditor would have the right either to cancel the condition with regard to the period of repayment and to recover the entire amount due to him through the Court or to wait until the expiry of the fixed period. Nothing was paid in respect of the mortgage and therefore on 3rd January 1917 the creditor became entitled to recover the amount of the loan. The suit was instituted on 13th September 1930. Thus if the period of 12 years limitation laid down in Art. 132, Sch. 1, Lim. Act, begins to run from the third consecutive default in the payment of the monthly instalments the suit is beyond time, but if the period begins to run from the expiry of the four years the suit is within time.

In a long series of decisions of this Court, by which I am bound it has been held that in such a case the money must be considered to become due at the earliest date when it is possible under the terms of the mortgage deed for the mortgagee to enforce payment thereof and therefore the starting point for the limitation of 12 years prescribed by Art. 132, Sch. 1, Lim. Act, would in this case be the date of the third consecutive default in the payment of the instalments provided for in the deed. It is sufficient to refer to *Lasa Din* v. *Gulab Kunwar* (1) in which case a number of earlier decisions of this Court have been referred to. It has been contended that the wording of the mortgage-deed in this particular case distinguishes the case from the previously decided cases on the point, inasmuch as the deed expressly states that in the event of default in payment of three consecutive instalments the creditors shall have the option either to cancel the condition about the period of payment and recover the whole amount due through the Court or to wait until the expiry of the fixed period, the action taken to depend on the will and pleasure of the creditor. It is accordingly argued that in the present case the starting point for limitation depended on the election of the creditor and he had elected for the later date. In my opinion there is no substance in this contention. There may be many variations in the wording of such mortgage deeds, but in essence they are the same in effect, namely that the creditor has the option to sue in the event of the default mentioned or to wait until the period for repayment provided for in the deed has expired. I find it impossible to make any distinction between the present case and the case dea't with in *Lasa Din* v. *Gulab Kunwar* (1).

It has been brought to my notice that the very point which has arisen for decision in the present case arises in another case pending before this Court, namely First Civil Appeal No. 32 of 1931 and has been referred for the decision of a Full Bench of this Court. I have also been informed that the decision of the Full Bench is likely in its turn to be deferred until the decision of a case pending before their Lordships of the Judicial Committee in which the very same point is involved. I have accordingly been asked by the learned counsel for the appellant to postpone the decision of this appeal pending the decision of either the Full Bench or the Judicial Committee. I am not disposed to allow this very petty case to be postponed for an indefinite period. As matters stand at present I am bound by the decisions of this Court in the light of which this appeal must be dismissed. The appeal is accordingly dismissed with costs. It will however be open to the appellant, in the event of the view hitherto taken by this Court being overruled either by the Full Bench or by their Lordships of the Judi-

(1) A. I. R. 1929 Oudh 536=125 I. C. 390.

cial Committee, to apply for a review of this judgment.

S.N./R.K. *Appeal dismissed.*

** A. I. R. 1932 Oudh 255

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Said Ahmad and *others*—Plaintiffs—Appellants.

v.

Raja Barkhandi Mahesh Pratab Narain Singh—Defendant—Respondent.

First Appeal No. 15 of 1931, Decided on 23rd December 1931, against decree of Addl. Sub-Judge, Bara Banki, D/- 10th November 1930.

(a) Mortgage—Construction — Money left in mortgagee's hand to pay prior mortgage—Mortgagor to be personally liable for excess money found due — Mortgagee paying such excess money—Mortgage deed providing that at redemption time mortgagor to pay to mortgagee sums found due in addition to mortgage money which would be found due—Mortgagor held personally liable for excess amount paid by mortgagee and same could not be added to mortgage money.

The whole of a mortgage deed should be taken together. A portion of the consideration was left in the hands of the mortgagee to pay the prior mortgage. The mortgage deed provided that if any sum in excess was found due to the prior mortgagee, the mortgagor would be personally liable for it. The mortgagor failed to pay the excess amount and the mortgagee had to pay it. It was also provided in the mortgage deed that the mortgagor at the time of redemption would pay to the mortgagee sums in addition to mortgage money which according to the mortgage deed would be found due.

Held: that the mortgagor was personally liable for the excess payment and that it could not be added to the mortgage money. [P 259 C 2]

(b) Transfer of Property Act (1882), S. 101—Mortgage executed to discharge prior mortgage—Money left in mortgagee's hand for that purpose—Mortgagor to be personally liable for any excess found due—No intermediate encumbrance—Intention was to extinguish prior mortgage and no question of subrogation would arise—Transfer of Property Act (1882), S. 74.

Where a mortgage deed was executed expressly with the object of discharging prior usufructuary mortgage and money was left in the hands of the mortgagee for that purpose, and the parties also contemplated the possibility of the money left in the hands of the mortgagee proving insufficient and covenanted that if such contingency arose mortgagor would pay it from his own pocket, and where there was no intermediate encumbrance on the property, the intention clearly was that the prior mortgage should be extinguished and no question of subrogation would arise and the mortgagee would not be entitled to claim the amount as charge: *A. I. R.* 1924 *P. C.* 36, *Rel. on.* [P 260 C 1]

(c) Mortgagor and Mortgagee—Mortgagee obtaining possession of plots exempted from mortgage and assessing exproprietary rent against mortgagor—He must be presumed to have enjoyed their profits and must be made liable to account for them.

Where mortgagee, as mortgagee, gets possession through Court of plots exempted from mortgage, gets exproprietary rent assessed on the plots as against the mortgagor and gets decrees for arrears of rent against the mortgagor, the mortgagee must be presumed to have enjoyed the profits thereof and must be made liable to account for the profits: 41 *Mad.* 1043, *Rel. on.* [P 260 C 2]

(d) Mortgagor and Mortgagee—Mortgagee in possession—Lambardar, one of co-mortgagors, realizing rent, from mortgaged land—Mortgagee, though entitled to claim accounting under Oudh Rent Act, failing to do so—Liability of each mortgagee being separate—Question regarding profits of that land cannot be gone into in redemption suit.

A mortgagee in possession is entitled under Oudh Rent Act to claim accounting from the lambardar in respect of the rent realized by the latter from certain plots of mortgaged property, and if the mortgagee fails to get rendition of accounts, the question regarding the profits of those plots cannot be gone into between the mortgagee and mortgagors as such in a redemption suit even though the lambardar happens to be one of the mortgagors, the liability of each mortgagor being admittedly separate. [P 261 C 1]

(e) Transfer of Property Act (1882), S. 76(g)—Mortgage deed contemplating accounting between parties at redemption time — Accounts to be taken from 1314 F to 1336 F—Mortgagee producing no accounts from 1314 to 1331 but relying only on patwari's papers—Accounts submitted for later years found incorrect and incomplete—Patwari's papers were not accurate accounts and could not be relied on—Every presumption could be made against mortgagee.

Mortgage deed showed clearly that it contemplated accounting between parties at the time of redemption, and accounts were to be taken from 1314 F when possession was taken up to 1336 F. The mortgagee produced no accounts for 1314 to 1331 F but relied only on patwari's papers. The accounts filed for the later years were found to be untrustworthy, incorrect and incomplete.

Held: that patwari's papers could not furnish accurate accounts and no reliance could be placed on them. [P 261 C 2]

Held further: that having regard to S. 76 (g) every presumption could be made against the mortgagee and it would not be improper to hold that all tenants had paid their rents: *A. I. R.* 1927 *Oudh* 199; *A. I. R.* 1921 *All.* 197 and *A.I.R.* 1932 *Oudh* 123, *Rel. on.* [P 261 C 2]

(f) Mortgagor and Mortgagee—Mortgagee in possession alleged to have made unlawful realizations—No presumption can be made against him.

Where mortgagee in possession, liable to give account at the time of redemption, is alleged to have realized certain unlawful amounts, no pre-

sumption with regard to such amounts can be made against him, and he would not be held liable for such amounts except in respect of those tenants who gave evidence that they paid such amounts : *A. I. R.* 1927 *Oudh* 199, *Ref.* [P 262 C 1]

(g) Mortgagor and Mortgagee—Mortgagee held responsible to account on basis of gross rental—He can realize arrears of rent.

Where mortgagee in possession has been held responsible to account on the basis of gross rental, he will be entitled to realize the arrears of rent from the tenants. [P 262 C 1]

**** (h) Hindu Law—Alienation—Legal necessity — Member of joint family charged with serious offence—Expenses of defence are for legal necessity though ultimately he was convicted—But fine paid is not for legal necessity.**

If the head of a joint family or for the matter of that any member of a joint Hindu family is accused of a serious criminal charge, there is no reason why the costs incurred in his defence should not be regarded as incurred for family necessity. The result of the prosecution, if he has ultimately been convicted, ought not to be allowed to affect the determination of the question. But the fine that he had to pay as a result of his conviction cannot be said to be for legal necessity : *A. I. R.* 1928 *All.* 582; 34 *All.* 4 and *A.I.R.* 1923 *All.* 287, *Rel. on*; *A. I. R.* 1922 *Pat.* 553, *Dist.* [P 262 C 2; P 263 C 1]

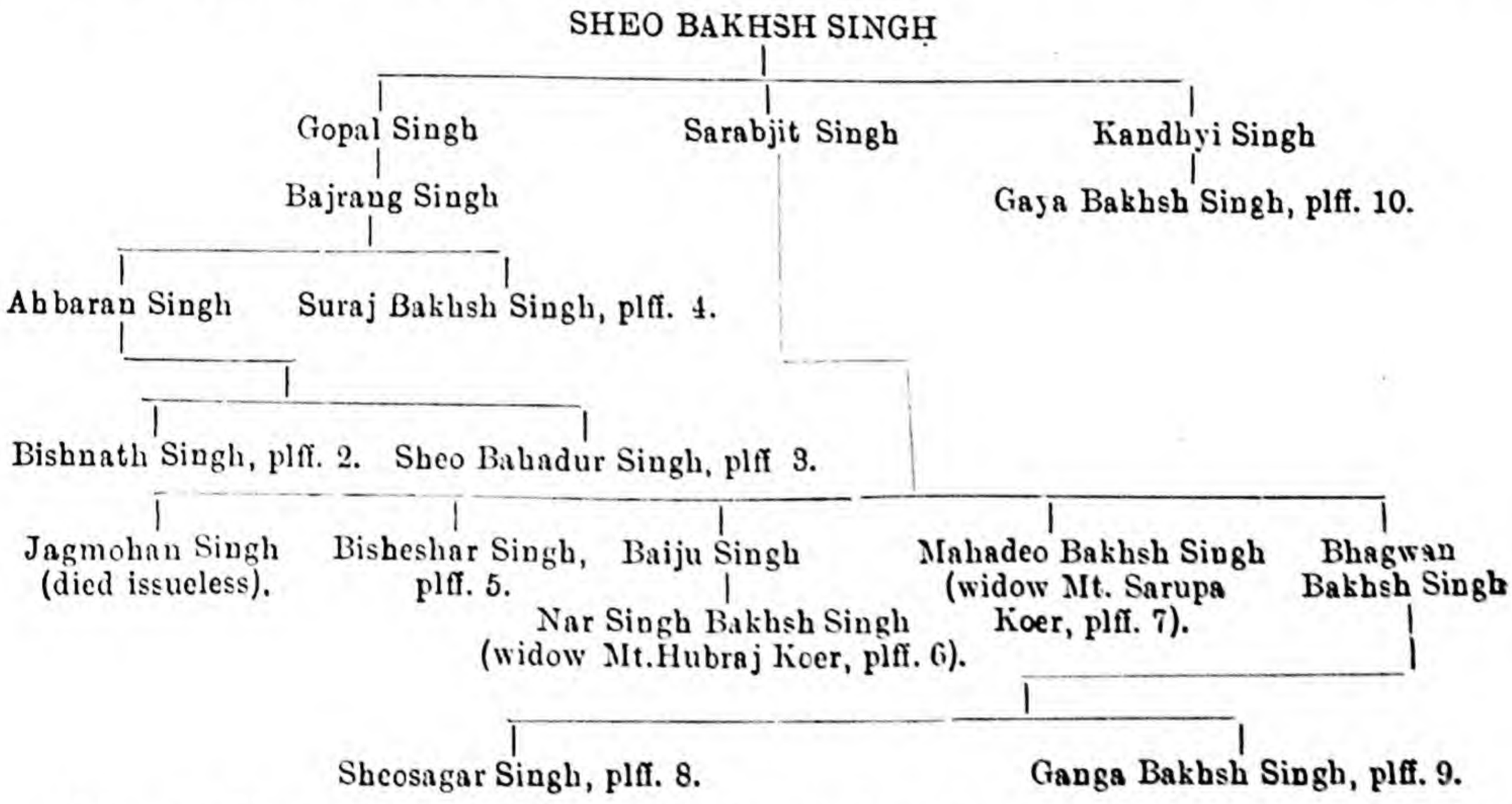
(i) Civil P. C. (1908), O. 34, R. 2 (b)—Future interest.

Whether under O. 34, R. 2 (b) future interest is to be allowed on whole amount due or only on principal amount is within the discretion of the trial Court. [P 263 C 1, 2]

Ali Zaheer and *Bhagwati Nath Srivastava*—for Appellants.

Radha Krishna Srivastava—for Respondents.

Judgment.—This is the plaintiffs' appeal against the judgment and decree dated 10th November 1930 of the Additional Subordinate Judge of Bara Banki arising out of a suit for redemption of a mortgage. The following pedigree will show the relationship of the several mortgagors and the array of the plaintiffs in the suit:



Ahbaran Singh, Suraj Bakhsh Singh plaintiff 4, Jagmohan Singh, Bisheshwar Singh plaintiff 5, Baiju Singh, Mahadeo Bakhsh Singh, Bhagwan Bakhsh Singh and Kandhayi Singh on 28th August 1903, executed a mortgage deed in favour of Babu Sheo Sahai, Talukdar of Osaha in respect of the entire village Picharwa with the exception of some *sir* and grove lands aggregating 121 bighas 12 biswas 9 biswansis in area for Rs. 25,000 carrying interest at 8 annas per cent per mensem. The entire consideration money was left in deposit with the mortgagee and he was directed to pay out of it Rs. 24,468-2-9 to Gaya Prasad a prior mortgagee who had obtained a decree for sale for that amount against the mortgagors from the Court of the Subordinate Judge of Bara Banki. The term fixed in the mortgage deed was 12 years. The deed also provided that if the mortgagors did not in any year pay the entire annual interest or any part thereof, then the mortgagee should have power to take possession over the mortgaged village and to appropriate the profits towards the interest. In case the proceeds of the mortgaged property were insufficient to meet the annual interest, then the mortgagors undertook to make good the deficiency from the exempted plots of *sir* and grove lands. If the deficiency of interest was not made good then that interest was to be added

to the principal and interest at the rate provided in the deed was payable in respect of the aggregate sum till the date of payment of the entire amount.

Default having been made in the payment of interest according to the terms of the deed, Sheo Sahai Singh instituted a suit for possession and obtained a decree on 6th November 1906 and entered into possession of the mortgaged village. Subsequently Sheo Sahai Singh died and was succeeded by his son Sahdeo Singh who made a will in favour of one Achal Singh. The latter sold 10 annas out of the entire estate of Sahdeo Singh to Raja Rameshwar Bakhsh. Under a partition which took place between Raja Rameshar Baksh and Achal Singh, the entire property mortgaged under the deed dated 28th August 1903 fell into the share of Rameshar Bakhsh who entered into possession of village Picharwa as mortgagee. Raja Rameshar Bakhsh is dead and is represented by his son Raja Barkhandi Mahesh Pratab Narain Singh, defendant. Several of the mortgagors have also died. Ahbaran Singh is represented by his two sons, plaintiffs 2 and 3. Jagmohan Singh died issueless and is represented by the surviving members of his branch. Baiju Singh is represented by his daughter-in-law Mt. Hubraj Kuar, plaintiff 6, and Mahadeo Bakhsh Singh by his widow Mt. Sarupa Kuar, plaintiff 7. Bhagwan Bakhsh Singh is represented by his two sons, plaintiffs 8 and 9, and Kandhayi Singh by his son, plaintiff 10. Plaintiff 1 is the vendee of a moiety share of the mortgaged property under a sale deed dated 16th April 1929 executed in his favour by plaintiffs 2 to 10.

The plaintiffs' case was that under the terms of the mortgage deed, the mortgagors have a right to get rendition of accounts in respect of the income of the mortgaged property realized by the mortgagee since the date of his obtaining possession. They claim that on accounts being taken it will appear that the entire mortgage money has been paid off by means of the income from the mortgaged property and that the plaintiffs are entitled to get a decree for redemption without payment of any money and if after accounts any surplus is payable to the plaintiffs, they are entitled to recover the same from the defendant. They accordingly prayed that a decree for possession by redemption without payment of any money or on payment of such sum as might be found due to the defendant on rendition of accounts be passed in his favour. They also prayed that if on accounts being taken any surplus is found due to the plaintiffs, they may be given a decree for it against the defendant. The defendant admitted the mortgage in suit and the pedigree set forth above. He pleaded that Sheo Sahai Singh paid Rs. 24,468-2-9 to Gaya Prasad and the balance of Rs. 531-13-3 to Ahbaram Singh on 26th January 1905. He further alleged that on an appeal filed by Gaya Prasad against the judgment of the Subordinate Judge of Bara Banki, the amount payable to him was increased by Rs. 3,000 and consequently Babu Sheo Sahai Singh on 24th October 1906 paid the aforesaid sum of Rs. 3,000 together with Rs. 700 for interest, total Rs. 3,700 to Gaya Prasad in addition to the amount made payable by the trial Court which had been left in deposit with him. The defendant admitted the decree for possession obtained by Sheo Sahai but pleaded that the latter obtained delivery of possession on 26th January 1907 and the accounting could be made only from that date. He also set up eight deeds of further charge executed by some of the mortgagors and their representatives, one in favour of Babu Sheo Sahai and the remaining seven in favour of Sahdeo Bakhsh Singh and claimed that Rupees 13,519-2-0 are due to him under these deeds. Lastly he pleaded that the mortgagors had taken possession of certain plots not exempted from the mortgage.

The plaintiffs in their written replication alleged that the payment of Rupees 531-13-3 to Ahbaran Singh does not bind his co-mortgagors or their representatives and that the alleged payment of Rs. 3,700 to Gaya Prasad does not create any charge on the mortgaged property and cannot be claimed in this suit. As regards the deeds of further charge they pleaded that they had not been executed by all the mortgagors and could not therefore create a charge on the entire mortgaged property. It was also pleaded that village Picharwa was the ancestral property of the mortgagors and that the deeds of further charge were not executed for any legal necessity and were not binding on the other members of the joint family. The plaintiffs also

alleged that Sheo Sahai Singh obtained possession soon after the passing of the decree in his favour and that he also took possession of the *sir* and grove lands which had ben exempted from the mortgage. The above pleadings gave rise to a number of issues which will appear from the findings of the learned Subordinate Judge. He found that village Pichharwa was the joint family property of the mortgagors, that Sheo Sahai Singh did pay Rs. 531-13-3 to Ahbaran Singh, but that this payment not having been shown to be for legal necessity or for payment of antecedent debt, was not binding on plaintiffs 2 to 4 or the other mortgagors. He also found that Sheo Sahai Singh paid an additional sum of Rs. 3,700 to Gaya Prasad but the defendant could not claim from the mortgagors the sum of Rs. 700 paid towards interest as the decree passed in appeal did not award any interest. As regards the balance of Rs. 3,000 he held that under the terms of the mortgage deed, this amount could not be added to the mortgage money. He was however of opinion that under the rule of subrogation contained in S. 74, T. P. Act, the defendant was entitled to claim it as a prior charge in the suit.

As the learned Subordinate Judge had held that the payment of Rs. 531-13-3 to Ahbaran Singh did not bind the plaintiffs, so he deducted this amount from Rs. 3,000 and held that the mortgagee was entitled to get only the balance of Rs. 2,468-2-9 from the plaintiffs. As regards the deeds of further charge Exs. A-2 to A-9, he held the execution of all the deeds proved but held that they could not bind the mortgaged property but only the respective shares of the particular mortgagors who executed them. After examining the purposes for which each of these deeds was executed, the learned trial Judge held that Exs A-3, A-6 and A-8 were not binding at all and that Exs. A-4, A-5, A-7 and A-9 are fully binding on the executants or in other words Ex. A-4 binds the shares of plaintiffs 6 and 7, A-5 the share of plaintiff 6, A-7 the share of plaintiff 10 and A-9 the share of plaintiffs 2 to 4. As regards A-2 he held that it was binding to the extent of Rs. 382-12-3 only on the shares of plaintiffs 2 to 4. The shares of the various plaintiffs determined by him were as follows:

Plaintiffs 2 and 3	5/9ths of 5/13ths
Plaintiff 4	4/9ths of 5/13ths
Plaintiff 5	1/4ths of 4/13ths
Plaintiff 6	1/4ths of 4/13ths
Plaintiff 7	1/4ths of 4/13ths
Plaintiffs 8 and 9	1/4ths of 4/13ths
Plaintiff 10	4/13ths share.

As regards delivery of possession to Sheo Sahai he held that possession was delivered to him only on 26th January 1907 and that interest should be calculated only up to that date. In respect of the *sir* and grove lands exempted from the mortgage, he found that Sheo Sahai Singh got a decree for possession in respect of them also and that he was delivered proprietary possession thereof but he found that the mortgagee did not actually enjoy the profits of those plots. He also found that the mortgagors had taken possession of plots 193, 217, 309, 96/16, 308/1, 308/2 and 656/1 which were not exempted from the mortgage but there was no evidence of their liability in respect of the rent of those plots. Next as regards accounting the learned trial Judge held that the terms of the mortgage deed showed clearly that it contemplates accounting between the parties and that accounts must be taken from 1314 F., when possession was taken by the mortgagee up to 1336F. The mortgagee produced no accounts for 1314 to 1331 F and relied only on patwari's papers. He held that patwari's papers could not be accepted in place of the accounts which the mortgagee is required to keep under S. 76 (g), T. P. Act. The accounts for the remaining period were rejected by him as untrustworthy, incorrect and incomplete. This being the position of the accounts, he held that as the mortgagee had taken possession of the exempted *sir* lands and the parties contemplated that such possession would sufficiently cover the interest that accrued due, it was reasonable to presume that all interest had been paid off. As a result of the above findings he held that the plaintiffs are entitled to redeem the mortgaged property on payment of Rs. 25,000 the principal amount and interest thereon at 6 per cent per mensem from 28th August 1903 to 26th January 1907 and Rs. 2,468-2-9 the additional amount paid to Gaya Prasad. He also held the shares of the various plaintiffs to which reference has been made above liable for payment of the amount of the principal money which was proved to be binding

on them under the deeds of further charge, Exs. A-2, A-4, A-5, A-7 and A-9 together with interest thereon at the stipulated rate.

The plaintiffs have appealed and the defendant has filed cross-objections. The parties accepted before us the correctness of the shares of the various plaintiffs in the mortgaged property as found by the lower Court. They have also agreed that the various plaintiffs should be given a decree for redemption of their separate shares in the mortgaged property and that their separate liabilities, if any, under the mortgage deed in suit should be specified as has been done by the lower Court in respect of the deeds of further charge. The plaintiffs have in the first place challenged their liability in respect of the excess payment of Rs. 3,000 paid by Sheo Sahai Singh to Gaya Prasad. It is contended that it did not constitute a charge in favour of the mortgagee. Reliance has been placed on the provisions of the mortgage deed as showing that the deed contemplates that the mortgagors should only have a personal liability for such payments. Para. 2 of the mortgage deed provides that if over and above the amount of Rs. 24,468-2 9 made payable to Gaya Prasad any other amount be found due to him then the mortgagors would pay the excess amount from their own pockets. If they failed to pay the same and the mortgagee paid the excess amount, then the mortgagee was authorized to realize it from the mortgagors and from their entire moveable and immovable property. The learned Subordinate Judge referring to the provisions of S. 72, T. P. Act, which entitles the mortgagee to add such money to the principal, held that the provisions of para. 2 constitute a contract to the contrary and that the mortgagee was therefore debarred from adding this amount to the mortgage money. The learned counsel for the defendant controverted this view and referred us to the provisions of paras. 3 and 14 of the mortgage deed which provide that the mortgagors at the time of redemption would pay to the mortgagee in addition to the principal money other items which according to the mortgage deed be found due to the mortgagee. He argued that the excess payment in question was one such item and therefore it was a charge on the mortgaged property under the terms of the deed. We are of opinion that the whole deed must be taken together and the provisions of paras. 3 and 14 must be read in the light of the provisions of para. 2. Reading them in that light it is clear that the excess payment to Gaya Prasad was not intended to constitute a charge on the mortgaged property. We are therefore of opinion that the learned Subordinate Judge is right in holding that what the parties contemplated was that the mortgagors should be personally liable for the excess payments the remedy given to the mortgagee in respect of it being to enforce payment of it against the mortgagors and that it should not be added to the mortgage money.

The next question is as regards the application of S. 74, T.-P. Act. This section has been repealed by the Transfer of Property Amendment Act 20 of 1929 which has in place of it enacted the more comprehensive S. 92 but it is the common case of both parties that the determination of the question in the present case must be based on the provisions of the old section. This section enacted the rule of subrogation and provided that a puisne mortgagee who redeems a prior mortgage acquires in respect of the property which has been redeemed by him all the rights and powers of the mortgagee as such. It has been repeatedly held that a puisne mortgagee can keep alive the prior mortgage which he has paid off if it suits his purpose to do so and that as a rule it is a question of intention and in the absence of clear evidence the presumption would be that the intention was to keep alive the prior mortgage. In *Malireddi Ayyareddi* v. *Gopalkrishnayya* (1), Lord Phillimore delivering the judgment of the Board of the Privy Council observed as follows:

> "It is now settled law that where in India there are several mortgages on a property the owner of the property subject to the mortgages may if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there was no such personal covenant. It is further to be presumed and indeed the statute so enacts (T. P. Act, S. 101) that if there is no indication to the contrary the owner has intended to have

(1) A. I. R. 1924 P. C. 36=79 I. C. 592=51 I. A. 140=47 Mad. 190 (P.C).

kept alive the previous charge if it would be for his benefit."

Admittedly in the present case there was no intermediate incumbrance on the property. The mortgage deed in suit was executed expressly with the object of discharging the prior usufructuary mortgage of Gaya Prasad and money was left in the hands of the mortgagee for that purpose. The parties also contemplated the possibility of the money left in the hands of the mortgagee proving insufficient for the purpose and covenanted that if such a contingency arose the mortgagors would pay it from their own pocket or failing this, would be personally liable for it. Taking these circumstances into consideration it seems to us that the intention clearly was that the prior mortgage should be extinguished. We are therefore of opinion that no question of subrogation arises and are unable to agree with the lower Court that the mortgagee is entitled to claim this amount as a prior charge in the present suit. The conclusion therefore is that the plaintiffs are not liable to pay the sum of Rs. 2,468-2-9 on this account and that the defendant mortgagee has to render accounts for Rs. 531-13-3 out of the consideration of the mortgage left in his hands.

The next question is as regards *sir* and grove plots exempted from the mortgage. The lower Court has found that the mortgagee obtained a decree for possession in respect of them and was delivered possession through the Court. This finding has not been disputed by the defendant-respondent. The question therefore is whether the mortgagee did or did not actually enjoy the profits of these exempted plots. The learned Subordinate Judge has relied on the khatounis, Exs. A-39 to A-49, as showing that the plaintiffs were in actual possession of these plots. The learned counsel for the defendant has also relied on the fact that when suits for arrears of rent were instituted by the defendant against the plaintiffs in respect of these plots the plaintiffs in their written statements pleaded that they had never paid rent for them. We are of opinion that these admissions contained in the written statement are of no value, as in spite of them the mortgagee succeeded in obtaining decrees in all those suits. The admissions were clearly interested statements which were not accepted by the Courts concerned. Thus the facts which are clearly proved in regard to these lands are that the mortgagee obtained a decree for possession in respect of them, that possession was delivered to him through Court and that he got expropriety rent assessed on the lands as against the plaintiffs which rent is entered in the khatounis commencing from 1325 F and that he got decrees for arrears of rent against the plaintiffs for some of the years. It is also in evidence that the defendant put the decrees in execution and applied for sale of certain properties of the judgment-debtors in execution thereof. There is no evidence to prove affirmatively that the rent was not realized during the other years subsequent to the assessment or that the decrees have not been realized.

In *Manjeshwar Naraina Rao* v. *S. Shivu Rao* (2) a Bench of the Madras High Court after a review of the English and Indian cases on the subject held that in a suit for redemption the mortgagee is not entitled to claim any arrears of rent with interest thereon in respect of the mortgaged lands which were left in the possession of the mortgagor as tenant of the mortgagee under the terms of the mortgage deed when the mortgagee has already sued and obtained a decree for such rent with interest and has allowed the decree to become barred by limitation even though the arrear of rent is a charge under the deed. In the present case it is not suggested that the decrees had become barred by time. The rent for which decrees have been obtained is a judgment debt, the payment of which can be enforced by the defendant under the decrees. We are therefore of opinion that Sheo Sahai Singh having obtained possession of the exempted plots as mortgagee he must in the circumstances of the case be presumed to have enjoyed the profits thereof and must be made liable to account for their profits.

The plaintiffs also questioned the finding of the lower Court with regard to plots 193, 217, 309, 96-16, 308-1, 308-2 and 656-1. The lower Court has held that the mortgagors or their representative had taken possession of those plots which are not exempted from the mortgage. Exs. A-206 to A-210 are copies of judgments of the Revenue Court in suits

(2) [1918] 41 Mad. 1043=49 I. C. 123.

for arrears of rent brought by the defendant against certain tenants in respect of those plots. The tenants pleaded that they had paid the rent to Ahbaran Singh. The Court found the alleged payments to Ahbaran Singh proved. It further held that Ahbaran Singh was the lambardar of the village and that payments had been made to him as such in good faith. The suits were accordingly dismissed. This is the entire evidence on which the lower Court has come to the conclusion that the mortgagors had taken possession of these plots. In the first place if this evidence proves possession it proves possession of Ahbaran Singh alone and the parties being agreed that the liabilities of each of the plaintiffs are separate the plaintiffs other than plaintiffs 2 and 3 who are representatives of Ahbaran Singh, cannot be made responsible for it. Secondly all that these judgments show is that Ahbaran Singh had realized rent as a lambardar. The defendant as the mortgagee in possession was entitled to claim accounting from Ahbaran Singh under the provisions of the Oudh Rent Act. There is no evidence to show that the defendant did not get rendition of accounts from the lambardar. Even if he did not he might have his remedy against his legal representatives. The question, if any, as regards the profits of these plots is not one which can be gone into between the mortgagee and the mortgagors as such in this redemption suit.

Then there is the important question as regards accounting. It is not disputed that the terms of the deed contemplate accounting at the time of redemption in case the mortgagee obtains possession. The learned counsel for the defendant has not questioned the finding of the lower Court that the accounts filed by him were suspicious, farzi and unreliable. It has been strongly contended on behalf of the plaintiffs that the lower Court has arbitrarily held that in the absence of reliable accounts, the profits realized by the mortgagee should be deemed to cover the interest. They contend that the accounting should take place on the basis of gross rental. S. 76, Cl. (g), T. P. Act, provides that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee. In *Khuddi Lal* v. *Mt. Aisha Jehan Begam* (3) a Bench of this Court observed as follows :

" The defendant being a mortgagee in possession was under a statutory liability to keep clear, full and accurate accounts. The accounts to be full must be detailed and supported by vouchers . . . It should be borne in mind that the accounts to be kept by the mortgagee are independent of those which may be kept by anyone else, as for example the patwari and cannot be dispensed with on the ground that the latter was keeping them *Ram Kishen Singh* v. *Shah Kundan Lal* (4) see also *Lal Bahadur* v. *Murlidhar* (5). The mortgagee is liable to the mortgagor for any sum realized by him out of the mortgaged property. The fact that his realizations were unauthorized or wrongful does not qualify his liability in this matter."

As pointed out by the learned Subordinate Judge the realizations in the patwari's siahas are always dictated by the zamindar, and the patwari's papers produced in the case cannot furnish true and accurate accounts of the realizations. It is difficult to place any reliance on them when it has been proved beyond doubt that the private accounts produced for the later years have been cooked up for the occasion and are quite untrustworthy. Under the circumstances we think we would be justified in making every presumption against the mortgagee. We are therefore of opinion that it would not be improper to proceed on the hypothesis that all the tenants had paid their rents. A similar view was taken by the Allahabad High Court in *Hardeo Prasad* v. *Ganga Sahai* (6) and by a Bench of this Court in *Lachmi Narain* v. *Mt. Mohammdi Begam* (7). (Here the judgment considered matter not material for this report, and then proceeded.) In connexion with the accounting one more point remains. The plaintiffs alleged that the defendant should be made liable for Rs. 2 per tenant per year on account of nazrana, bhusa and paira. They referred to the evidence of D. W. 1, the patwari, who stated that there are from 200 to 250 tenants and relied on the evidence of P. W. 1, P. W. 2, P. W. 3, P. W. 4 and P. W. 5 to prove that the defendant had been realizing these amounts from every tenant. It is admitted that they are in the nature of illegal exactions but

(3) A.I.R. 1927 Oudh 199=102 I.C. 263=2 Luck. 564.
(4) [1864] W.R. 177 Cr.
(5) A.I.R. 1924 Oudh 92=74 I.C. 95=27 O.C. 250.
(6) A.I.R. 1921 All. 197=61 I.C. 48.
(7) A.I.R. 1932 Oudh 123=137 I.C. 102.

it is claimed on the authority of *Khuddi Lal* v. *Mt. Aisha Jehan Begam* (3) already referred to that even though the realizations were wrongful, the mortgagee is liable to account for them. We have examined the evidence of these witnesses. At best they show that the tenants used to pay this amount to the mortgagee but none of them is prepared to say that any other tenant paid any nazrana, or bhusa or paira in their presence. The evidence therefore falls short of proving actual realization. The realizations being unlawful, no presumption can be made in respect of them. However the evidence of these five witnesses must be accepted as sufficient so far as they are concerned. We would therefore make the defendant liable for Rs. 10 per annum realized on account of nazrana, bhusa and paira from these five tenants. Rs. 10 will therefore be added to the profits on this account for each of the years in suit. It might be added that the mortgagee having been held responsible to account on the basis of gross rental, he will be entitled to realize the arrears of rent from the tenants. The only other point urged by the appellants was as regards costs. We will deal with this at the end of the judgment.

We now come to the cross-objections. The defendant-respondent has questioned the correctness of the findings of the lower Court in respect of the deeds of further charge Exs. A-2, A-6 and A-8. (Here the judgment considered evidence and then concluded.) We are therefore unable to place any reliance on this evidence. We are of opinion that the lower Court's findings in respect of Exs. A-2 and A-6 are correct. Exs. A-8 was executed by Suraj Bakhsh Singh, brother of Ahbaran Singh. It is for Rs. 500. It recites that the money was borrowed to meet the expenses for the prosecution of a case and for payment of a fine due from Ahbaran Singh. It is in evidence that there was a criminal case against Ahbaran Singh who was accused of beating some police constables. Ultimately he was sentenced to three months rigorous imprisonment and a fine of Rs. 100. The learned Subordinate Judge, relying on a decision of the Allahabad High Court in *Krishnapal Singh* v. *District Judge, Agra* *A. I. R.* 1928 *All.* 582, held that as Ahbaran Singh had been convicted of a criminal offence money borrowed for prosecuting his defence could not be regarded as legal necessity justifying alienation of the family property. We find ourselves unable to accept this view as correct. Ahbaran Singh was the head of the joint family. Suraj Bakhsh was the next senior member. The term legal necessity is not capable of precise definition. It is admitted on all hands that costs incurred in litigation for preserving and protecting the family estate constitute legal necessity. If the head of a joint family or for the matter of that any member of a joint Hindu family, is accused of a serious criminal charge, there is no reason why the costs incurred in his defence should not be regarded as incurred for family necessity. The result of the prosecution, if he has ultimately been convicted, ought not in our opinion to be allowed to affect the determination of the question. In the Mitakshara, Ch. 1, S. 1, para. 28 it is provided that :

" even a single individual may conclude a donation, mortgage, or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes."

We have no doubt that when the manager of a joint family is being prosecuted for a serious criminal offence it is a period of distress for the whole family such as would justify a mortgage of the family property according to the rule enunciated in the Mitakshara. In *Beni Ram* v. *Man Singh* (8) it was held that the necessity of raising money to pay for the defence of the head of a joint family committed to the Court of Session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purpose. Another Bench of the same Court in *Ram Raghubar Lal* v. *Dip Narain Singh* (9), held that ordinarily speaking the defence of a member of the family charged with a serious crime would be a matter which might well justify the borrowing of money as a charge on the property of the joint family. In *Dhanukdhari Singh* v. *Rambirich Singh* (10) it was held that among Hindus the defence of a member of a joint family is regarded

(8) [1912] 34 All. 4=11 I. C. 663.
(9) A. I. R. 1923 All. 287=71 I. C. 749=45 All. 311.
(10) A. I. R. 1922 Pat. 553=70 I. C. 391=1 Pat. 171.

as a pious and necessary act in order to remove the stigma of disgrace upon the whole family consequent upon the conviction of one member. Family property may therefore be charged with a debt incurred for the purpose of defending members of a family in a criminal case.

As regards the decision in *Krishnapal Singh* v. *District Judge, Agra*, *A. I. R.* 1928 *All.* 582, relied on by the lower Court, there is nothing in common between that case and the present one. The question there was whether the sons were bound to meet the liability of their deceased father arising out of acts of a criminal character. In that case there was no prosecution of the father and no question of any expenses incurred in his defence or of any alienation for that purpose. We are therefore of opinion that Ex. A-8, in so far as the consideration of it was borrowed for prosecuting the defence of Ahbaran Singh, was for legal necessity, but as regards the sum of Rs. 100 required for payment of the fine imposed on him, the case stands on a somewhat different footing. Ahbaran Singh had already been convicted and sentenced to three months' rigorous imprisonment. The family could not be saved from stigma by payment of the fine. A fine is regarded as an avyayaharika debt or a debt for a cause repugnant to good morals. In the circumstances we are not prepared to treat it as one for legal necessity. We would accordingly hold that Ex. A-8 is binding to the extent of Rs. 400 only. The defendant is entitled also to get interest on this amount at the rate of 6 per cent per annum from 20th January 1916 till the date fixed for payment compoundable yearly as provided in the deed. The amount in respect of this deed will be payable in the proportion of five-ninths of five-thirteenths by plaintffs 2 and 3, the sons of Ahbaran Singh and four-ninths of five-thirteenths by Suraj Bakhsh Singh, plaintiff 4.

Next our attention was drawn to the decree of the lower Court which allows future interest at 6 per cent per annum from the date fixed for payment till realisation on the principal amount of the deeds of further charge held binding on the plaintiffs. It was contended on behalf of the defendant-respondent with reference to O. 34, R. 11, Cl. (b), Civil P. C., that such future interest should have been allowed on the whole amount due and not merely on the principal money. The matter was one in the discretion of the lower Court and we can see no sufficient grounds to interfere with the exercise of its discretion. Lastly it was contended that the defendant should have been allowed interest on the sum of Rs. 2,468-2-9 in respect of the amount paid by the mortgagee to Gaya Prasad. We have already held that the defendant is not entitled to a decree for this amount. The question of interest in respect of this amount therefore does not arise.

It was also contended by the learned counsel for the defendant that the appellants, in view of the amount of court-fee paid by them in the appeal, were not entitled to claim any surplus. We find that the court-fee has been paid on the amount of the decree of the lower Court less the amount decreed in respect of the deeds of further charge which is not questioned. The appellants are therefore entitled to question the correctness of the finding of the learned Subordinate Judge in regard to the whole case except as regards the deeds of further charge in so far as they have been upheld by him. If on the making up of accounts the appellants are found entitled to any surplus they will of course be required to pay the necessary court-fee in respect of it.

The learned Subordinate Judge, relying on the general rule that a mortgagee is ordinarily entitled to his costs in a redemption suit held the plaintiffs liable for the costs of the defendant. We have no idea as to the result of this litigation on the making up of accounts according to the directions given by us. We think, taking all the circumstances into consideration, the proper order would be that in case the defendant is found entitled to any amount, he should get his costs of both the Courts from the plaintiffs. In case however the result is that the defendant is not found entitled to any amount, or if any surplus is found payable to the plaintiffs, the parties should bear their own costs in both the Courts. We order accordingly. (Here the judgment summarized conclusions and then proceeded). If on the other hand nothing is found due to the defendant, the plaintiffs' claim for possession by redemption will be decreed without payment of any amount. In case any surplus is found in the hands of the defendant, a decree for the surplus amount will be passed in favour of the several

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plaintiffs according to their shares. In either of these cases the parties will bear their respective costs in both the Courts. We further direct that if it is not found necessary to go into the accounts after 1336 F then the plaintiffs can institute a separate suit for the profits from the date of suit till delivery of possession.

S.N./R.K. *Decree modified.*

A. I. R. 1932 Oudh 264

KISCH, J.

Mohammad Ali and *another*—Defendants—Appellants.

v.

Ahmad Husain and *others*—Plaintiffs—Respondents.

Second Appeal No. 245 of 1931, Decided on 3rd May 1932, against decree of Sub-Judge, Hardoi, D/- 12th May 1931.

(a) Civil P. C. (1908), S. 100—Finding of fact.

Finding of fact not vitiated by any error of law or procedure is binding on Court in second appeal. [P 264 C 2]

(b) Easements Act (1882), S. 60—Licensee only to remain in possession of plot—House built—S. 60 would be inapplicable.

Section 60 is inapplicable where the licensee builds a house while the license was merely to remain in possession of the plot; for the house cannot be said to be built, acting upon the license. [P 264 C 2]

Ali Zaheer and *A. N. Mulla*—for Appellants.

Ghulam Hasan and *Saiyed Husain*—for Respondents.

Judgment.—This is the defendants' appeal from the decree of the Subordinate Judge of Hardoi dated 12th May 1931 reversing the decree of the Munsif of Bilgram dated 26th January 1931. The suit was brought by the plaintiffs for recovery of possession of a piece of land in Bilgram town on which the defendants had a dwelling house. They based their claim on an agreement executed in the year 1860 by the predecessors-in-interest of the defendants in favour of the predecessors-in-interest of the plaintiff by which the plaintiffs were allowed to retain possession of the land in suit on payment of a nominal rent of one pice per month subject to the condition that whenever the owners wished them to give up the land they would immediately remove the materials of their house from the land and deliver possession to the owners. The deed further recites that the licensees have no claim to the land and will never have any. Admittedly from the date of that agreement the defendants or their predecessors-in-title have been in possession and nominal rent has not been paid. The Court below rejecting all the defendants' pleas including the plea that they had perfected their title by adverse possession, decreed the plaintiffs' suit. Only two points have been urged by the learned counsel for the appellants in support of the appeal. The first is that the identity of the plot in suit with the plot covered by the agreement of 1860 has not been established. This is a pure question of fact, and both the Courts below after consideration of all the evidence have come to the conclusion that the plot in suit is the plot referred to in the agreement of 1860. This finding of fact is not vitiated by any error of law or procedure and is binding on this Court in second appeal.

The lower Court's finding on the question of adverse possession has not been challenged, and the only other point urged is that under S. 60, Easements Act, 1882, the license granted by the zamindar in 1860 cannot be revoked because the licensees, acting upon the license, have executed a work of a permanent character and incurred expenses in the execution. In the first place this plea has been raised for the first time in this Court and in the second place it does not appear to be a valid plea. Apart from the fact that S. 2, Easements Act, saves any right acquired, or arising out of a relation created before this Act comes into force from being derogated from by any of the provisions of the Act, the terms of S. 60 of the Act are inapplicable in the present case as the defendants' house was not built acting upon the license. It was merely a license to remain in possession of the plot on which the defendants' predecessors-in-interest already dwelt. The case is certainly a hard one, but there is no ground for interference with the decree of the Court below and the appeal is accordingly dismissed with costs.

S.N./R.K. ***Appeal dismissed.***

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to the greatest respect. But whatever may have been the views expressed by individual Judges, there is an authoritative ruling on the essentials of the section in the Full Bench decision of the Madras High Court in *Ramkrishna Chetti* v. *Palaniyandi* (2) where the Judges observe :

"It is not part of the definition of the offence that the act of the accused should be in common language a mere wanton act of waste. Under S. 430, Penal Code, the physical requisites of the act are the doing of an act which causes, or to the doer's knowledge is likely to cause a diminution of supply. He also fulfils the mental requisites, when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right, and it matters not that he claims to set up such a right if the facts are so clear that the claim is manifestly only an additional wrong. It is for judicial tact to distinguish where the case is sufficiently doubtful to prevent the inference of a wrong intent."

In the case before me there is no doubt that the bandh in question was the property of the complainant, that it held water which he required for the irrigation of his fields, that the accused by cutting the bandh let out some of the water and it would violate the most elementary principles of mathematics to hold that the supply of water was not thereby diminished. The result is that the rule is discharged.

R.M./R.K. *Rule discharged.*

(2) [1876] 1 Mad. 262=1 Weir. 502 (F.B.).

A. I. R. 1932 Patna 225
Full Bench

COURTNEY-TERRELL, C. J.;
KULWANT SAHAY, MACPHERSON,
FAZL ALI AND JAMES, JJ.

Nathuni Thakur—Appellant.

v.

Ramsaran Singh—Respondent.

Letters Patent Appeal No. 86 of 1931, Decided on 5th May 1932.

Bengal Tenancy Act (1885), Ss. 30 (b) and 35—Rent—"Unfair and inequitable" meaning of, explained—In a suit for enhancement of rent under S. 30 (b) Court can consider economic depression—High Court does not interfere with discretion where it is wrongly exercised.

The general purpose of the Bengal Tenancy Act makes it clear that the words "unfair and inequitable" in S. 35 refer to the maintenance of the proportion of the produce taken by the landlord in the form of money rent or corrections of the proportions to comply with the conditions prevailing under equal conditions within a given area. The words involve the further reservation that the amount of enhancement imposed must not be such as to reduce the raiyat's income calculated in terms of money to such an extent as to involve serious hardship. The recent great and sudden economic change in the value, in terms of money, of foodstuffs is a notorious fact. Its effect in any particular case might be such as to render an enhancement (otherwise justifiable in the sense that the correct proportions are restored) unfair and inequitable because the money value of the proportion left to the raiyat might be so low as to involve serious hardship. It is incumbent upon the tenant who desires that the economic convulsion may be considered as having affected his own particular case to prove his contention as a matter of fact. The very fixing by the legislature of a period of 15 years before any individual case can be reopened shows that the legislature intended that justice in individual cases must be subordinated to the public convenience of maintaining periods of stability and avoiding many successive suits. The discretion given by S. 35 is very wide, and where it is applied on right principles, that is to say, for the purpose of maintaining the proportion of the produce allotted to the landlord and the tenant respectively, it should not be a matter of interference by the High Court by way of revision. Where however it is wrongly applied, that is to say, where for example a tribunal has considered the words "fair and equitable" as giving it a right to alter these proportions in accordance with its own economic or political ideas of justice, the Court should and will correct the error. It is incumbent upon the tribunal in an enhancement suit to take into consideration the fact of the great economic depression provided it is shown by evidence that in the particular circumstances of the case the economic depression will, if considered together with the proposed enhancement, disturb the proportions of the profits allotted to the landlord and the tenant respectively under equal conditions within the area covered by the inquiry and measured money value up to the time of the suit. The consideration of decennial periods is a matter of procedure, compulsory it is true to the extent enacted, but it is not to be taken as being the only matter to be considered by the tribunal. Any matter which affects what is "fair and equitable" may, and indeed should, be considered by a tribunal under S. 35 of the Act. [P 227 C 1, 2, P 228 C 1, 2]

S. N. Ray and *B. N. Ray*—for Appellant.

S. M. Mullick and *J. K. Prasad*—for Respondent.

Courtney-Terrell, C. J.—This Letters Patent appeal from the judgment of Mohammad Noor, J., first came on for hearing before two of us (Kulwant Sahay, J. and myself) and finding that it raised a question of great importance in enhancement suits under the Bengal Tenancy Act we decided that it should be reheard before a Bench of five Judges.

The question is whether in a suit for enhancement under S. 30 (b), Ben. Ten. Act, the tribunal is entitled to take into consideration under S. 35 the great eccnomic depression with reduction in staple food-crop prices which has taken place

recently. Other and minor points were raised by the appeal, but this is the only question of importance. The material parts of S. 30 are as follows :

"The landlord of a holding held at a money rent by an occupancy raiyat may, subject to the provisions of this Act, institute a suit to enhance the rent on one or more of the following grounds (namely): (a) that the rate of rent paid by the raiyat is below the prevailing rate paid by occupancy raiyats for land of a similar description and with similar advantages in the same village or in neighbouring villages, and that there is no sufficient reason for his holding at so low a rate; (b) that there has been a rise in the average local prices of staple food-crops during the currency of the present rent; (c) that the productive powers of the land held by the raiyat have been increased by an improvement effected by, or at the expense of the landlord during the currency of the present rent; (d) that the productive powers of the land held by the raiyat have been increased by fluvial action."

It is now well recognized that the rents paid by raiyats in settled areas are not economic rents as understood in western countries. In *Kamala Prasad Singh* v. *Bankey Prasad Singh* (1) at p. 695 (*of* 10 *P. L. T.*) James, J., said :

"I should observe that the section as a whole is based not on economic principles but on the legal and historical principle that the landlord is entitled to a certain share of the produce of the holding. In the words of Regn. 19 of 1793 :

"By the ancient law of the country the ruling power is entitled to a certain proportion of the produce of every bigha of land, demandable in money or kind according to the local custom unless he transfers his right thereto for a term of years or in perpetuity.'

"In those areas to which the decennial settlement applied, the ruling power compounding with the zamindars transferred this right to them; and except where raiyats hold at fixed rates, the landlord is entitled to a periodical revision of rent under S. 30 (b), Ben. Ten. Act, not on general economic principles but because he is entitled to a certain proportion of the produce of the land."

Now where rent is paid in kind not as a fixed rent but on the principle of division of the crops no qustion of enhancement can arise. But in the course of history over large areas of the country the share payable by the tenant to the landlord has been commuted for a money rent. Nevertheless that money rent represents the share of the produce to which the landlord is entitled, and as economic forces produce from time to time changes in the relative values of money and agricultural produce, the provisions for a reconsideration from time to time of the money rent become necessary and were at an early time recognized as necessary in the interests of both parties for the purpose of preserving the proportion between the shares of the produce taken by the landlord and the tenant respectively and to correct lack of uniformity in such proportions when uniform conditions prevail in any given area.

For this purpose those clauses in the Bengal Tenancy Act which deal with enhancement suits were framed in order to introduce certainty and uniformity of practice. To that end S. 32 institutes a uniform procedure for testing not only the uniformity of the agricultural conditions prevailing in an area but also whether there has been a rise in the average local prices of staple food-crops during the currency of the present rent. For this latter purpose it enacts that the Court shall compare the average prices over decennial periods and also that the enhanced rent shall bear to the previous rent the same proportion as the average prices in the latter decennial periods bear to the average prices for the previous decennial period with which the first period is compared. These enactments make clear that the purposes of this portion of the Act is to maintain on the whole the proportions taken by the landlord and the tenant respectively and that they are not for the purpose of changing the proportions in accordance with any supposed economic or political considerations. When this is appreciated it will easily be seen that the consideration of fact most important for the tribunal is the change in the value of money relatively to staple food-crops which has taken place.

For purposes of practical convenience and to avoid yearly harassment of tenants by successive suits for enhancement it became necessary to enact, following on well-established customs, that the determination of an enhancement suit, whether in favour of the landlord or in favour of the tenant should, for a number of years, preclude the further reopening of the matter as between the landlord and the tenant, notwithstanding that within such period the value of money had changed relatively to that of food-crops. Having regard to the periodicity of the fluctuations observed in records of prices and to the reasonable anticipation that such periodicity would be maintained until the legislature might be called upon to reconsider the subject,

(1) A. I. R. 1929 Pat. 702=124 I. C. 390.

it was enacted that the determination of an enhancement suit should conclude the amount of the money rent payable by the tenant for a period of 15 years.

Notwithstanding these provisions it was felt that in any given case circumstances might arise in which a decision based strictly upon the change in prices calculated according to the procedure laid down by S. 32 might result in a rent in which the proportions of the food products payable to the landlord and calculated in terms of money by that procedure might be disturbed. Such circumstances, unless the tribunal could take them into acconnt, might defeat in any particular case the main purpose of the Act. Accordingly by S. 35 it was enacted that :

" Notwithstanding anything in the foregoing sections, the Court shall not in any case decree any enhancement which is under the circumstances of the case unfair or inequitable."

The general purpose of the Act, as I have above described, makes it clear that the words " unfair and inequitable" refer to the maintenance of the proportion of the produce taken by the landlord in the form of money rent or corrections of the proportions to comply with the conditions prevailing under equal conditions within a given area. They do not refer to considerations which might properly influence the legislature, if it so chose, to decree a change in those proportions or the adoption of another criterion. The Act has to be administered as it stands not by economists or politicians but by lawyers who have to carry out the policy laid down by the legislature. Had it been otherwise intended, the legislature might have left to the tribunals the question of the enhancement not only of money rent but of produce rent paid on a division of the crops, that is to decide whether it was " fair and equitable " to alter the proportions received by the landlord and the tenant respectively. We have therefore in administering S. 35 to consider only such matters as are " fair and equitable " in the sense of maintaining these proportions. Moreover I consider that the words involve the further reservation that the amount of enhancement imposed must not be such as to reduce the raiyat's income calculated in terms of money to such an extent as to involve serious hardship.

The recent great and sudden economic change in the value, in terms of money of foodstuffs is a notorious fact. A Court which declined to take judicial notice of it would, I imagine serenely ignore an earthquake. Its effect in any particular case might be such as to render an enhancement (otherwise justifiable in the sense that the correct proportions are restored) unfair and inequitable because the money value of the proportion left to the raiyat might be so low as to involve serious hardship. The precise date when that change began to take effect in any particular locality and the precise extent to which it would affect the particular circumstances of any case are matters which may on the one hand be ascertained by the Court as matters of public history from documents of public record and on the other hand are matters of evidence to be given before the tribunal.

In other words it is incumbent upon a tenant who desires that the economic convulsion may be considered as having affected his own particular case to prove his contention as a matter of fact. It is urged on the other hand that it cannot be assumed by a Court and cannot be proved by evidence that the economic catastrophe will have permanent effects that world changes in economic conditions may well occur again and within a very short time in the opposite direction. It is contended that it would be unfair to the landlord, having regard to the fact that he is precluded from reopening the matter for a period of 15 years, to burden him with the results of what may be a purely temporary condition. There is, no doubt, some force in this argument but it must be remembered that the very fixing by the legislature of a period of 15 years before any individual case can be reopened shows that the legislature intended that justice in individual cases must be subordinated to the public convenience of maintaining periods of stability and avoiding many successive suits. One method for avoiding hardship in any particular case is provided by S. 36 of the Act :

" If the Court passing a decree for enhancement considers that the immediate enforcement of the decree in its full extent will be attended with hardship to the raiyat, it may direct that enhancement shall be gradual, that is to say, that the rent shall increase yearly by degrees for any number of years not exceeding five until the limit of the enhancement decreed has been reached."

SRINAGAR (Kashmir)

It may be noted here that it is not necessary under this section that the successive yearly enhancements over the limited period of five years shall proceed by equal increment. The curve of increment may either be a straight line or convex or concave as the tribunal may in its discretion determine. Nevertheless if this method be adopted at the end of five years the full enhancement must come into force. I mention this section therefore not by way of indicating that it provides for all circumstances an adequate method of giving effect to the consideration involved in the economic depression, but as providing a method which may in very many circumstances be satisfactory and enable the Courts to do justice as between the parties. The discretion given by S. 35 is very wide and where it is applied on right principles, that is to say, for the purpose of maintaining the proportion of the produce allotted to the landlord and the tenant respectively, it should not be a matter of interference by this Court by way of revision. Where however it is wrongly applied that is to say, where, for example, a tribunal has considered the words "fair and equitable" as giving it a right to alter these proportions in accordance with its own economic or political ideas of justice, the Court should and will correct the error. For the reasons which I have given above, I respectfully disagree with the opinion expressed by the learned Judge before whom this case first came in second appeal. He said :

"The learned advocate has relied upon the present economic depression prevailing in the country. First of all, one cannot be sure how long this depression is going to last, and secondly, if this becomes a permanent feature it will be open to the defendants to apply for reduction of rent under the provisions of S. 38, Ben. Ten. Act."

The material parts of S. 38 enable an occupancy raiyat holding at a money rent to sue for the reduction of his rent :

"(b) on the ground that there has been a fall, not due to a temporary cause, in the average local prices of staple food-crops during the currency of the present rent."

The words "not being due to a temporary cause" show very clearly that S. 38 would not give relief to the tenant from changes in the proportions due to the economic depression; for from the learned Judge's premise that it cannot be shown that the depression will have a permanent effect, he would be unable in any case to obtain a reduction for this cause. In my opinion therefore, it is incumbent upon the tribunal in an enhancement suit to take into consideration the fact of the great economic depression provided it is shown by evidence that in the particular circumstances of the case the economic depression will, if considered together with the proposed enhancement, disturb the proportions of the profits allotted to the landlord and the tenant respectively under equal conditions within the area covered by the inquiry and measured money value up to the time of the suit. The consideration of decennial periods is a matter of procedure, compulsory it is true to the extent enacted, but it is not to be taken as being the only matter to be considered by the tribunal. Any matter which affects what is "fair and equitable," construing those words in the way I have indicated may and indeed should be considered by a tribunal under S. 35 of the Act.

The facts of this particular case however need but brief reference. It is very clear that the rent which has prevailed even when enhanced to the maximum decreed by the Munsif represents a proportion much below that paid under equal conditions within the area and the enhanced rent cannot be considered otherwise than as fair and equitable in the circumstances. The question of the area of the tenant's holding is purely one of fact with which a Court in second appeal is not concerned to interfere. In the result while giving expression to the law as I understand it and differing from the learned Judge in this matter I would dismiss this appeal upon the findings of fact but without costs.

Kulwant Sahay, J.—I agree.

Macpherson, J.—I agree.

Fazl Ali, J.—I agree.

James, J.—I agree.

K.N./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Patna 228

KULWANT SAHAY AND SCROOPE, JJ.

Kedar Nath Goenka—Appellant.

v.

Chandra Mauleshwar Prasad Singh—Respondent.

Reference in First Appeals Nos. 28, 29, 32 and 33 of 1928, Decided on 10th March 1932.

(a) Court-fees Act (1870), S. 28 — High Court can determine whether proper court-fee is paid on memorandum of appeal.

Under S. 28 the High Court has power to determine whether the court-fee paid on the memorandum of appeal is sufficient or not. [P 230 C 1]

(b) Court-fees Act (1870), S. 4 and Sch. 1, Art. 1—Appeal from mesne profits requires ad valorem court-fee.

Memorandum of appeal from an order made on an application for ascertainment of mesne profits requires an ad valorem court-fee stamp: 3 *Pat. L. J.* 67, *Foll.*; *A.I.R.* 1926 *Pat.* 218, *Dist.*; 129 *I. C.* 662, *Diss. from.* [P 230 C 1]

*** (c) Civil P. C. (1908), O. 20, Rr. 6 and 7 —Preparation of decree after judgment is pronounced cannot be stopped—Court-fees Act (1870), S. 28.**

After the judgment has been pronounced and it has been signed and sealed, no power is left in the Court to alter it or add to it or subtract anything from it; and the judgment having been pronounced a decree must be prepared in accordance with it. S. 28, Court-fees Act, does not empower the Court to call upon the parties to pay the deficit court-fee after judgment has been pronounced. It only provides for validating certain acts which would be invalid if a certain document was not properly stamped. Therefore when once the judgment has been pronounced, the High Court has no power to stop the preparation of the decree merely on the ground that proper court-fee is not paid by the party : 4 *Pat. L. J.* 472, *Ref.* [P 231 C 1]

Hasan Imam, *S. Niamutullah*, *N. C. Ghosh* and *J. C. Sinha*—for Appellant.

S. N. Bose and *S. R. Sen Gupta*—for Respondent.

Shiveshwar Dayal, *Govt. Pleader*—for the Crown.

Order.—This matter comes before us on a reference by the Registrar under the following circumstances: It appears that a suit was instituted by the proprietor of Mahal Bistahazari in the District of Monghyr and the reliefs asked for in the plaint were to set aside the revenue sale of the mahal, to recover possession from the auction-purchasers at the revenue sale and for recovery of mesne profits for the period up to the date of suit and also for futue mesne profits up to the date of delivery of possession. This suit was ultimately decreed by the Privy Council. Two applications were then made for delivery of possession, one by the Maharaja of Gidhour and the other by Maharaj Kumar Babu Bageshwari Prosad Singh and others. Possession was delivered to them over the properties in which they were interested out of the various villages comprised within Mahal Bisthazari. Thereafter two separate applications were made by the Maharaja of Gidhour and Maharaj Kumar Babu Bageshwari Prosad Singh for ascertainment of future mesne profits from the date of suit up to the date of delivery of possession. The Maharaja in his application claimed a sum of Rs. 1,01,591, odd and Maharaj Kumar Bageshwari Prosad Singh claimed a sum of Rupees 3,85,000 odd as mesne profits. Upon their applications for ascertainment of mesne profits they paid ad valorem court-fee calculated on the amount claimed by them as mesne profits. The Subordinate Judge, after a prolonged inquiry, made decrees for mesne profits, awarding Rs. 41,803 odd to the Maharaja and Rs. 57,452 odd to Kumar Bageshwari Prosad Singh. Four appeals were preferred against the decrees made by the Subordinate Judge. The judgment-debtor Babu Kedar Nath Goenka filed Appeal No. 28 of 1928 against the Maharaja valuing his appeal at the sum of Rupees 41,803 odd, namely the amount decreed against him. The Maharaja filed Appeal No. 33 of 1928 against Babu Kedar Nath Goenka claiming Rs. 52,000 odd as the amount to which he was entitled to over and above the amount decreed in his favour by the Subordinate Judge. Babu Kedar Nath Goenka preferred Appeal No. 29 of 1928 against Maharaja Kumar Babu Bageshwari Prosad Singh valuing his appeal at Rs. 57,452, that is, the entire amount decreed against him in favour of the Maharaj Kumar, and Maharaj Kumar Babu Bageshwari Prosad Singh preferred Appeal No. 32 of 1928 claiming a further sum of Rs. 54,000 over and above the amount decreed in his favour by the Subordinate Judge. The memorandum of appeal in each one of these four appeals was stamped with a court-fee stamp of Rs. 4 only. The appeals came on for hearing in due course and we pronounced our judgment in the appeals on the 13th August 1931. We dismissed Appeal No. 33 entirely and we allowed the other three appeals partially. When the stage came for the preparation of the decree, the officer of the Court in charge of the preparation of the decree discovered that the memorandum of appeal in each case had been insufficiently stamped. He made a reference to the Registrar and the Registrar was of opinion that the court-fee payable on the memorandum of appeal was ad valorem upon the value of the subject-matter in dispute in the appeal. He thereupon called upon the

parties to pay the deficit court-fee and directed that until the deficit court-fee was paid, the decree in the four appeals shall not be drawn up. The parties appeared and contested the jurisdiction of the Registrar to call upon them to pay additional court-fee at this stage. They further contended that the memorandum of appeal in each case had been properly stamped. The Registrar has dealt with this case in a dual capacity. As Registrar he has refused to draw up the decree so long as the deficit court-fee was not paid. As taxing officer purporting to act under S. 5, Court-fees Act, he has held that the proper court.fee payable on the memorandum of appeal in each case was ad valorem upon the value of the claim of the appellants in each case. As the parties refused to pay the court-fee the matter has now been referred to us for final orders.

Mr. Hasan Imam has questioned the jurisdiction of the taxing officer under S. 5, Court-fees Act, to pass any order at this stage of the appeal. It is however not necessary to consider the question as regards the jurisdiction of the Registrar as a taxing officer, because in any event the matter has been referred to us and under S. 28, Court-fees Act, we have undoubtedly the powers to determine whether the court-fee paid on the memorandum of appeal was sufficient.

It is next contended that the court-fee paid on the memorandum of appeal was sufficient ; and reliance is placed upon a decision of this Court in *Sheodhin Singh* v. *Norangi Lal Ram* (1). The facts of that case appear to be precisely similar to the facts of the present case. There also an application had been made for ascertainment of mesne profits. Mesne profits had been ascertained by the Court below and an appeal had been preferred to the High Court disputing the amount ascertained by the Court below. It was held by the taxing Judge to whom the matter had been referred by the taxing officer under S. 5, Court-fees Act, that the court-fee payable on the memorandum of appeal was not ad valorem but a fix sum of Rs. 4. This decision was based on a Full Bench decision of this Court in *Ram Gulam Sahu* v. *Chintaman Singh* (2) where the question raised was whether the application for ascertainment of mesne profits made to the trial Court was to be stamped ad valorem and it was held that such an application did not require to be stamped ad valorem, the reason being that it was merely an application and ought to be stamped under Sch. 2, Court-fees Act. The Full Bench decision therefore did not decide the question of the court-fee payable on a memorandum of appeal presented against a decree made by the lower Court on an application for ascertainment of mesne profits. The decision of the taxing Judge was based on the decision of the Full Bench on a question of the court fee payable on petition for ascertainment of mesne profits and not on the question as regards the court-fee payable on the memorandum of appeal. I find myself unable to agree with the view taken by the taxing Judge in *Sheodhin's* case (1). Under S. 4, Court Fees Act, the document which has to be considered is not the petition for ascertainment of mesne profits but the memorandum of appeal.

Section 4, Court Eees Act, provides that a document like the one now before us, namely, a memorandum of appeal, cannot be received by the High Court unless in respect of it there be paid a fee of an amount not less than that indicated by the schedules attached to the Act. Sch. 1, Art. 1, Court fees Act, prescribes that a memorandum of appeal is to be stamped with a court-fee stamp calculated on the amount or value of the subject-matter in dispute in the appeal. The amount or value of the subject-matter in dispute in the four appeals was the amount claimed by the appellant in each case and therefore the memorandum of appeal in each case ought to have been stamped ad valorem. This was the view taken by this Court in *Nand Kumar Singh* v. *Bilas Ram* (3). It is true that the decision arrived at in this case was doubted in the Full Bench decision of this Court in *Ram Gulam's* case (2), referred to above ; but that was only with reference to the court-fee stamp payable on the petition for ascertainment of mesne profits filed in the lower Court and not with reference to the court-fee payable on the memorandum of appeal. We are therefore of opinion that the view taken by the Registrar that the

(1) [1926] 129 I. C. 662.
(2) A.I.R. 1926 Pat. 218=5 Pat. 361 = 93 I.C. 939 (F.B.).
(3) [1917] 3 Pat. L. J. 67=40 I. C. 579.

memorandum of appeal in each case ought to have been stamped ad valorem is the correct view.

The next question that arises is what orders we should pass. It is contended by the learned advocate for the appellants in each case that the Court having pronounced judgment is now functus officio and no order can be passed directing the stoppage of the preparation of the decree or calling upon the parties to pay the deficit court-fee. Reference is made to S. 33 and O. 20, Rr. 6 and 7, Civil P. C., and it is contended that a judgment having been pronounced, the decree must follow, and the Court is unable to direct that the preparation of the decree be stopped until the payment of the deficit court-fee. In our opinion this contention is well-founded. After the judgment has been pronounced and it has been signed and sealed, no power is left in the Court to alter it or add to it or subtract anything from it ; and the judgment having been pronounced a decree must be prepared in accordance with it. S. 28, Court-fees Act, in our opinion, does not empower the Court to call upon the parties to pay the deficit court-fee after judgment has been pronounced. It only provides for validating certain acts which would be invalid if a certain document was not properly stamped. We are fortified in the view we take by a Full Bench decision of our own Court in *Radika Raman Prosad Singh* v. *Janaki Kuer* (4) where it was held that when the High Court dismisses an appeal from whatever cause, it ceases to have seisin of the appeal or case, and is powerless to call upon the respondent to pay any deficiency due to him in respect of court-fees payable in the lower Court, and consequently has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him. The same view was taken in the Calcutta High Court in *Jatra Mohan Sen* v. *Secy. of State* (5): see also *The Shanghai Life Insurance Co.* v. *Mrs. Helen Constance Brown* (6) and *Abdullah* v. *Secy. of State* (7). It is therefore clear that we have no power to stop the preparation of the decree. We would therefore direct that decrees be prepared in accordance with the judgment pronounced by us.

K.N./R.K. *Order accordingly.*

(4) [1919] 4 Pat. L. J. 472=51 I. C. 756 (F.B.).
(5) [1918] 46 Cal. 520=52 I. C. 435.
(6) [1916] 32 I. C. 534.
(7) A. I. R. 1925 Lah. 131=82 I. C. 588.

** A. I. R. 1932 Patna 231

MACPHERSON AND DHAVLE, JJ.

Bhola Prasad—Appellant.

v.

Ramkumar Marwari—Respondent.

Appeal No. 85 of 1930, Decided on 13th August 1931.

*** * Provincial Insolvency Act (1920), S. 28—Partnership between stranger and joint Hindu family of father and minor sons—Firm adjudged insolvent—Adults mortgaging ancestral property for partnership debts—Minor's shares in ancestral property can be sold by receiver to discharge debt of firm.**

A partnership existed between a stranger and a joint Hindu family consisting of father and sons, some of whom were minors. On the partnership firm being adjudicated as insolvent, its assets vested in the Official Receiver. The adults had mortgaged a part of the ancestral property as partners for a debt due to the partnership. On the receiver trying to sell the shares of the minor members in the ancestral property, they objected to the sale as the partnership was with a stranger.

Held: that the liability of the minors as the sons of their fathers must be distinguished from their liability as partners of the firm. So far as the latter was concerned, they were under no personal liability and no property of theirs, which was not the property of the firm could be touched by the receiver. The receiver was entitled to proceed against the interest of the minor sons in the joint family property, and the sons could only obtain exemption by showing that the father's debts were not binding on the sons by reason of immorality and the like. The fact that the minors had not been and could not be adjudicated insolvent would not affect the vesting—in the receiver—of the entire assets of the firm including their shares in the family property which had become part of the firm's assets. With the insolvency of the firm, as on the dissolution of a firm, the share of the minors in the property or assets of the firm means nothing more than their right to participate in the surplus or divisible income and capital of the firm at the proper time and after the obligations of the firm have been discharged. The minor's shares in the family property which was mortgaged for a debt of the family as a partner in the firm could not in any event be saved by them except by showing that the debts for which the fathers were personally liable were contracted for immoral purposes: *Case law referred.*

[P 233 C 1 ; P 234 C 2]

D. N. Varma—for Appellant.

N. N. Ray—for Respondent.

Judgment. — This appeal has been heard along with appeal from *Original Order No.* 65 of 1930 (*Haji Muhammad Ali* and *another* v. *Ramkumar Marwari* and *others*) in which a separate judgment has been delivered. The present appeal is preferred against para. 3 of order

No. 65, dated 19th February 1930, in Insolvency Case No. 113 of 1929 refusing to exempt from sale "the ancestral property of the petitioners" who are minor partners of an insolvent firm. The application for adjudication was made by the creditor Ramkumar Marwari (respondent 1) against nine persons, all Kalwars. Of the nine persons eight constitute a joint family with Garibchand Ram of Ekaunaganj as karta, while the ninth is Bansidhar Kalwar of Rampur (who, it may be observed, also holds four annas in Tauzi 11291 of Ekaunaganj whereof the joint family holds eight annas). The first four members of the joint family are adults, while the other four, who are the present appellants, are minors, the first two being the sons of Garibchand and the second two the sons of Lurki Prasad, another adult member of the joint family.

The act of insolvency alleged was the execution by the debtors within three months of the application of a bogus deed of mortgage (Ex. 1) for Rs. 27,500 in favour of Haji Muhammad Ali, Jagannath Prasad of Calcutta, by which all the properties appertaining to the debtors have been mortgaged in order to defraud and defeat the claims of other creditors. By amendment, the addition was made to the names of the opposite party of the description:

"Partners carrying on business at Arrah in the name and style Garibchand Lurki Prasad."

The learned Judge held that the debtors had committed the act of insolvency alleged and the objection that the mortgagee was a creditor in respect of another business, namely, Ramprasad Bansidhar, of the debtors' joint family in which Bansidhar was also a partner was negatived (Lurki Prasad is a son of Ramprasad), it being held that the grain business in which the petitioners' debt had accrued and the cloth business in which Bansidhar was a partner, actually belonged to the same persons, the joint family and Bansidhar being interested in both. In the bond itself which is executed by Garibchand Ram, Lurki Prasad and Bansidhar, it is actually set out that Bansidhar is a partner of the other executors and that they all carry on both the businesses, and it was held that all the nine debtors were liable to the petitioning creditor and also to other creditors, and that they had committed an act of insolvency. The learned District Judge accordingly passed "an order of adjudication against the debtors."

In appeal the first contention is that the minors could not be adjudicated insolvents. The order which has been quoted has however to be read in conjunction with the previous order of 26th August 1929, in which it was held that an application in the names of the partners to adjudge the firm insolvent is maintainable, and the Judge proceeded as follows:

"As regards the minors the decision in *Jagmohan Narain* v. *Girish Babu* (1) and the decision—*In re Sital Prasad* (2), show that a minor cannot be adjudicated insolvent. It is clear however to my mind that a minor is a proper party to an application to adjudge insolvent a firm in which that minor is a partner.

I therefore allow the amendment and hold that after amendment the application to adjudge the firm insolvent is maintainable provided that none of the minors who are partners in the firm shall personally be adjudged insolvent."

Unfortunately the procedure was somewhat casual in that no formal adjudication order was drawn up and no copy of the notification in the Gazette is found on the record. But it is clear on reading the two orders together that the minors were not adjudicated insolvent and in fact they have not preferred any appeal against the order of adjudication. In their petition the minors (now appellants) claimed that as minors they could not be partners of the firm and that, at any rate, their ancestral properties, not being assets of the firm, could not be liable for the debts of the firm nor taken by the receiver in insolvency. In view of the findings it is not now contended that they are not partners of the firm. The only contention is that their shares in the ancestral property cannot be sold to discharge the debts of a firm in which their joint family is in partnership with a stranger and that it is only the property of the firm which vests in the receiver. In this connexion it may be observed that all the property has actually been sold by the receiver except the family house, sale of which was stayed by this Court. The receiver is the second of the two respondents in this appeal.

Now the property (except the house) in which the appellants claim their shares to be not liable to sale, was in fact mortgaged by their respective fathers together in Ex. 1, wherein Bansidhar also mort-

(1) A. I. R. 1920 All. 210=42 All. 515.
(2) [1916] 43 Cal. 1157=37 I. C. 663.

gaged his own property. The property was manifestly mortgaged by the said fathers who are the karta of the joint family and another adult member, for a debt of the joint family as a partner in the firm, and was thus treated as a part of the assets of the firm. This included the shares of the minors in the family property mortgaged. As a result of the adjudication in insolvency of the firm, all the assets of the firm vest in the receiver. The fact that the minors have not been and cannot be adjudicated insolvent will not affect the vesting—in the receiver—of the entire assets of the firm including their shares in the family property which had become part of the firm's assets. With the insolvency of the firm, as on the dissolution of a firm, the share of the minor appellants in the property or assets of the firm means nothing more than their right to participate in the surplus or divisible income and capital of the firm at the proper time and after the obligations of the firm have been discharged. The minors' shares in the family property which was mortgaged for a debt of the family as a partner in the firm cannot in any event be saved by them except by showing that the debts for which the fathers are personally liable were contracted for immoral purposes : and the same would appear to be the case with the family house which was not mortgaged.

The question of the liability of ancestral family property in circumstances somewhat like the present has been the subject of much judicial decision in recent years in this and other Courts.

In *Sant Prasad Singh* v. *Sheodut Singh* (3) the three minor sons of an insolvent applied for the exemption of their three-fourths share in the family property, the whole of which was about to be sold by the receiver under the orders of the District Judge. Das, J., (Kulwant Sahay, J., concurring) was of opinion that in view of the decision of their Lordships of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* (4) it can no longer be held that the father had any property, within the meaning of the Provincial Insolvency Act, that could vest in the receiver. The same insolvent's case came again before the High Court in *Chairman, District Board, Monghyr* v. *Sheodutt Singh* (5), in which Ross, J., (Kulwant Sahay, J., concurring) referred to the subsequent decision of their Lordships of the Judicial Committee in *Brij Narain* v. *Mangla Prasad* (6), and following the Full Bench decision of the Lahore High Court in *Behari Lal* v *Sat Narain* (7) held that as the father's debt was not shown to have been incurred for immoral purposes, there was no obstacle to the sale of the family property by the receiver in order that the debt may be discharged, the son having no right to question the sale effected in order to liquidate his father's debt. In the earlier case of *Amolak Chand* v. *Mansukh Rai Mangal Lal* (8), Ross, J. (Das, J. concurring) had, distinguishing *Sant Prasad* v. *Sheodutt Singh* (3) definitely held that property over which a person has a disposing power which he may exercise for his own benefit, includes ancestral property which may be sold for the satisfaction of antecedent debts. The Full Bench decision of the Lahore High Court in *Behari Lal* v. *Sat Narain* (7) was overruled by the Judicial Committee in *Sat Narain* v. *Behari Lal* (9). This was a decision under the Presidency Towns Insolvency Act of 1909, though the suit was for pre-emption (on the ground of contiguity) brought by the minor son of a Mitakshara insolvent. The High Court held that on the father's insolvency, the entire property of the joint family, including the share of the minor, vested in the Official Assignee. The Judicial Committee definitely overruled that view, but observed that it may be that in some way the property may in a proper case be made available for payment of the father's just debts. The observation probably referred to the alternative mentioned by Shadi Lal, C. J., in the Full Bench decision in *Behari Lal* v. *Sat Narain* (7):

"As the son's share is in certain cases liable for the debts of the father, the Official Receiver may be able to enforce that liability, provided that he takes appropriate proceedings for the purpose and satisfies the conditions which alone render the son's interest liable for the father's debts."

In *Khem Chand* v. *Narain Das* (10) a Bench of the Lahore High Court, after

(3) A. I. R. 1924 Pat. 259 =2 Pat. 724.
(4) A. I. R. 1917 P. C. 61=39 All. 437 (P. C.).
(5) A. I. R. 1926 Pat. 438 = 5 Pat. 476.
(6) A. I. R. 1924 P. C. 50 = 46 All. 95 (P. C.).
(7) A. I. R. 1923 Lah. 1=3 Lah. 329 (F. B.).
(8) A. I. R. 1925 Pat. 127=3 Pat. 857.
(9) A. I. R. 1925 P. C. 18=6 Lah. 1 (P.C.).
(10) A. I. R. 1926 Lah. 41=6 Lah. 493.

referring to the Privy Council decision in *Sat Narain* v. *Behari Lal* (9), held that the receiver was entitled to proceed against all the coparcenary property, even though the minor sons' share in it does not vest in the receiver; this was a case of insolvency in the course of a business started and carried on by the father as the karta of the family. In *Allahabad Bank Ltd., Bareilly* v. *Bhagwan Das Johari* (11), it was held that the insolvency of the father does not vest in the receiver the interest of the sons in the joint family property. The Bombay High Court in *Shripad* v. *Basappa* (12) held that where a creditor had obtained a decree against a father and his son, and attached the joint family property, and the father was subsequently adjudicated insolvent, the creditor was entitled as against the receiver to execute his decree against the son. Macleod, C. J., speaking for himself, did not consider that the manager's power to dispose of family property for legal necessity had vested in the receiver: Coyajee, J. only agreed with Macleod, C. J., in dismissing the appeal. In *Sethurama Chettiyar* v. *Official Receiver, Tanjore* (13) a Full Bench of the Madras High Court consisting of three Judges held that the power of the father in a Mitakshara joint family to sell his son's shares also for paying his just and proper debts vests on his insolvency in the receiver, though the shares themselves do not vest in him. In *Official Receiver, Anantapur* v. *Ramachandrappa* (14) there was a difference of opinion between Odgers, J. and Curgenven, J., who first heard the appeal. The case was one of a Hindu joint trading family with several minors; the manager was not the father and the adult members including the manager had been adjudicated insolvent. Curgenven, J. was of opinion that the manager's power of disposing of the family property was not property within the definition of the Provincial Insolvency Act and was distinguishable from the father's power inasmuch as his own debts may be binding upon his sons. Odgers, J. held that there was no difference between the power of the manager, if he is a father, and the power of the manager when he is a brother or some other relation of a minor partner who cannot be adjudicated. Devadoss, J., to whom the case was referred under S. 98, Civil P. C. agreed on the authorities with Odgers, J. Thus the decision of the majority was that the power of the manager to dispose of joint family property for debts incurred for trading purposes passes to, and becomes exercisable by, the Official Receiver so as to bind the minors' shares. Devadoss, J., however observed that if the question were res integra, he would be inclined to hold that under the Provincial Insolvency Act the power of a Hindu father to dispose of his son's shares in the family property for his debts does not vest in the Official Receiver.

In the present case the liability of the minors as the sons of their fathers must be distinguished from their liability as partners of the firm. So far as the latter is concerned, they are under no personal liability and no property of theirs, which is not the property of the firm, can be touched by the receiver. Their liability as the sons of their fathers is confined to such debts incurred by their fathers as are not shown to be immoral. The liability of the fathers for the trading debts is not confined to the assets of the firm but will extend to their shares in the joint family property. The decisions of this Court may possibly have gone a little too far, and it is perhaps not essential in the present case to say whether the father's power to dispose of their son's shares for their own just and proper debts has vested in the receiver. On the authorities the receiver would seem to be entitled to proceed against the interest of the minor sons in the joint family property, and the sons can only obtain exemption by showing that the father's debts are not binding on the sons by reason of immorality and the like and there is no proof or even suggestion of anything of the kind. The appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

(11) A. I. R. 1926 All. 262=48 All. 343.
(12) A. I. R. 1925 Bom. 416=49 Bom. 785.
(13) A. I. R. 1926 Mad. 994=49 Mad. 849 (F.B.).
(14) A. I. R. 1929 Mad. 166=52 Mad. 246.

A. I. R. 1932 Patna 234

MACPHERSON AND MOHAMAD NOOR, JJ.

Smith—Appellant.

v.

Gokul Chandra—Respondent.

Appeal No. 164 of 1929, Decided on 4th August 1931, against original order of Sub-Judge, Ranchi, D/- 5th June 1929.

Civil P. C. (1908), O. 21, R. 90—Application by judgment-debtor—Judgment-debtor dying—Legal representatives can continue proceeding without obtaining letters of administration—Succession Act (1925), S. 212.

Section 212 does not apply to the case of a judgment-debtor applying to set aside a sale on ground of material irregularity. Establishing a right to the property of a deceased person is one thing and trying to keep a property within his estate is another. In an application for setting aside a sale the applicants do not want to establish their right to the property itself. Therefore the legal representatives of a judgment-debtor, dying intestate, can proceed with the application filed by him, for setting aside a sale in execution of a decree without obtaining beforehand letters of administration to his estate: 4 *Pat. L. J.* 360, *Appl.*; 4 *All.* 192, *Dist.*

[P 235 C 2 P 236 C 1]

K. N. Choudhury and *S. C. Mazumdar* —for Appellant.

Sultan Ahmed, *S. N. Banerji*, *B. N. Mitter*, *H. P. Sinha* and *K. K. Banerjee* —for Respondents.

Mohamad Noor, J. — This appeal arises out of an application to set aside a sale in execution of a simple money decree obtained by the respondents from the Court of the Subordinate Judge of Dhanbad against one Mr. C. J. Smith. The decree was brought on transfer to the Court of the Subordinate Judge of Ranchi and the decree-holders attached and got sold a piece of land in Hinu which is described in the sale proclamation as follows:

" Property of the judgment-debtor situated in Mauza Hinu, Hathu, Hundru and Kalyanpur within Barkagaon Government khas mahal which is one plot of 144 acres and 8 rods and is surrounded by wire and is named as *Chalie Saheb ka hata* with all the land together with one pacca two-storied house situated therein with a pacca well, court-yard and open space in front and back of the land which is the purchased right of the judgment-debtor from the Free School and is in possession of the judgment-debtor without the partnership of anybody and which is valued at Rs. 20,000."

The sale was held on 16th March 1928, and the property was purchased by the decree-holders for Rs. 20,000. On 12th April the judgment-debtor, Mr. C. J. Smith, filed an application for setting aside the sale on the ground that on account of material irregularity in publishing and conducting the sale the property worth about two lakhs of rupees was sold for an inadequate price of Rs. 20,000. Mr. Smith died on 25th July 1928. On 11th October 1928, his son Mr. C. T. M. Smith and his widow Mrs. D. M. Smith applied for substitution of their names in place of the deceased applicant and proceeded with the case. The learned Subordinate Judge rejected the application on the ground that the son and the widow of the deceased Mr. C. J. Smith were not entitled to continue the proceeding as they had not obtained letters of administration to the estate of the deceased as required by S. 212, Succession Act, and further held that there was no material irregularity in conducting the sale; that notices were properly served and in the circumstances the price fetched (Rs. 20,000) was adequate. The first question for consideration is whether the son and the widow of the deceased Mr. C. J. Smith were entitled to prosecute the application for setting aside the sale. S. 212, Succession Act, enacts that

" no right to any part o the property of a person who has died intestate can be establishsd in any Court of ustice Junless letters of administration have first been granted by a Court of competent jurisdiction "

The appellants contended before the learned Subordinate Judge that Mr. Smith was an Indian Christian and therefore came within the exception of S. 212. I am however of opinion that Mr. Smith was not an Indian Christian. He was described as a European in the decree under execution. The petitioners' witness Panchugopal Roy describes him as an Indian Christian but the only ground that the witness gives in support of his description is that Mr. Smith was born at Murshidabad. Further questioned, the witness was unable to say whether his ancestors were or were not Europeans. An "Indian Christian" as defined in the Act is

" a native of India who is or in good faith claims to be of unmixed Asiatic descent and who professes any form of Christian religion."

There is nothing to show that Mr. Smith claimed himself to be of unmixed Asiatic descent. The appellants have not given their own evidence. I am therefore of opinion that at least for the purposes of this case Mr. Smith must be treated not to be an Indian Christian. Nevertheless in my opinion S. 212 is not applicable here. The case was started by Mr. Smith himself in his lifetime. What his son and widow wanted was to continue the proceeding. It cannot be said that they wanted to establish their right to any part of the property of Mr. Smith. Establishing a right to the property of a deceased person is one thing and trying to keep a property within his estate is

another. The effect of the sale was that the estate of Mr. Smith was deprived of the property sold. Mr. Smith's application was in effect to bring the property back to the estate by having the sale set aside. The son and the widow of the deceased want to continue that application with the sole object of restoring to the estate of Mr. Smith a property which has gone away. In this application they are making no claims in their favour. Once the property is restored to the estate of the deceased it will be a quite different question who is entitled to succeed to that property. Reference may be made to the decision in *Brij Kishore Lal* v. *Pratab Narain* (1) where it was held that the

"reversioner in a Hindu widow's estate is entitled to apply under O. 21, R. 90, Civil P. C,, 1908, to set aside a sale of immovable property on account of fraud or irregularity in publishing or conducting the sale."

It is obvious that if a reversioner applies for setting aside the sale held in execution of a decree against a widow, he is not trying to establish his right to the property itself which he cannot do during the lifetime of the widow. In an application for setting aside a sale the applicants do not want to establish their right to the property itself. Sir Sultan Ahmed for the respondents refers us to the decision in *Sukanandun* v. *Rennick* (2). It was held in that case that

"where persons who did not legally represent the estate of the deceased intestate were sued as his representatives for a debt due by him, and in execution of the decree obtained therein, property of the deceased was attached and brought to sale, such proceedings, being inoperative as against the estate of the deceased, could not confer any title upon the decree-holders in respect of the proceeds of such sale, as against a person who has obtained letters of administration to the estate of the deceased, and a suit by the decree-holders for the recovery of such sale proceeds paid over to the legally constituted administrator of the estate is not maintainable."

In my opinion the facts of that case have no application to the case before us. There the question was who represented the estate of the deceased. Here the question is whether the deceased's son and widow could continue the proceedings started by the deceased himself. On these grounds I am of opinion that the son and the widow of the deceased were entitled to continue the proceedings.

(1) [1919] 4 Pat. L. J. 360=51 I. C. 359.
(2) [1882] 4 All. 192.

Now I come to the merits of the case. The irregularity complained of by the appellants are nonservice of notice under O. 21, R. 66, Civil P. C., and misdescription of property in the sale proclamation, namely, the mention of an area of 144 acres and 8 rods, though in fact the area is 440 acres, and the mention of a grossly inadequate value, i.e., Rs. 20,000 for a property worth about two lakhs of rupees.

It appears that the notice under O. 21, R. 66, Civil P. C., was served at the colliery office of the judgment-debtor at Dhanbad in January 1928. It was served by hanging a copy at the outer door of the office. Hem Chandra Sen, a medical practitioner (witness 1 for the appellants) says that Mr. Smith was lying ill at Suria in the District of Hazaribagh in January 1928. Witness 2 for the appellants, Mr. Loisean, deposes that he was the only person authorized to receive notices on behalf of Mr. Smith and that Mr. Smith was ill in January 1928, and since then he did not go to the colliery at Dhanbad. I have no reason to disbelieve these witnesses and in my opinion the service of notice was not regular. I do not however attach much importance to this as on 14th March Mr. Smith entered appearance and raised objection on the question of valuation. The learned Subordinate Judge overruled the objection on the merits.

As to the misdescription of the property in the sale proclamation, there cannot be two opinions and the contention of the appellants is well founded. The area mentioned in the sale proclamation is 144 acres 8 rods. Mr. Loisean, witness 2 for the appellants, describes the area to be 440 acres. We sent for the original title deed of Mr. Smith which we were told was with the Chota Nagpur Banking Association. The bank has sent a copy of the title-deed with the copy of a letter of Mr. Smith to the Managing Director of the bank under which the bank claims an equitable mortgage for Rs. 1,50,000 over the property sold. The correctness of the copies is not disputed. It appears that the land was originally acquired by the Government for the governors of the Free School of Calcutta as they wanted to shift the school from Calcutta to Ranchi. The idea was afterwards abandoned; the governors of the Free School and the Government in 1915

jointly transferred the land to Mr. Smith for Rs. 50,000. The actual area mentioned in the title-deed is 444 acres, 3 rods and 34 poles. .There is no question therefore that the area and the value were very grossly understated in the sale proclamation and therefore one should not be surprised if the price fetched at the sale was only Rs. 20,000. I am bound to hold that by the misstatement of the area and the value of the property there has been irregularity, and one can safely infer that the intending bidders were misled. The learned Subordinate Judge says that the property is subject to an equitable mortgage to the extent of Rs. 1,50,000 in favour of the Chota Nagpur Banking Association. If so, the non-mention of this equitable mortgage in the sale proclamation was another misdescription. It is however not clear whether the property was sold subject to any equitable mortgage. On the other hand I find from the execution proceedings (O. 5, dated 14th March 1928) that the learned Subordinate Judge observed that the judgment-debtor did not produce any document to show that the property was under mortgage and that the fact of the existence of any encumbrance on the property was denied in the decree-holders' verified petition. It is clear therefore that Rs. 20,000 was fixed as the value of the property ignoring the mortgage, if any; and, obviously, this was a very inadequate price. The judgment-debtor purchased the property for Rs. 50,000 and he constructed buildings and a well and fenced the area. The value must have considerably increased. The Chota Nagpur Bank claims to have advanced Rs. 1,50,000 on the security of this property. The judgment-debtor sustained substantial injury by the misdescription of the property in the sale proclamation. On the whole therefore I am of opinion that there has been material irregularity in publishing the sale and in consequence thereof the property has been sold for a grossly inadequate price.

I would therefore set aside the sale and direct that the property be resold after terms of the sale proclamation are settled and fresh sale proclamation is issued. If the learned Subordinate Judge be satisfied on such inquiry as he thinks fit to institute, that the property is subject to any mortgage legally enforceable, he will direct the fact to be mentioned in the sale proclamation. The appeal is allowed with costs.

Macpherson, J.—I agree.

K.N./R.K. *Appeal allowed.*

A. I. R. 1932 Patna 237

COURTNEY-TERRELL, C. J. AND FAZI ALI, J.

Kameshwar Singh Bahadur—Decree-holder—Appellant.

v.

Ramjiwan Sahu and *another*—Judgment-debtors—Respondents.

Misc. Appeal No. 261 of 1931, Decided on 4th March 1932, against order of Dist. Judge, Bhagalpur, D/- 8th August 1931.

(a) Maxims—De minimis non curat lex—Smallness of sum involved does not involve application of maxim.

A Court is not entitled to deprive a decree-holder of interest to which he is entitled under the decree however inconsiderable the amount may be and although the decree-holder may be a wealthy landlord and the judgment-debtor a minor. The smallness of the sum involved does not involve the application of the legal maxim *de minimis non curat lex.* A very small sum may involve a very big question of principle. [P 238 C 1, 2]

(b) Execution—Decree binding.

An executing Court is not entitled to go behind the form of a decree. [P 238 C 2]

(c) Practice—Powers of Court.

The Court has no right to demand generosity from a party as a term for giving him his legal rights. [P 238 C 2]

Murari Prasad, K. P. Upadhya and *R. Misra*—for Appellant.

Courtney-Terrell, C. J.—This is an appeal from a decision of the District Judge of Bhagalpur affirming a decision of the Munsif in the following circumstances: The plaintiff in the suit is the Maharajadhiraja of Darbhanga who sued the defendants for arrears of rent and interest. He obtained a decree for Rs. 483 with interest until realization. He put this decree into execution and the decretal amount together with costs and interest up to the date fixed for the sale on 22nd December was Rs. 599. The judgment-debtors came into Court with an application that the plaintiffs be ordered to accept a sum of Rs. 200 and that the sale might be postponed till February. To this application the plaintiff agreed and the sale was accordingly adjourned until the month of February. On 13th February the judgment-debtors again came into Court with another part payment of Rs. 125, but this time the plaintiff objected to any further post-

ponement of the sale. Nevertheless the Munsif did in fact order against the express wish of the plaintiff an adjournment of the sale until 2nd April on which date the judgment-debtors paid up the balance of Rs. 274. Thereupon the plaintiff having obtained a decree for the decretal amount with interest up to the date of realization claimed that he was entitled to the amount of interest upon the sum outstanding against the defendants between the dates of 23rd December and 7th April, 22nd December being the date when Rs. 200 was paid and 7th April being the date of the final payment. In view of the decree he was clearly entitled to this sum.

It is true that the actual sum of interest is only Rs. 5-15-6 which in itself is entirely inconsiderable; but the plaintiff is right in stating that his claim is a matter of principle which if decided against him would have a very severe effect in many other cases. The attitude of the Munsif was to call attention to the fact that the decree-holder had on the first occasion accepted part payment and had voluntarily agreed to the postponement of the sale, and he seems to imagine that having made this agreement it entitled the Munsif to postpone the sale on future occasions and at the same time, whether or not the plaintiff consented, to deprive him of the interest to which he was entitled under the decree. This principle cannot be accepted for a moment. When the matter went before the learned District Judge on appeal, he made a mistake of a more serious character which requires emphatic correction. He drew attention to the fact that the plaintiff was a wealthy landlord and that the defendant was a minor and said that he could not imagine that such a wealthy man could wish to harass his tenant for such an extremely small sum. Incidentally he also agreed with the erroneous reasoning of the Munsif and he said that in these circumstances he was not prepared to set aside the Munsif's order and reopen the execution case and inflict further harassment upon the judgment-debtors for the sake of a petty sum like Rs. 5-15-6 and ended with the legal maxim *de minimis non curat lex*.

That maxim in the first place does not apply to the circumstances in the least. The relative wealth of the plaintiff and defendant is utterly immaterial to the decision of this matter and moreover the smallness of the sum involved does not involve the application of the maxim, for it frequently happens, as has clearly happened in this case, that a very small sum may involve a very big question of principle which may affect other cases. Furthermore a fundamental mistake has been made by the Munsif and by the District Judge in disregarding the form of the decree behind which the executing Court is not entitled to go. The form of the decree was that the plaintiff was entitled to the decretal amount together with interest to the date of realization and the order of the Munsif and the District Judge is a simple decision that they will not give the plaintiff that to which he has been held entitled and they in effect alter the decree passed in his favour. I regret that it should be necessary to call attention to such elementary principles of justice but this case has necessitated it. The appeal is accordingly allowed. We may say in conclusion that we have been informed by the learned advocate on behalf of the plaintiff that it is not the intention of the plaintiff to put the decree into execution for this small amount, but it is necessary to draw attention to the fact that that matter has not influenced us in the very slightest in making this order because it is a principle that the Court has no right to demand generosity from a party as a term for giving him his legal rights.

Fazl Ali, J.—I agree.

R.M./R.K. *Appeal allowed.*

A. I. R. 1932 Patna 238

WORT AND FAZL ALI, JJ.

Batuk Prasad Singh—Petitioner.

v.

Ambica Prasad Singh — Opposite Party.

Misc. Judicial Case No. 65 of 1931, Decided on 6th August 1931.

Civil P C. (1908), S. 132—Appeal summarily dismissed—Lower Court and not appellate Court can amend decree.

Where an appeal is summarily dismissed under O. 41, R. 11 the original decree of the lower Court is neither varied nor reversed but is left untouched and therefore it is the original Court and not the appellate Court which can amend the decree to make it in conformity with the judgment: 24 *Cal.* 759, *not Foll*; 21 *Bom.* 548, *Foll.* [P 239 C 1]

S. S. Bose—for Petitioner,
Ganesh Sharma—for Opposite Party.

Wort, J.—This was an application before the learned District Judge of Muzaffarpur for the amendment of a decree. Relying upon the case of *Uma Sundari Devi* v. *Bindu Bashini* (1) the learned District Judge came to the conclusion that it was this Court and not the Court of the District Judge which had jurisdiction. The learned Judge cannot be blamed for taking this view as the case to which I have referred has been followed in a number of Courts but speaking for myself I prefer the reasoning of the case of *Bapu* v. *Vajir* (2), that is to say, that the decree is the decree of the lower Court and not of this Court when an appeal is summarily dismissed under O. 41, R. 11, Civil P. C. That being so I think the proper order to make in this case is that the case should be sent back to the learned District Judge to be heard and determined according to law. Having regard to the circumstances under which this application comes to this Court I think the proper order as to costs should be that the costs will abide the result of the hearing before the learned District Judge.

Fazl Ali, J.—I agree. In my opinion the Civil Procedure Code itself makes a distinction between those cases where an appeal is dismissed summarily under O. 41, R. 11 (1), and those where the appellate Court after hearing the parties affirms, varies or reverses the decree appealed from. This can be made plain by comparing the language of O. 41, R. 11, with that of O. 41, R. 32. Some further light is thrown on the subject by referring to S. 551 as it originally stood in the Code of 1882. It ran thus:

"The appellate Court may if it thinks fit after fixing a time for hearing the appellant or his pleader and hearing him accordingly if he appears at such time, confirm the decision of the Court against whose decree the appeal is made without sending notice of the appeal to such Court and without serving notice on the respondent or his pleader : but in such case the confirmation shall be notified to the same Court."

This section was amended by the Civil Procedure Code Amending Act (7 of 1888) by substituting the words:

"Dismiss the appeal."

for the words

"Confirm the decision of the Court against whose decree the appeal is made."

This change must have had some meaning and it is plain that unless there was some distinction sought to be drawn between "the confirmation of the decree appealed from" and "the dismissal of the appeal" no amendment of the section was necessary. No such distinction however appears to have been recognized in *Munisami Naidu* v. *Munisami Reddi* (3) as well as *Uma Sundari Debi* v. *Bindubashini* (1). I refer to these cases particularly because they seem to have been the basis of a large number of decisions in which the various High Courts except the Bombay High Court have held that where an appeal is dismissed under O. 41, R. 11, it is the appellate Court which is to amend the decree if necessary and not the Court whose decree is appealed from. In the former case a Bench of three Judges of the Madras High Court held that the case was governed by the ruling of the Full Bench in *Pichuvayyangar* v. *Sheshayyangar* (4) where it had been held that the jurisdiction of a Court of first instance to amend a decree under S. 206 was ousted by the confirmation of that decree on appeal. In the other case it was held that where an appeal is dismissed under S. 551, Civil P. C., or in the case of a second appeal where the decree is one of dismissal the effect practically is to make the decree which is confirmed the final decree to be executed in the suit and the High Court making such order has power to amend the decree of the lower Court which has been in effect confirmed by it, so as to bring it in conformity with the judgment which is also confirmed. The only case however in which the result of the amendment of 1888 was fully appreciated is the case of *Bapu* v. *Vajir* (2). In that case Farran, C. J., dealt with the matter thus:

"The change of language made in 1888 in that section by the legislature shows, we think, that it was intended that there should be a difference between the result of a dismissal under it and of a confirmation under S. 577; as, indeed, we think, there must be. Dismissing an appeal is, we think refusing to entertain it as in the case of an appeal dismissed as being time barred. Where an appeal is dismissed under S. 551, there is no decree of the High Court which can be executed, and the reasoning in the cases to which we have been referred does not apply. Mr.

(1) [1897] 24 Cal. 759.
(2) [1896] 21 Bom. 548.
(3) [1898] 22 Mad. 293.
(4) [1893] 18 Mad. 214=5 M. L. J. 39.

Govardhandas argues that the dismissal of the appeal under S. 551 is a decree and appealable under S. 584. That may be conceded. Still it is clearly not one confirming the decree of the lower Court. It leaves the decree of the lower Court untouched, neither confirmed, nor varied nor reversed, and it remains we think the decree of the lower Court."

I prefer to follow this decision because the view expressed here receives considerable support from certain observations made by the Judicial Committee in *Kristo Kinkar* v. *Burroda Kant* (5). In that case Sir James Colvile, after referring to two Full Bench decisions of the Calcutta and Madras High Courts respectively, where it had been held that when a decree of the lower Court is reversed, modified or affirmed the decree passed by the appellate Court is the final decree in the suit, added:

"if the question were res integra, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz., that the execution ought to proceed on a decree of which the mandatory part expressly declares the right sought to be enforced. Considering however that for the reasons already given the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras High Court and of the Full Bench of the Bengal Court further than by saying that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal and to abstain from confirming a decree, erroneous or questionable, yet upon the examination by reason of the special and limited nature of the appeal."

It is further to be noticed that no appellate decree is in fact drawn up where the appeal is dismissed under O. 41, R. 11 (1), and the language of O. 21, R. 35, seems to me to suggest and even the Code does not contemplate that a decree should be drawn up in such a case. Under sub-R. (1) of this provision

"The decree of the appellate Court shall bear date the day on which the judgment was pronounced."

Now it is very doubtful whether strictly speaking a judgment is necessary when an appeal is dismissed under O. 41, R. 11 (1), and although the Calcutta High Court and certain other High Courts are of opinion that it is necessary, the Allahabad High Court has given good reasons for holding that it is not so: see *Samin Husain* v. *Piran* (6). Again sub-R. (3), O. 21, R. 35, provides that:

"the decree shall also state the amount of costs incurred in the appeal and by whom or out of which property and in what proportion such costs and the costs in the suit are to be paid."

This plainly cannot apply when an appeal is dismissed under O. 41, R. 11 (1), as the respondent, not having appeared at that stage, can have incurred no costs.

There are two further considerations which also in my opinion go to support the view taken by the Bombay High Court in *Bapu* v. *Vajir* (2): (1) where an appeal is summarily dismissed the decree to be executed must be the decree of the lower Court, because the decree-holder may not even know about the appeal or its dismissal under O. 41, R. 11 (1); and (2) the provision in sub-R. (3), O. 41, R. 11, requiring that the dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred, seems to suggest that the decree of the lower Court is left untouched. A comparison between the language of this subrule and that of O. 41, R. 37, which directs that a copy of the judgment and of the decree of the appellate Court shall be sent to the Court which passed the decree appealed from shows that the legislature meant to draw a distinction between the mere dismissal of an appeal under O. 41, R. 11 (1), and its disposal in ordinary course in the presence of both the parties. The only flaw that may be found in the view taken by the Bombay High Court is that the dismissal of the appeal being conceded to be a decree within the meaning of S. 2, Civil P. C., there would be two decrees in existence, one of the lower Court and the other of the Court dismissing the appeal under O. 41, R. 11 (1). This somewhat technical argument need not however deter us from adopting the view, especially when there is nothing in the Code to prevent two such decrees being simultaneously in existence and when, in spite of the dismissal of the appeal under O. 41, R. 11 (1), the decree to be executed is the decree of the lower and not of the Court dismissing the appeal. In my opinion therefore if any amendment is to be made in the decree, it should be made by the Court below and not by this Court.

K.N./R.K. *Order accordingly.*

(5) [1872] 14 M. I. A. 465=10 B. L. R. 101 =17 W. R. 292 (P.C.).
(6) [1908] 30 All. 319=5 A. L. J. 300=(1908) A. W. N. 115.

A. I. R. 1932 Oudh 265

RAZA AND SRIVASTAVA, JJ.

Secy. of State — Defendant—Appellant.

v.

Saran Brothers and *Co.*—Plaintiffs—Respondents.

Misc. Appln. No. 43 of 1931, Decided on 28th April 1932, from order of Sub-Judge, Malihabad, Lucknow, D/- 21st August 1931.

Contract Act (1872), S. 28, Excep. 1—Deputy Commissioner engaging plaintiff as workman — Agreement providing that in case of breach, workman to accept without objection amount Deputy Commissioner would decide to give and that in all matters plaintiff should abide by Deputy Commissioner's decision—After Deputy Commissioner gave his due wages, plaintiff suing for balance—Suit is covered by exception to S. 28, and is barred under Specific Relief Act (1877), S. 21.

The Deputy Commissioner had entered into a contract with the plaintiff a workman who was to do certain repairs work. Agreement deed was executed and it provided in effect that if on account of breach the work was taken from piaintiff he should without objection accept the amount offered by the Deputy Commissioner and that he would abide in all matters with the decision of the Deputy Commissioner. The plaintiff sued for balance of his wages after the Deputy Commissioner had given him certain amount as his due.

Held: that as the agreement was on behalf of the Secretary of State, the agreement to refer to arbitration cannot be said to be in favour of a party to the contract. The case was therefore covered by Excep. 1, S. 28, Contract Act and was barred by S. 21, Specific Relief Act: 11 *Cal.* 232, *Foll.* [P 266 C 2]

G. H. Thomas—for Appellant.

Sri Ram—for Respondents.

Judgment.—This is a defendant's appeal against the decision dated 21st August 1931 of the learned Subordinate Judge of Malihabad at Lucknow reversing the decision dated 21st April 1931 of the learned Munsif, South Lucknow. It arises out of a suit to recover a sum of money claimed to be due with regard to some work done by the plaintiff for the defendant.

It is the common case of both parties that the Deputy Commissioner of Lucknow invited tenders for annual repairs in respect of some Government buildings in the Lucknow District. The plaintiff's tender was accepted and on 4th Ooctober 1929 the plaintiff executed a deed of agreement some clauses of which are the subject of controversy in this appeal.

The plaintiff's case was that he was entitled to Rs. 3,586-2-9 in respect of the work done by him but had been paid only Rs. 2,125-1-3 and that the balance of Rs. 1,461-1-6 remained unpaid. He claimed this amount together with interest thereon Rs. 116-14-3 total Rupees 1,577-15-9.

The suit was contested on several grounds, one of them being that it was not maintainable. In support of this contention reliance was placed on Cls. 5 and 6 of the agreement (Ex. 1/P.W. 1) dated 4th October 1929. The learned Munsif accepted the defendant's plea about the suit not being maintainable and dismissed the suit. On appeal the learned Subordinate Judge was of opinion that the clauses in question were void under S. 28, Contract Act. He therefore allowed the appeal, set aside the decision of the trial Court and remanded the case for disposal according to law.

The only question therefore which requires determination in this appeal is as regards the validity of the two aforesaid clauses of the agreement dated 4th October 1929. Cl. 5 lays down that if owing to breach of any condition of the agreement the work is taken away from the executant then the Deputy Commissioner would have the power to decide the amount to which he is entitled in respect of the work already done and that he would have no objection to the decision of the Deputy Comissioner. Cl. 6 provides that the executant would be bound by the decision of the Deputy Commissioner in all matters (relating to the contract). The defendant relies on these clauses of the agreement as precluding the plaintiff from maintaining the present suit. The argument is that the plaintiff is bound to accept any amount which may be fixed by the Deputy Commissioner as the value of the work done and is debarred from enforcing his rights under the contract in a Court of law. Tkere is no disagreement between the parties as regards the construction of these clauses. Both parties construe them as restraining the plaintiff from taking any legal proceedings in respect of his claim arising under the contract. Thus the agreement being one in absolute restraint of legal proceedings to which the plaintiff may otherwise be entitled it must be considered to be void under the substantive provisions of S. 28, Contract Act. The learned counsel for the defendant appel-

pellant also does not seriously dispute this part of the decision of the lower appellate Court. He has however contended that the case falls within the first exception to that section. This exception provides that the section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. The lower appellate Court disposed of this argument by observing that an arbitration implies the decision of a third party and as the Deputy Commissioner was a party to the contract the agreement contained in Cols. 5 and 6 could not be regarded as an agreement for reference to arbitration. We regret we find ourselves unable to accept this opinion of the learned Additional Subordinate Judge. The plaintiff is suing the Secretary of State for India in Council as defendant. In para. 1 of the plaint it is stated that:

"on 4th October 1929 the plaintiff entered into an agreement with the defendant to carry on the annual repairs etc."

Thus it is clear that according to the plaintiff's own case he had entered into the contract with the Secretary of State for India in Council. No doubt the Deputy Commissioner represented the Secretary of State and acted as his agent in inviting tenders and in accepting the tender made by the plaintiff. But it cannot be said that the contract was made with the Deputy Commissioner on his own behalf. The agreement Ex. 1/P. W. 1 must therefore be regarded as an agreement executed by the plaintiff in favour of the Secretary of State. It is not possible to construe the references to the Deputy Commissioner in Cls. 5 and 6 in their context as a reference to the Secretary of State. Therefore we are of opinion that the agreement for reference to the arbitration of the Deputy Commissioner cannot be regarded as an agreement for reference to a party to the contract. The case is very similar to the case of *Aghore Nath* v. *Calcutta Tramways Co. Ltd.* (1). In this case an agreement was entered into between the Calcutta Tramway Co., and one of its conductors in which it was provided that the manager of the company should be the sole judge between the company and the conductor as regards certain matters arising out of a contract entered into between the parties. A Bench of the Calcutta High Court in dealing with the objection that the agreement was void under S. 28 observed as follows:

"That seems to me precisely such a case as comes within Excep. 1, S. 28, Contract Act . . . "It has been argued for the plaintiff that the manager of this case is virtually the company. But this is not so. The manager here is no more the company than the engineer or the architect in the cases to which I have just referred is the employer. Both parties have faith in the manager and are content to place themselves in his hands as an arbitrator between them in the event of dispute."

This case is a direct authority in favour of the view contended for by the appellant. We can see no reason to take a different view. We are therefore of opinion that the case falls within Excep. 1, S. 28, Contract Act, and the agreement to abide by the decision of the Deputy Commissioner must be regarded as an agreement for reference to arbitration. This being so the present suit is barred by S. 21, Specific Relief Act, which provides that if any person has made a contract to refer present or future differences to arbitration the existence of such a contract shall bar a suit in respect of any subject he has contracted to refer.

Before we take leave of the case, we should mention that the learned counsel for the plaintiff has contended before us that there has been no award by the Deputy Commissioner as arbitrator and that on a request made by him to the Deputy Commissioner to decide the matter after giving him an opportunity to state his case the Deputy Commissioner had refused to comply with his request. These are matters with which we are not concerned in this appeal. If no arbitration has been done and no award has been made by the Deputy Commissioner it is open to the plaintiff to take necessary proceedings in that behalf. For the above reasons we allow the appeal, set aside the decision of the lower Court and dismiss the plaintiff's suit with costs throughout, The cross-objections also fail and are dismissed with costs.

S.N./R.K. *Suit dismissed.*

(1) [1885] 11 Cal. 532.

A. I. R. 1932 Oudh 267

WAZIR HASAN, C. J. AND KISCH, J.

Abdul Hafiz and *others*—Appellants.

v.

Mool Chand and *others*—Respondents.

Appeal No. 6 of 1931, Decided on 9th March 1932, against order of Srivastava, J., D/- 15th October 1931.

Provincial Insolvency Act (as amended by Act 10 of 1930), S. 53 — Amendment has retrospective effect.

The amendment made by Act 10 of 1930 has retrospective effect and applies to proceedings pending at the time when the Act came into force. The amendment has not introduced a new period of limitation, but has only clarified the meaning of the old section. And on this view it must be taken to apply to a transfer made within two years of the date of the petition on which the transferor was adjudged insolvent : *A. I. R.* 1930 *Mad.* 834 (*F.B.*), *Ref.* [P 267 C 2]

H. D. Chandra—for Appellants.

K. N. Tandon—for Respondents.

Judgment.—This is an appeal against the order of our learned brother Srivastava, J., affirming the order of the District Judge of Hardoi by which he annulled a deed of gift under S. 53, Provincial Insolvency Act, 1920. This deed of gift was executed by one Abdur Rashid in favour of his sons on 17th December 1927. On 21st November 1928 Abdur Rashid presented a petition to be adjudged insolvent. He was adjudged insolvent on this petition by an order of the Court dated 8th March 1930. On 5th September 1930 the receiver of his estate made an application under S. 53, Provincial Insolvency Act, 1920, to have the deed of gift annulled.

Prior to the execution of the deed of gift the relevant portion of S. 53, Provincial Insolvency Act, was as follows :

"Any transfer of property ..... shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."

By the amending Act 10 of 1930, which received the assent of the Governor-General on 20th March 1930, S. 53 was amended so as to read :

"Any transfer of property ..... shall, if the transferor is adjudged insolvent "on a petition presented" within two years after the date of the transfer be voidable as against the receiver and may be annulled by the Court."

The only contention that was urged before the learned single Judge of this Court, and which has been urged before us in this appeal, is that the amendment of S. 53, Provincial Insolvency Act, 1920, made by Act 10 of 1930 does not apply to the gift in question inasmuch as the gift has been made long before the amendment and the amending Act has not been given retrospective effect. Our learned brother was of opinion that the amendment made by Act 10 of 1930 has retrospective effect and applies to proceedings pending at the time when the Act came into force. We find ourselves in full agreement with him.

Previous to the amendment of the Act there was a sharp conflict of judicial opinion on the subject whether S. 53, as it stood before the amendment, was controlled by sub-Cl. (7), S. 28 of the Act which provides that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made, or whether the words were to be interpreted literally as they stood in the section so as to make a transfer of property voidable under S. 53 only if made within two years of the order of adjudication. The former was the view taken by the Calcutta, Madras and Allahabad High Courts and the latter was the view taken by the Bombay and Lahore High Courts. It was to set at rest this controversy and make clear the intention of the legislature that the words "on a petition presented" were inserted in S. 53 by Act 10 of 1930. In our opinion it is clear that the amendment in question has not introduced a new period of limitation, but has only clarified the meaning of the old section and on this view there can be no doubt that the amendment must be taken to apply to the present case. This view has the support of a decision of a Full Bench of the Madras High Court in *Pichamma* v. *Official Receiver, Cuddapah* (1), to which a reference has been made in the judgment under appeal.

It has been argued by the learned counsel for the appellant that such interpretation of the amendment impairs the vested rights of persons who have taken transfers within two years of their transferor presenting an insolvency petition, but more than two years before the date of his adjudication. In our opinion there is no substance in this argument. That S. 53, as it stood before the amendment was open to both interpretations is clear from the conflict of judicial opinion on the subject to which reference has already been

(1) A. I. R. 1930 Mad. 834=128 I. C. 154=54 Mad. 12 (F.B.).

made. It has been contended with reference to *Hinga Lal* v. *Jawahir Prashad* (2) and *Amjad Ali* v. *Nand Lal* (3) that this Court at any rate has hitherto adopted the interpretation of S. 53 favourable to the appellants' case and that therefore as far as Oudh is concerned, vested rights have been created. A reference to the above two cases will however show that the question whether sub-Cl. (7), S. 28, Provincial Insolvency Act, did or did not govern S. 53 was not even considered and no case of this Court has been pointed out to us in which this Court has given an opinion on the point. In our opinion the question of impairment of vested rights does not arise.

The appeal accordingly fails and is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

(2) [1928] 114 I. C. 126.
(3) A. I. R. 1930 Oudh 314=123 I. C. 217=5 Luck. 742.

A. I. R. 1932 Oudh 268

SRIVASTAVA AND NANAVUTTY, JJ.

Kanhiya Lal—Plaintiff—Appellant.

v.

Mt. Ikram Fatima and *others*—Defendants—Respondents.

First Appeal No. 51 of 1931, Decided on 29th April 1932, against decree of Addl. Sub-Judge, Hardoi, D/- 9th February 1931.

(a) Civil P. C. (1908), S. 11—Part of purchase money left in vendee's hands to discharge prior charges and another part to pay off other creditors—Prior charges discharged, but creditors not paid—Vendor suing for unpaid purchase money or alternatively for sale of that property—Claim for sale decreed—Vendee subsequently suing for declaration that sale of property should be subject to prior charges discharged by him and contending that he intended to keep them alive as shield against unpaid purchase money—Vendee's claim held barred by res judicata—Nor could he claim to have kept charges alive as shield against vendor's lien—T. P. Act (1882), S. 101.

A vendor sold certain property, which was subject to prior charges. Part of the consideration money was kept in the hands of the vendee to discharge these charges and also another part to pay off some other creditors of the vendor. The vendee discharged the prior charges, but did not pay off the other creditors. Vendor sued to recover unpaid purchase money or in the alternative to sell the property in question. Decree for sale of the property was passed. The vendee then sued for declaration that the sale in execution of that decree should be subject to the prior charges which he had discharged. He pleaded that he had intended to keep the prior charges alive as a shield against the vendor's lien for the unpaid purchase money.

Held: that the vendee was precluded under S. 11, from claiming any priority in respect of the charges he had discharged. He not only "might", but "ought" to have set up the priority by way of defence in the former suit by the vendor: 39 *Cal.* 527 (*P.C.*) and 34 *All.* 599, *Rel. on*; *A. I. R.* 1920 *P.C.* 81 and *A. I. R.* 1929 *Oudh* 463, *Dist.* [P 270 C 1]

Held further: that the vendee could not contend that he had intended to keep prior charges alive as shield against vendor's lien for at the time of the sale he ought to have intended to pay off the creditors whom he undertook to pay: *A. I. R.* 1928 *All.* 77; 34 *Mad.* 119; 43 *Cal.* 69 and *A. I. R.* 1932 *Oudh* 255, *Rel. on.* [P 270 C 2]

(b) Transfer of Property Act (as amended in 1929), S. 101—In absence of puisne encumbrance, there is no presumption in favour of intention to keep prior encumbrance alive.

It is true that while under the old S. 101, merger was the rule, the section as amended makes it the exception; but in the absence of any puisne encumbrance there is no room for any presumption in favour of an intention to keep the prior encumbrance alive. [P 270 C 2]

(c) Transfer of Property Act (as amended in 1929), S. 92—No right of subrogation unless mortgage is redeemed in full.

Section 92 provides that nothing in S. 92 shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full: 36 *Cal.* 193 and 38 *All.* 502, *Rel. on.* [P 271 C 1]

Radha Krishna and *K. N. Tandon*—for Appellant.

H. Husain and *Triloki Nath Kaul*—for Respondents.

Judgment.—This is an appeal against the judgment and decree dated 9th February 1931 of the Additional Subordinate Judge of Hardoi dismissing the plaintiff's suit. The facts material for the purposes of the appeal which are not in dispute between the parties are that one Saqib Ali owned a ten biswa share in village Dhagasar. On his death the share was inherited by his minor son Riasat Ali. On 26th July 1912 Riasat Ali, acting through his mother and certificated guardian Ikram Fatima, defendant 1, executed a deed of mortgage, Ex. 1, in respect of a five biswas share in favour of four persons, Hori Lal, Hulmi, Dharmoom and Mihin, Lal, for a sum of Rs. 2,000. On the same date a deed of further charge, Ex. 2, was also executed for Rs. 50. On 7th October 1915 Ikram Fatima, acting as guardian of Riasat Ali, executed another mortgage deed (Ex. 3) of the remaining five biswas share in favour of Kanhaiya Lal, plaintiff. Riasat Ali died in September 1916 and his

mother Ikram Fatima became owner of the entire ten biswas share.

On 9th February 1917 Ikram Fatima executed a deed of further charge (Ex. 4) in favour of the plaintiff. She followed this up with a sale deed (Ex. 5) in respect of the entire ten biswas share in favour of Kanhaiya Lal. This sale deed was executed on 12th April 1917 in lieu of Rs. 15,000. Out of the sale consideration Rs. 2,444 were credited in respect of the amount due to the plaintiff on account of the mortgage deed (Ex. 3) and the deed of further charge (Ex. 4) and Rs. 2,050 were left with the vendee Kanhaiya Lal for redemption of the mortgage deed Ex. 1, and the deed of further charge Ex. 2. Out of the balance the vendor acknowledged receipt of Rs. 156; Rupees 3,800 were paid in cash at the time of registration, Rs. 466-15-0 were to be paid to the vendor after 15 days and the rest was to be left in the hands of the vendee for payment to certain creditors of the vendor. In 1917 and 1923 Kanhaiya Lal obtained deeds of release (Exs. 6 and 7) from two out of the four mortgagees of the deeds Exs. 1 and 2 and redeemed two and a half biswas out of the five biswas mortgaged under those deeds. On 9th April 1923 Ikram Fatima instituted a suit for recovery of the unpaid sale consideration on the allegation that Kanhaiya Lal had failed to pay her creditors the money left with him for that purpose. On 31st May 1924 a decree was passed in favour of Ikram Fatima in the suit just mentioned for Rs. 7,637-15-11. The decree provided that if the decretal amount was not paid within three months the ten biswas share in village Dhagasar would be sold to realize the amount.

On 5th January 1927 Ikram Fatima assigned one third of her decree to Ram Narain, defendant 2. Thereafter Ram Narain applied for a final decree which was passed on 17th March 1928. On 9th July 1928 Ikram Fatima made an assignment of the remaining two-thirds of her decree in favour of Mata Din and Ram Sarup, defendants 3 and 4. Defendants 3 and 4 put their share of the decree into execution and a 6-2/3rds biswas share in village Dhagasar was put up for sale and purchased by defendants 3 and 4 themselves on 20th June 1930. On 16th July 1930 the plaintiff instituted the present suit claiming various reliefs out of which only one need be stated, namely, a declaration to the effect that the property purchased by defendants 3 and 4 was subject to the prior charge of the plaintiff in respect of the mortgage deeds Exs. 1 and 3 and the deeds of further charge Exs. 2 and 4. The defendants denied that the plaintiff was entitled to claim any priority on the basis of Exs. 1 to 4 against the defendants and pleaded inter alia that the claim for priority was barred by res judicata by the decree dated 31st May 1924. The learned Subordinate Judge held that Exs. 1 to 4 were no longer subsisting and the plaintiff was therefore not entitled to claim priority in respect of them. He also held that the plaintiff was precluded under S. 11, Civil P. C., from claiming priority in respect of the mortgages that had been paid up and discharged. The learned Subordinate Judge also negatived the plaintiff's claim in respect of the other reliefs and in the result dismissed the suit.

The only contention urged by the learned counsel for the plaintiff-appellant is that the learned Subordinate Judge has wrongly disallowed the plaintiff's claim for priority. In the first place it is argued that as in the previous suit instituted by Ikram Fatima there was no controversy in regard to the mortgages Exs. 1 to 4, it was not necessary for the plaintiff to set up his plea of priority in that suit. We find ourselves unable to accede to this argument. Ex. C-3 is a copy of the plaint of the suit which was instituted by Mt. Ikram Fatima for recovery of the unpaid purchase money. In para. 20 of this plaint she claimed a decree for Rs. 9,000 on account of the unpaid consideration money of the sale deed and further prayed that if the defendant did not pay the decree money

"then the ten biswas land, situate at village Dhagasar, Pargana Sandi, Tahsil Bilgram, District Hardoi, be sold."

Exhibit C-8 is a copy of the written statement filed on behalf of Kanhaiya Lal. He denied the plaintiff's right to any relief, but he did not raise any plea that in case the plaintiff was held entitled to a decree for sale, the sale could only be made subject to his prior charge on the basis of the mortgages Exs. 1 to 4. Ex. C-1, the judgment, and Ex. C-2 the decree passed in favour of Ikram Fatima, also show that the plea of priority set up in the present suit was not raised in that suit. Expln. 4, S. 11,

Civil P. C., provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. That this plea of priority might have been made a ground of defence in the former suit cannot admit of any doubt.

It is also clear that if the plea had been raised and had been decided in the plaintiff's favour in the previous suit the necessity for his bringing the present suit would not have arisen. The suit, as we have stated above, was for a decree for sale. Reading the plaint as a whole it is perfectly clear that Mt. Ikram Fatima in claiming a decree for the unpaid purchase money did not recognize any prior charge of Kanhaiya Lal. We have no doubt that the decree for sale claimed by her was on the footing of her having the first and the only charge on the property. If the defendants had a prior charge and the decree for sale as claimed by her could not be properly passed without the sale being made subject to the defendants' charge, it was clearly the duty of the plaintiff to set up the prior charges in defence to the claim of Ikram Fatima for sale of the property. We are supported in this view by the decisions in *Mohammad Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (1) and *Gajadhar Teli* v. *Bhagwanta* (2). The cases relied on by the learned counsel for the appellant, namely, *Radha Kishun* v. *Khurshed Hossein* (3) and *Abdul Wahid Khan* v. *Ali Husain* (4), are distinguishable. The determination of the question must depend to a great extent upon the facts and pleadings of each case. In a case like the present we think the plaintiff not only "might" but also "ought" to have set up the priority of his mortgages by way of defence in the former suit. Defendants 3 and 4 are admittedly the assignees of the decree obtained by Ikram Fatima and as such representatives. We have therefore no hesitation in agreeing with the lower Court that the plaintiff's claim for priority against the defendants-respondents is barred by res judicata.

(1) [1909] 39 Cal. 527=14 I. C. 496=39 I. A. 68 (P.C.).
(2) [1912] 34 All 599=16 I.C. 8.
(3) A.I.R. 1920 P. C. 81=55 I. C. 959=47 I. A. 11=47 Cal. 662 (P.C.).
(4) A.I.R. 1929 Oudh 463=115 I. C. 833=4 Luck 250.

Apart from the bar of res judicata the plaintiff's plea about priority must, in our opinion, also fail on the merits. The argument on behalf of the plaintiff is that it was to the benefit of the plaintiff to keep alive his charge in respect of his own mortgages Exs. 3 and 4 and in respect of the mortgages Exs. 1 and 2 redeemed by him to the extent of half and that under the provisions of the amended S. 101, T. P. Act, he must be deemed to have kept them alive. It is true that while under the old S. 101 merger was the rule, the section as amended makes it the exception. But we are of opinion that the facts and circumstances of the present case are sufficient to displace the general rule as enacted by the amended section. The only encumbrances existing on the property at the date of the sale in the plaintiff's favour were the mortgages Exs. 1 to 4. If there had been any puisne encumbrance it would no doubt have been to the benefit of the purchaser to keep the prior encumbrance alive for being used as a shield against the claim for the puisne encumbrances. But in the absence of any puisne encumbrance there is no room for any presumption in favour of an intention to keep the prior encumbrance alive. In fact the terms of the sale deed definitely point to a contrary intention. The details of the sale consideration show that the whole of the money due on the plaintiff's mortgages Exs. 3 and 4 was paid up out of it. It also shows that the entire money due on the other encumbrances Exs. 1 and 2 was left in the hands of the plaintiff for the said mortgages being redeemed. It seems therefore to be clear that the intention was to completely discharge all encumbrances existing on the property.

When we put it to the learned counsel for the plaintiff that in the absence of any puisne encumbrance it was difficult to imagine any reason for the plaintiff vendee intending to keep the mortgage alive, the learned counsel said that he had intended to keep it alive to be used as a shield against the vendor's lien in respect of the unpaid purchase money. The reply was ingenious but has no substance. It can hardly be supposed that at the time of the execution of the sale deed the vendee had no intention of making payments to the creditors whom he undertook to pay. It may also be pointed out that in the case of some of these

creditors the money was not payable until some years after the execution of the sale deed. We are therefore of opinion that the intention of the parties to the sale at the time of the execution of the sale deed was to extinguish all the encumbrances on the property, and the plaintiffs are for this reason not entitled to set up the mortgages Exs. 1 to 4 against the defendants-respondents : see *Maksud Ali Khan* v. *Abdullah Khan* (5), *Govindasami Tevan* v. *Dorasami Pillai* (6), *Har Shyam Chowdhuri* v. *Shyam Lal Sahu* (7) and *Said Ahmad* v. *Mahesh Pratab Narain Singh* (8). It may also be pointed out that the plaintiff cannot claim any right of subrogation in respect of the mortgages Exs. 1 and 2 because admittedly only a half-share in those mortgages has been redeemed. S. 92, T. P. Act, provides that nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full. Even before the enactment of this provision by the Transfer of Property (Amendment) Act 1929, the same principle was recognized in *Gurdeo Singh* v. *Chandrikah Singh* (9) and *Udit Narain Misir* v. *Asharfi Lal* (10). For the reasons given above we are of opinion that the decision of the lower Court is correct and must be upheld. We accordingly dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(5) A.I.R. 1928 All. 77=108 I. C. 728=50 All. 218.
(6) [1911] 34 Mad. 119=6 I.C. 781.
(7) [1916] 43 Cal. 69=31 I.C. 22.
(8) A.I.R. 1932 Oudh 255.
(9) [1909] 36 Cal. 193=1 I.C. 913.
(10) [1916] 38 All. 502=35 I.C. 732.

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* A. I. R. 1932 Oudh 271

SRIVASTAVA AND NANAVUTTY, JJ.

K. S. Mohammad Fariduddin Ahmad and *another*—Defendants—Appellants.

v.

L. Shankar Sahai and *another*—Plaintiffs—Respondents.

Appeal No. 37 of 1931, Decided on 2nd March 1932, against order of Sub-Judge, Bara Banki, D/- 13th April 1931.

(a) Civil P. C. (1908), O. 20, R. 12—Application under, held maintainable—No appeal lies.

An interlocutory order, deciding that an application under O. 20, R. 12 for the determination of mesne profits, is maintainable, is not appealable. [P 272 C 1]

*** (b) Civil P. C. (1908), O. 20, R. 12—Case—Meaning of—Decision as to maintainability of claim for mesne profits is not decided case—Civil P. C. (1908), S. 115.**

A revision to the High Court lies only if there is a "case" decided. The word "case" has not been defined anywhere in the Code. It is a term of much wider amplitude than a suit; but the decision of the learned Sub-Judge on the question of the maintainability of the claim for mesne profits cannot be regarded as a decided case: *A. I. R.* 1921 *All.* 1 (*F. B.*); *A. I. R.* 1924 *Lah.* 425 (*F. B.*) and *A. I. R.* 1928 *Oudh* 355 (*F. B*), *Rel. on.* [P 272 C 1]

(c) Civil P. C. (1908), S. 115—Interlocutory order—Another remedy open — No revision lies.

An order deciding that a claim for mesne profits is maintainable is an interlocutory order. The party aggrieved will have a right to question the correctness of the order in an appeal against the final decree passed under O. 20, R. 12. [P 272 C 2]

Ghulam Hasan—for Appellants.

M. Wasim and *Akhtar Husain* — for Respondents.

Judgment.—One Roshan Ali brought a suit for possession of certain properties and for mesne profits in respect thereto. The Subordinate Judge of Bara Banki decreed the plaintiff's claim for possession in respect of half the property. Both parties appealed to this Court and the result of these appeals was that the plaintiff's suit was dismissed in its entirety. The plaintiff appealed to His Majesty in Council. Their Lordships of the Judicial Committee allowed the appeal, set aside the decision of this Court and restored the decree of the trial Court. The plaintiffs made two applications under O. 20, R. 12, Civil P. C., for determination of mesne profits in respect of of the property decreed in their favour. These applications were opposed on various grounds, one of them being that the claim for mesne profits was not maintainable inasmuch as no decree for mesne profits had been passed by the trial Court. The plaintiffs, in answer to this contention, relied on proceedings dated 20th November 1924, in which the parties had agreed that the inquiry as to mesne profits should be made after the passing of the decree for possession and on the order passed by the Subordinate Judge granting the request of the parties and directing that a final decree in respect of mesne profits shall be passed in accordance with the result of such inquiry as is contemplated by O. 20, R. 12, Civil P. C. The learned Subordinate

Judge has decided the issue regarding the maintainability of the claim for mesne profits as a preliminary question against the defendants.

The order of the learned Subordinate Judge forms the subject-matter of the two appeals before us. The learned counsel for the plaintiffs-respondents objects in limine that the order of the trial Court was not appealable and the present appeals therefore were incompetent. The learned counsel for the defendants-appellants has accepted the validity of this objection and asked us to treat the appeals as applications for revision. The learned counsel for the plaintiffs objects that, even if the appeals are treated as applications for revision under S. 115, Civil P. C., they cannot be entertained because there is no case decided by the lower Court. It is also argued that the order in question is only an interlocutory order and this Court will not be justified in entertaining applications for revision against it.

We are of opinion that the objection raised on behalf of the plaintiffs is valid and must succeed. S. 115, Civil P. C., allows the High Court to call for the record of any "case" which has been decided by any subordinate Court. Therefore, in order to entitle the defendants to invoke the aid of the revisional jurisdiction of this Court, it is necessary for them to show that there is a case which has been decided by the lower Court. The word "case" has not been defined anywhere in the Code. It is no doubt a term of much wider amplitude than a suit; but it is difficult to say that the decision of the learned Subordinate Judge on the question of the maintainability of the claim for mesne profits can be regarded as a decided case. In *Buddhu Lal* v. *Mewa Ram* (1) the trial Court, on a preliminary issue arising out of a suit for damages of breach of contract, decided that it had jurisdiction to try the case. A Full Bench of the Allahabad High Court held that this could not be regarded as a case and that no revision lay against the decision passed on that preliminary issue. It was observed that all that had been decided was one out of several issues in the suit, and the defendants had their remedy by way of appeal from the decree in the suit, if it should be decided against them. In *Lal Chand-Mangal Deen* v. *Behari Lal-Mehr Chand* (2) also the Munsif on a preliminary issue decided that he had jurisdiction to hear the suit. The defendants applied to the High Court for revision of the order.

A Full Bench of the Lahore High Court held that the High Court had no jurisdiction to entertain the application as an interlocutory order of that nature could not constitute a case within the meaning of S. 44, Punjab Courts Act, which corresponds to S. 115, Civil P. C. In *Sahdeo Singh* v. *Chanun Kuer* (3) Hasan, J., (now Sir Syed Wazir Hasan) the present Chief Judge of this Court, observed that the meaning to be given to the word "case" in S. 115 must depend on the particular nature of the proceedings. The decision of the learned Subordinate Judge in the present case, as regards the maintainability of the claim for mesne profits, is analogous to the decision in *Buddhu Lal* v. *Mewa Ram* (1) and *Lal Chand-Mangal Deen* v. *Behari Lal-Mehr Chand* (2) about the Court having jurisdiction to entertain the suit. It is not denied that the order of the lower Court is an interlocutory order. The defendants will have the right to question the correctness of this order in an appeal against the final decree passed under O. 20, R. 12, Civil P. C. As the defendants have this remedy open to them they can have no reasonable ground for grievance if they are required to wait for the final decision of the case.

We are accordingly of opinion that the order of the lower Court is not open to appeal or revision. We therefore dismiss these appeals with costs.

R.K. *Appeals dismissed.*

(1) [1900] 25 Bom. 337=27 I. A. 216 (P.C.).

(1) A. I. R. 1921 All. 1=63 I. C. 15=43 All. 564 (F. B.).
(2) A. I. R. 1924 Lah. 425=84 I. C. 259=5 Lah. 288 (F. B.).
(3) A. I. R. 1928 Oudh 355=111 I. C. 161=3 Luck. 650 (F. B.).

A. I. R. 1932 Oudh 273

RAZA AND SRIVASTAVA, JJ.

Jageshwar Singh and *another*—Defendants—Appellants.

v.

Rameshar Bakhsh Singh and *another*—Plaintiffs and Defendants — Respondents.

Second Appeal No. 262 of 1931, Decided on 26th April 1932, against decree and order of Dist. Judge, Fyzabad, D/- 14th May 1931.

Jurisdiction — Where Revenue Court has exclusive jurisdiction to try certain matters no subsequent suit lies in civil Court to annul decree of Revenue Court in respect of such matters.

When a matter exclusively within the jurisdiction of a Court of revenue has been tried and decided by the Court as between the parties, no subsequent suit will lie in the civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. Where the Commissioner has exclusive jurisdiction to decide certain cases mentioned in para. 1011, Cl. 8 of the Manual of the U. P. Government Orders, Revenue Department, Vol. 1, p. 315, he may decide those matters rightly or wrongly and the civil Court has no jurisdiction to question the correctness or validity of the Commissioner's order when the matter decided is exclusively within jurisdiction of the revenue authorities.

[P 274 C 2]

H. D. Chandra—for Appellants.

Ali Raza and *H. Husain*—for Respondent 1.

Judgment.—This is an appeal from a decree of the District Judge of Fyzabad, dated 14th May 1931 affirming a decree of the Additional Subordinate Judge of Sultanpur, dated 24th September 1930.

The facts of the case are sufficiently set out in the judgment of the learned District Judge and it is not necessary to repeat them in detail. The appeal arises out of a declaratory suit brought by Rameshwar Baksh Singh against Mahabir Singh Jageshwar Singh and Tawakkal Singh in the Court of the Additional Subordinate Judge of Sultanpur. Defendant 1 (Mahabir Singh) held a decree against defendants 2 and 3 (Jageshwar Singh and Tawakkal Singh) and in execution of that decree, certain ancestral property of the judgment-debtors was to be sold. Execution of the decree was transferred to the Collector as the property to be sold was ancestral property. The property was sold by the Collector on 20th December 1928. It was purchased by the plaintiff (Babu Rameshwar Baksh Singh) for the sum of Rs. 2,950. Defendants 2 and 3 filed certain objections in the Court of the Collector but their objections were dismissed on 23rd January 1929. The sale was eventually confirmed by the Collector on 18th February 1929. The sale certificate was issued to the auction-purchaser and he was put in possession of the property purchased by him at the auction sale. Defendants 2 and 3 then filed an appeal in the Court of the Commissioner Fyzabad, on 19th March 1929, from the order of the Collector dated 23rd January 1929. The Commissioner decreed the appeal on 2nd May 1930 and ordered that the property be resold. The plaintiff then filed the suit, out of which this appeal arises, in the civil Court on 11th July 1930, on the allegation that the order passed by the Commissioner was ultra vires inasmuch as he could hear no appeal from the order of the Collector rejecting objections of defendants 2 and 3.

The learned Additional Subordinate Judge decreed the plaintiff's claim declaring that the order passed by the Commissioner on 2nd May 1930 was without jurisdiction. Defendants 2 and 3 appealed to the learned District Judge but their appeal was dismissed on 14th May 1931, as already stated. They have come to this Court in second appeal. In our opinion this appeal should be allowed. The learned District Judge has made the following observations in his judgment on the point under consideration.

"The only question for decision in appeal is whether the order dated 2nd May 1930 of the Commissioner was passed with or without jurisdiction. The rules framed by the Local Government under S. 70, Civil P. C., give the right of appeal to the Commissioner from an order of the Collector confirming or setting aside sale: vide para. 1011, Cl. 8 of the Manual of Government Orders, Revenue Department, Vol. 1, p. 315. These rules do not give any right of appeal from an order rejecting the objections of a decree-holder or a judgment-debtor or a person whose immovable property has been sold under the rules. The sale was confirmed in due course by the Deputy Commissioner of Sultanpur, on 18th February 1929 and the sale certificate issued by him conferred title on the auction-purchaser. The order passed by the Commissioner was clearly ultra vires and inasmuch as it was passed without jurisdiction, I hold that it is invalid."

We think some amendments in para. 1011 mentioned above were not brought to the notice of the learned District Judge. Para. 1011 runs thus:

"All orders passed by an Assistant Collector under powers delegated to him by the Collector under para. 1011 shall be appealable to the Col-

lector whose order shall be final. Appeals from orders passed by the Collector shall lie to the Commissioner of the division in the following cases and in cases of illegality or material irregularity and no others, the Commissioner's orders shall be final."

Then follow the cases referred in the paragraph and one of them is the following case:

"(8). By a decree-holder or judgment-debtor or a person whose immovable property has been sold under the rules from an order confirming or setting aside a sale."

Thus the paragraph provides for appeal from orders passed by the Collector to the Commissioner of the Division in cases detailed in the said paragraph, and also in cases of illegality or material irregularity. Thus almost all the orders of the Collector in this connexion have been made appealable to the Commissioner and it is for the Commissioner to decide whether the case before him is or is not a case ef illegality or material irregularity or any other cases specified in the said paragraph. It is not and cannot be disputed that the Commissioner has exclusive jurisdiction in the matter. It is not for the civil Court to decide in the matters referred to in the said paragraph. If the Commissioner had decided the question rightly or wrongly the Commissioner has jurisdiction to decide the matter and he may decide it rightly or wrongly. The Commissioner may make a mistake in deciding the matter but as pointed out in the case of *Malkarjun Shidramappa* v. *Narhari Shivappa* (1) (at p. 225 *of* 27 *I. A.*). "a Court has jurisdiction to decide wrong as well as right."

It is noticeable that the appeal was filed in the Court of the Commissioner after the sale was confirmed by the Collector. It is true that the appeal was not in so many words an appeal from the order confirming the sale but the fact remains that it was filed after the Collector had confirmed the sale and related to matters which had been decided by the Collector on 23rd January 1929. If the judgment-debtors had filed their appeal with reference to the order dated 18th February 1929 even then they would have directed their appeal, against those very matters which had been decided by the Collector on 23rd January 1929. In our opinion the auction-purchaser cannot be allowed to attach too much importance to this technical defect in the present case. We are definitely of opinion that the civil Court should not assume jurisdiction in such matters. As pointed out in the case of *Har Nath Singh* v. *Sriram* (2) when a matter exclusively within the jurisdiction of a Court of revenue has been tried and decided by the Court as between the parties no subsequent suit will lie in the civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. We hold that the order of the Commissioner of Fyzabad. dated 2nd May 1930 was not without jurisdiction and that the civil Court had no jurisdiction to question the correctness or validity of the Commissioner's order when the matter decided was exclusively within the jurisdiction of the revenue authorities. The result is that we allow this appeal and setting aside the decrees of the lower Courts, dismiss the plaintiff's suit with costs in all the three Courts.

B.V./R.K. *Appeal allowed.*

(1) [1900] 25 Bom. 337=27 I. A. 216 (P. C.).

(2) A. I. R. 1926 Oudh 348=93 I. C. 374.

A. I. R. 1932 Oudh 274

RAZA, J.

Mohammad Abbas and *others* — Plaintiffs—Appellants.

v.

Jahangir and *others* — Defendants — Respondents.

Second Appeal No. 13 of 1931, Decided on 26th November 1931, against decree of Sub-Judge, Fyzabad, D/- 8th December 1930.

(a) Easements Act (1882), S. 28—Right of way appurtenant to enclosure of mosque—It can be used for only passing to and from enclosure—No additional burden can be imposed on land by opening new passages.

A right of way imports the right of passing in a particular line and not the right of varying it at pleasure. A right of way of any one kind does not include a right of way of any other kind. The right of way appurtenant to the enclosure of a mosque can be used only for the purpose of passing to and from that enclosure. One cannot be allowed to impose any additional burden on the zamindar's lands by removing boundary walls or opening new passages from the enclosure of the mosque. [P 277 C 2]

(b) Easements Act (1882), S. 28—Power to make way over another's land must be exercised with reasonable care.

If a man has power to make a way across another person's land he must exercise his power in a reasonable manner and have due regard to the convenience of the servient owner so as to avoid inflicting on him needless and unreasonable injury. [P 277 C 2]

Radha Krishna, *Ghulam Imam* and *Bhagwati Nath*—for Appellants.

Hyder Husein and *Faiyaz Ali* — for Respondents.

Judgment.—These appeals arise out of a suit brought by the plaintiff, Muhammad Abbas and others, against Jahangir and others for demolition of certain buildings and, in the alternative, for a perpetual injunction restraining the defendants from opening any new way from the buildings in dispute either towards the south or towards the east of them.

The facts relevant to these appeals may be shortly stated: The plaintiffs and certain other persons are the zamindars (landlords) of village Bhadarsa in the District of Fyzabad.

The defendants are raiyats and do not belong to the proprietary body. There is an old mosque of Bhadarsa, to the north of the pacca (metalled) road, which connects the village with the Fyzabad-Sultanpur road and was constructed there about 18 or 20 years ago. The village is at the distance of about a mile from the Fyzabad-Sultanpur road. The mosque has a compound wall enclosing parti land on all the four sides of the mosque with the entrance in the eastern wall. A narrow strip of land adjoins the southern wall of the compound, outside the compound. There is a nali (drain) between the said strip of land and the parti land which is called the northern parti on the metalled road. The said road has parti lands on both sides and they are called the northern and the southern partis of the road. A market is held twice a week—on Mondays and Fridays—on the northern and southern partis of the road and the proprietors of the village realize the market dues from the persons who sit and keep shops on the partis and sell their wares in the market. Some time before the institution of the present suit the defendants, who have been sued as representing the Mahomedan raiyats of the village (Bhadarsa), began raising certain structures on the parti land lying between the mosque and the southern boundary wall of the mosque within the compound. These structures are shops which, with the exception of one which faces east, all face south. There is parti land belonging to the plaintiffs and this land adjoins the eastern boundary wall of the compound of the mosque, outside the compound. Some shopkeepers have their shops on a portion of the said parti land also, adjoining the nali (drain). The pacca road is to the south of that nali also. It appears that the defendants who are responsible for building the shops in dispute, look after the management of the mosque. They want to demolish the southern boundary wall of the compound of the mosque and a portion of the eastern boundary wall also, in order to have free access to the shops in dispute from over the northern parti of the road and the vacant land towards the east.

The plaintiffs' case was that the defendants had no right to build the shops in dispute on the vacant land within the compound wall of the mosque and to have a passage to them from over the 'parti' on the northern side of the pacca road which would interfere with the holding of the market and would thereby cause the landlords of the village a heavy decrease in the market dues. They prayed for demolition of the shops in dispute and in the alternative for a perpetual injunction restraining the defendants from opening any passage or passages through the southern and the eastern walls of the compound of the mosque towards the parti of the pacca road mentioned above.

The defence was that the plaintiffs had no right to the parti land within the compound wall of the mosque where the shops in dispute were built by the defendants, that the land in dispute was a public wakf appurtenant to the mosque and that the plaintiffs had no right to prevent the defendants from building the shops or opening passages from them to the pacca road mentioned above.

The learned Munsif held that the land in dispute within the compound wall of the mosque was wakf and was not therefore the plaintiffs' property and that the defendants were entitled to build on that land. He therefore rejected the plaintiffs' claim for demolition of the shops in dispute, but granted the alternative prayer for perpetual injunction. He gave the following reasons for granting the plaintiffs' prayer for injunction:

"The contention of the plaintiffs is that if the defendants are allowed to open new passages towards the parti a large number of crowds and customers will pass over that parti and prevent free enjoyment by their (plaintiffs') shopkeepers

of the parti land on which the market is held, thereby causing a heavy loss to the plaintiffs who realize the market dues. This contention seems to have got a good force. It is an admitted fact that a market is held at least twice a week on the parti just to the south of the constructions in suit. It is also an admitted fact that the constructions in suit about ten in number are meant to be used as shops with their faces towards the parti and that the intention of the defendants is to demolish the intervening southern boundary wall between the new constructions and the parti and thus to have a free passage from over the parti to the newly erected shops. Defendants' contention is that a very few shopkeepers, in number seven or eight, sit on the parti and that therefore no loss will be caused to the plaintiffs. There is a controversy about the number of shopkeepers that sit on the parti, and since all the oral evidence is that of the interested persons or of persons otherwise influenced, I take into consideration the testimony of P. W. 2 who is an uninterested witness. He is a Hindu pleader practising at Fyzabad. He was appointed Commissioner in the case to prepare a map of the locality. It was a market day when he went to the spot to prepare the map. He states that he found about 26 shopkeepers sitting on the parti over which the defendants want to have a passage. It appears from the map filed by the said Commissioner that the entire length of the constructions in suit is 75 feet 6 inches. It therefore follows that if 26 shopkeepers sit on a land 75 feet 6 inches in length there can be hardly any room left for customers to pass in and to go through the newly-constructed shops of the defendants just behind these shopkeepers. The trouble and inconvenience is too obvious. Both the shops cannot go simultaneously. It is but natural that customers will go to the new shops and in so doing they would cause a good deal of inconvenience to the shopkeepers that sit on parti with the result that either the shopkeepers on parti will have to leave their places or there might ensue an affray which might lead to criminal proceedings. If the shopkeepers leave their places on parti it is bound to cause damage to the landlords (plaintiffs) who realize the market dues. If there ensue any affray that too would be most undesirable. In either case injury is too clear. The rights of the plaintiffs are clearly threatened and as such the plaintiffs are entitled to get a perpetual injunction issued restraining the defendants from opening any new passage over this parti to the south of the mosque.

Similarly one of the constructions of the defendants faces east and the defendants want to demolish that portion of the eastern boundary wall which is just before this construction and to have a free passage over the patri land of the plaintiffs immediately in front of it. The length of this portion is about ten feet and it is found by oral evidence that some shopkeepers of the plaintiffs sit there also. It also appears from the map filed by the Commissioner on 10th February 1930. It mentions a butcher's shop at that place. The result in this case would also be the same as in the previous case. There is nothing to show that defendants had ever any such right of way as they now want to have. The opening of these new passages to the south and east would mean a destruction of the plaintiffs' market. Therefore for the reasons given above, I hold that the defendants cannot open any passage over the parti land to the south and over the parti land to the east of their construction."

It should be noted that no objection was filed by the parties to the Commissioner's map and the report submitted by him. The Commissioner's map forms part of the decree of the first Court. Both parties appealed from the decree of the first Court. The defendants appealed contending that the plaintiffs were not entitled to the injunction granted by the first Court. The plaintiffs appealed contending that their claim for demolition of the new shops in dispute should also have been decreed by the first Court.

The learned Subordinate Judge found that the parti land within the compound wall of the mosque appertains to the mosque, that the mosque and the parti land both are wakf by user, that the present boundary wall enclosing the parti land round about the mosque is the old boundary of the mosque and that it has been in existence from before the memory of a living man. He agreed with the learned Munsif that the defendants were entitled to build the shops in dispute on the land within the compound wall of the mosque and that the plaintiffs had no right to prevent them from building the new shops. He therefore dismissed the plaintiffs' appeal. He however disagreed with the finding of the learned Munsif that the plaintiffs were entitled to the injunction prayed for. He rejected the plaintiffs' claim for injunction for the following reasons:

"The right of the general public to use the parti of the road for going on to the pacca road in front of the southern boundary of the mosque is not disputed by the plaintiffs. They have no doubt a right that the patri be used by the shopkeepers from whom they realize market dues just as it is used at present. The number of such shopkeepers who were found by the Commissioner when he went there on a market day was 26. They were occupying the patri in front of the structures in suit the length whereof from east to west is 75 feet 6 inches. I am not at all satisfied that the opening of a passage from the structures in dispute on the southern or eastern sides would in any way interfere with the holding of the market. Nor do I think that the defendants can be called upon to keep the boundary wall in existence for all time to come. I fail to see why they should not be allowed to have access to the road from the structures in dispute if they can do so without invading the plaintiffs' and other zamindars' right to the use of the patri by those who bring their wares for sale there twice a week. Certainly they cannot trample upon the shopkeepers who go there. If

they find the way blocked by the shopkeepers or their customers they would go to the road by another way. In the present suit the defendants do not claim that the occupants of the structures which they are constructing will have a right to disturb the shopkeepers sitting on the patris in order to go to or from the road. Anyone who goes to a village on a market day will find shopkeepers sitting with their wares on the patri on either side of the road with a number of prominent shops behind them on both sides of the patris. From the evidence of P. W. 1 it appears that adjoining the southern boundary of the mosque there is a drain two feet wide running the whole length of the road. How deep this drain is there is nothing to show. Its existence is likely to impede easy access from the structures in suit to the road and vice versa. In my opinion no case for granting the injunction prayed for or an injunction to the effect that the defendants or the occupants of the said structures, whoever they may be, should not use the patri of the road on market days in such a way as to disturb those who keep their shops there has been made out."

The plaintiffs have now come to this Court in second appeal. They had to file two appeals in this Court. Appeal No. 13 relates to the demolition of the shops in dispute and Appeal No. 14, to the injunction granted by the first Court. (The learned Judge held that the plaintiffs' appeal, so far as the relief for demolition of the shops in dispute is concerned, failed and must be dismissed. (The plaintiffs' other appeal (Appeal No. 14) is not without force.

It has been found that the mosque with its compound wall is an old mosque. It is also in evidence that the market which is held on the land to the south of the southern boundary wall of the mosque is an old market. It appears that the zamindars of Bhandarsa made a wakf of the whole land within the compound wall to the mosque. The mosque was built there in the central portion and the compound wall was built at the same time to separate the dedicated land from other lands belonging to the zamindars on all the four sides of the mosque. No doors were opened in the boundary walls towards the north, the west and the south. The door was opened in the eastern boundary wall only. The existence of the boundary wall itself establishes the fact that there was to be no right of way from the land within the enclosure to the private lands of the zamindars outside the enclosure. The object of raising the boundary wall on all sides with the entrance in the eastern wall was surely to separate the mosque and its land from the private lands of the zamindars and to keep the mosque approachable from one way alone which was the way through the door towards the east.

The defendants, who are the managers of the mosque, may make any lawful use of the land round about the mosque within the compound wall, but the wakf land cannot be used to the detriment of the dedicators. I think the very object of having boundary walls on all the four sides of the mosque would be defeated if the defendants are allowed to remove the boundary wall on any side and to open passages with the object of trespassing on the lands on which the zamindars hold their market. The defendants have a right of way, of course, but that way is through the entrance in the eastern boundary wall of the mosque. What right have they to remove the boundary wall, on any side or to open a passage and change the right of way as they like ? The right of way which has been given them cannct now in my opinion be changed by them at pleasure. A right of way imports the right of passing in a particular line and not the right of varying it at pleasure. A right of way of any one kind does not include a right of way of any other kind. The right of way appurtenant to the enclosure of the mosque can be used only for the purpose of passing to and from that enclosure.

The defendants cannot be allowed to impose any additional burden on the zamindars' lands by removing boundary walls or opening new passages from the enclosure of the mosque. If a man has power to make a way across another person's land he must exercise his power in a reasonable manner and have due regard to the convenience of the servient owner so as to avoid inflicting on him needless and unreasonable injury. It has been found that the defendants want to demolish the southern boundary wall and a portion of the eastern boundary wall also in order to have free access to the new shops from over the northern patri of the road and the vacant land towards the east where the plaintiffs hold their market. I agree with the learned Munsif that it is but natural that customers and others would go to the new shops and in doing so they would cause a good deal of inconvenience to the shopkeepers who sit on the northern parti of the road to the south of the southern boundary wall of the mosque and also on the plain-

tiffs' parti land to the east of the eastern boundary wall, with the result that either the shopkeepers would have to leave their places or there might ensue an affray which might lead to criminal proceedings. If the shop-keepers leave their places it is clear that the zamindars would suffer loss. Some 26 shopkeepers keep their shops on the northern patri of the road to the south of the southern boundary wall and some 3 shopkeepers on the patri land to the east of the eastern boundary wall of the mosque.

I do not agree with the learned Subordinate Judge that the opening of passages from the shops in dispute on the southern and eastern side would not interfere in any way with the holding of the market. I do not agree with him that the defendants cannot be called upon to keep the boundary wall in existence for all time to come. In my opinion they must keep the boundary walls in existence so long as the mosque exists there. The learned counsel has argued that an owner of land which is contiguous to a public highway has a right of access to the highway from his land and vice versa at any point along the line of contract whether the soil of the highway is vested in him or not. This is true ; but I think that proposition of law cannot help the defendants in this case. I find that no such plea was raised in the lower Courts. It is clear that the contentions which were not formulated before either of the Courts are not open to the defendants in this Court. If the defendants had raised the plea in question in the trial Court it would have been necessary to frame issues to find if the road mentioned above was a public highway and if the line of contract existed there as alleged. It should be borne in mind that a road is not always a highway.

"A road or path over which only individuals or a limited class of public (e. g., inhabitants or occupants of a particular house, field or village) have a right of passage is not a highway . . . . . There being no obligation on an owner to dedicate or on the public to accept, the public cannot complain that the owner has dedicated to them an unsatisfactory or dangerous highway, or has imposed restrictions upon his dedication ; and if they accept his land as a highway, they must use it for such purposes and subject to such restrictions as he has indicated and imposed . . . . A highway may be dedicated subject to a right to obstruct it periodically in a particular way, such as to plough up in due course of agriculture a footpath running across an arable field, and possibly to cut a channel across a road to carry off flood water when necessary. In many cases a highway has been dedicated subject to "market rights," that is, the right of the owner or other people to hold markets or erect fair booths thereon to the partial obstruction of the public or subject to the right of the occupiers of adjoining premises to deposit goods upon it in front of their premises . . . . . An owner of land adjoining a highway is entitled to access to such highway at any point at which his land actually touches it, even though the soil of the highway be vested in another ; but he has no such right if a strip of land, however narrow, belonging to another and not subject to the public right of passage, intervenes . . . . . Where a fence bordering a highway has on the roadway side of it a ditch, such as is usually made by an owner on the margin of his property, there is probably a presumption that the ditch itself does not form part of the highway ; a fortiori when the road has been awarded to be of a certain width and is in fact of that width exclusive of the ditches ; but such a ditch may be piped in and the site subsequently dedicated. There is no rule of law which prevents a ditch, or land in a condition at present impracticable for traffic, being dedicated as part of a highway; and therefore where a wide drain, proved to be necessary for the existence of the road, runs between a metalled road and the fence, a jury, may properly find that the site of the drain has in fact been dedicated as past of the highway : see Halsbury's Laws of England, Vol. 16, pp. 7, 8, 12, 46, 59 and 68."

The questions referred to above are important questions which could not be gone into as the contention mentioned above was not advanced in the trial Court. As the contention was not advanced and no issue was framed on that point, the parties could not produce evidence which was necessary for the determination of the questions involved in the proposition of law mentioned above.

A glance at the Commissioner's map, which forms part of the first Court's decree, will show that the mosque land does not really touch the pacca road on any side. The eastern boundary wall of the mosque touches the patri land which admittedly belongs to the zamindars of the village. The southern boundary wall of the mosque also does not touch the public road. There is a narrow strip of land which adjoins the southern wall and then there is a nali (drain). The nali (drain) adjoins the northern patri of the road. There is no evidence to show that the said narrow strip of land and the nali (drain) form part of the road. There is also no reliable evidence to show that the zamindars dedicated the whole of the patri land to the public for the pacca road mentioned above. They still hold their market there and realize the market dues. Under these circumstance

the contention advanced by the defendant's learned counsel in this Court must be overruled. In my opinion the learned Munsif has given good reasons for granting the injunction prayed for. The result is that Appeal No. 13 is dismissed with costs. Appeal No. 14 is allowed. The decree of the lower appellate Court is set aside so far as the order relating to injunction is concerned. The plaintiffs' prayer for injunction is granted. Thus the decree of the first Court is restored. The appellants will get their costs from the respondents in this Court and also in the lower appellate Court so far as their appeals relating to injunction are concerned. I do not interfere with the order of the learned Munsif as to costs in the first Court.

S.N./R.K. *Decree modified.*

A. I. R. 1932 Oudh 279

SRIVASTAVA, J.

Bharat Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 137 of 1932, Decided on 14th July 1932, against order of Addl. Sess. Judge, Kheri, D/- 7th April 1932.

(a) Penal Code (1860), S. 299, Expl. 2 — Death avoidable by proper treatment—Fact does not take away case from operation of S. 299.

The fact that the death of the deceased could have been prevented by proper treatment cannot take away the case from the operation of S. 299. [P 280 C 1]

(b) Penal Code (1860), Ss. 304 and 325—Deceased taking cattle of accused to impound them asked by accused to release them and on refusal belaboured with lathis—Deceased dying after few days — No injury proved to have been inflicted on vital parts—Deceased found to be suffering from enlarged heart — Accused held to be guilty under S. 325 and not under S. 304.

While the deceased was taking the cattle of the accused to the pound to impound them, the accused came armed with lathis and asked to release them and on his refusal belaboured him with lathis inflicting several injuries. The deceased was taken to dispensary but was subsequently removed to another place by his son, where he died after five or six days. No injury was inflicted on the head or any vital part of the body and although the deceased was suffering from a badly enlarged heart the accused had no knowledge of that, the deceased was not otherwise physically infirm.

Held: that the accused were guilty of the offence under S. 325 and not of an offence under S. 304. It was not safe to raise against the accused any presumption of an intention of causing such bodily injury as was likely to cause death or to impute to them any constructive knowledge that their acts were likely to cause death which was due more to the abnormally enlarged heart of the deceased. [P 280 C 2]

K. N. Chak—for Appellant.

H. K. Ghose—for the Crown.

Judgment. — These are appeals by Brij Lal and Bharat Singh who have been convicted by the learned Additional Sessions Judge of Kheri under S. 304, I. P. C., and sentenced to seven years' rigorous imprisonment each. The case for the prosecution as disclosed by the evidence is that on 19th November 1931 Imamdin son of the deceased Sukhai saw that four she-buffaloes belonging to Bharat Singh accused were grazing in the paddy field of his father. He caught hold of the buffaloes and proceeded with them to Parli in order to impound them. On reaching near his house he called his father Sukhai who joined him in driving the cattle towards the pound in village Parli. On their way to the pound they were stopped by the two accused who came running up to them armed with lathis. The accused asked Sukhai to release the buffaloes. When Sukhai refused to comply with this demand, Bharat Singh and Brij Lal accused belaboured him with lathis. Saktu P. W. 4 and Tikan P. W. 5 who happened to pass that way at that time of the assault caught hold of Brij Lal and Bharat Singh and restrained them from causing further injuries to Sukhai. Subsequently Sukhai was taken to the dispensary at Dhaurahra and remained there for five or six days. As Imamdin the son of Sukhai was not satisfied with the treatment in the dispensary he removed him to the house of one Jummon Dhoby where Sukhai was kept for five or six days. It is alleged that after keeping Sukhai in Jummon Dhoby's house for five or six days Imamdin was taking Sukhai on a bullock cart to the Lakhimpur hospital when Sukhai died on the way. (His Lordship after mentioning the nature of injuries found on the body of the deceased proceeded as follows): The cause of Sukhai's death according to the post mortem report of the Civil Surgeon was asphyxia and heart failure due to hypostatic congestion of lungs brought on by injuries on his body having been confined to bed for several days,

being an old man. The medical officer of of Dhaurahra, Dr. Mata Din, deposed that:

"when Sukhai left the hospital he was in a relieved condition and had no fever. If Sukhai had continued to remain in the hospital he would certainly have been cured."

Dr. K. B. S. Karki, Civil Surgeon, stated that if the man was properly treated in the hospital from the time he received the injuries, it was possible he "might not have died." He also stated that the heart of the deceased Sukhai was enlarged. It was 11 ounces in weight whereas the normal weight is six to eight ounces. He also stated in cross-examination that if the heart is enlarged there is probability of heart failure even by minor injuries. The learned Additional Sessions Judge was of opinion that even though the medical evidence shows that by resorting to proper remedies and qualified treatment the death of Sukhai might have been prevented but this fact cannot be taken into consideration under Expln. 2, S. 299, I. P. C. He was however of opinion that both the accused knew the age and bodily infirmity of Sukhai at the time they inflicted grievous hurt on his body with lathis and were therefore guilty of committing culpable homicide not amounting to murder and were therefore punishable under S. 304, I. P. C.

The only contention urged by the learned counsel for Bharat Singh before me was that the case is really one of causing grievous hurt under S. 325, I. P. C., and not of culpable homicide not amounting to murder under S. 304, I. P. C. Whatever moral blame may attach to Imamdin in removing his father from the dispensary at Dhaurahra where he had been making satisfactory progress, I have no hesitation in agreeing with the learned Additional Sessions Judge that the fact, that according to the evidence of Dr. Mata Din and Dr. Karki, the death of Sukhai could have been prevented by proper treatment, cannot take away the case from the operation of S. 299, I. P. C., Expl. 2, of that section is perfectly clear on the point. There can be no doubt and it is not disputed that the accused had no direct intention of causing the death of Sukhai. The question however remains whether they can be presumed to have had the intention of causing such bodily injury as was likely to cause death or to have caused the injuries with the knowledge that by such act they were likely to cause death. Having given my careful consideration to the matter it seems to me clear that the main object of the accused was to rescue their cattle and to give Sukhai a sound beating for his refusal to surrender the cattle when he was asked to do so. It is important to note that not a single injury was inflicted on the head or any other vital part of the body. All the injuries as reported by the Medical Officer of Dhaurahra are to be found either on the arms or on the legs. There is absolutely no evidence and there is no reason to suppose that the accused had any knowledge that Sukhai was suffering from a badly enlarged heart. We have no evidence, either, about Sukhai having been physically infirm. The mere fact that he was an old man of 60 would not be sufficient under the circumstances of the case to justify the inference that the offence was one of culpable homicide not amounting to murder.

Taking all the circumstances into consideration I do not think it would be safe to raise against the accused any presumption of an intention of causing such bodily injury as was likely to cause death or to impute to them any constructive knowledge that their acts were likely to cause death. The unfortunate death of Sukhai was in my opinion due more to the abnormally enlarged heart of the deceased than to the nature of the injuries inflicted on him. I am therefore of opinion that the accused are guilty only of an offence under S. 325, I. P. C., and not of an offence under S. 304, I. P. C. I therefore allow the appeals, set aside the conviction and sentence passed against the appellants under S. 304, I. P. C., and convicting them under S. 325, I. P. C., sentence them to three years rigorous imprisonment each.

R.M./R.K. *Appeals allowed*

A. I. R. 1932 Oudh 281

SRIVASTAVA, J.

Lachhmi Narain—Defendant--Appellant.

v.

Kampta Prasad—Plaintiff — Respondent.

Second Appeal No. 365 of 1931, Decided on 29th July 1932, against decree of First Sub-Judge, Bahraich, D/- 7th October 1931.

Landlord and Tenant — Grove — Plot of land given to plant grove—Landlord is not entitled to enter into possession of portion of grove which becomes vacant — Principle only applies where entire area is held under single grant.

For the application of the principle that where a plot of land is given to a person to plant a grove thereon the landlord is not entitled to enter into possession of portions of the grove which have become vacant or to cultivate them himself or to let them for cultivation to the others it is necessary that the entire area must be held under one single grant. The principle has no application to a case in which separate groves are held under different grants: *A. I. R.* 1926 *Oudh* 458, *Ref. and Dist.* [P 281 C 2]

Qismat Rai Jagadhari — for Appellant.

H. N. Misra—for Respondent.

Judgment.—This is a defendant's appeal against the decision dated 7th October 1931 of the 1st Subordinate Judge of Bahraich modifying the decision dated 27th March 1931 of the Munsif of that place. The plaintiff Kamta Prasad instituted the suit which has given rise to this appeal for possession of two plots 1375 and 1376 situate in Bahraich Mohalla Qanungopurwa on the allegation that he had been holding the plots in suit as a grove holder and that he had been wrongfully dispossessed by defendants 1 and 2 in January 1929. Defendants 1 and 2 pleaded that they had been admitted into the occupation of the plots in suit as tenants by one Lachmi Narain who was the owner of the said plots. Lachmi Narain was subsequently on an order passed by the Court of appeal, impleaded as defendant 3. Lachmi Narain's case was that the plots in suit of which he was the owner had lost their character as groves and had been resumed by him and let out to defendants 1 and 2 for cultivation. The learned Munsif held that plot 1375 and a portion of No. 1376 described as 1376/1 still continued to bear the character of groves. But as regards another portion of 1376 described as 1376/2 the finding of the learned Munsif was that it was no more a grove. He accordingly decreed the plaintiff's claim for Nos. 1375 and 1376/1 and dismissed it in respect of No. 1376/2. Lachmi Narain appealed and Kampta Prasad, plaintiff, filed cross-objections. The lower appellate Court was of opinion that the two plots 1375 and 1376 constituted one single grove and that the two plots taken as a whole still retained the character of a grove. As a result of this finding he dismissed the appeal of Lachmi Narain and allowed the cross-objections of Kampta Prasad and decreed the plaintiff's claim in its entirety.

The first and the main question which requires determination in this appeal is whether or not the two plots 1375 and 1376 constitute one single grove. (His Lordship then discussing evidence came to the following conclusion.) Thus there is absolutely no evidence to show how and when the plaintiff who is a Kayesth came into possession of the plots in suit. Nor is there any evidence to show that both the plots in suit were constituted a grove at one and the same time or by one single grant. The lower appellate Court has based its decision on a ruling of this Court in *Jagadish Bahadur Singh* v. *Ragho Ram* (1). It was held in this case that where a plot of land is given to a person to plant a grove thereon the landlord is not entitled to enter into possession of portions of the grove which have become vacant or to cultivate them himself or to let them for cultivation to others. It was observed that:

"the plot must be taken to have been granted as a whole and the tenure must stand or fall as a whole unless some custom or contract is shown to the contrary."

The mere fact that a portion of the grove has become devoid of trees does not entitle the landlord to resume that portion of it; in fact there can be no resumption "piecemeal." It seems to me perfectly clear that for the aplication of the principle enunciated in this case with which I am in full agreement it is necessary that the entire area must be held under one single grant. It has no application to a case in which separate groves are held under different grants. In the present case the learned counsel for the plaintiff-respondent is unable to refer me to any evidence to show that the two plots in suit were held under

(1) A. I. R. 1926 Oudh 458=94 I. C. 349=29 O. C. 271.

one grant. The ruling in *Jagadish Bahadur Singh* v. *Ragho Ram* (1) has therefore no application to the case. Admittedly plot 350 has an area of 19 biswas and there is only one tree standing on it. I have no hesitation in holding that the plot no longer bears 'the character of a grove. The defendant-appellant was therefore entitled to resume it and the plaintiff's claim in respect of it must fail. (His Lordship then discussed evidence with respect to plot 1376 and proceeded as follows.) I am therefore in agreement with the lower appellate Court that plots 1376/1 and 1376/2 which as I have just stated must be treated as constituting one grove, still retain their character as such. The result therefore is that I allow the appeal in respect of plot 350 old=1375 new. The plaintiff's claim in respect of this plot will be dismissed. The rest of the decree of the lower Court will stand. The parties will pay any and receive costs according to their success and failure in all the Courts.

R.M./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 282

SRIVASTAVA AND KISCH, JJ.:

Ram Autar and *others*—Defendants—Appellants.

v.

Ram Samujh and *others*—Plaintiffs—Respondents.

Misc. Appeal No. 20 of 1931, Decided on 21st April 1931, against order of Addl. Sub-Judge, Gonda, D/- 9th December 1930.

Civil P. C. (1908), Sch. 2, Paras. 20 and 21—Appeal—Order filing or refusing to file award—Court-fee stamp of Rs. 2 is sufficient—Court-fees Act (1870), Sch. 2, Art. 11.

An order filing or refusing to file an award can neither be regarded as a decree nor as an order having the force of a decree. An appeal against such an order under S. 104 (f), Civil P. C., falls within the purview of Art. 11, Sch. 2, Court-fees Act, and is therefore chargeable with a court-fee of Rs. 2 only : *A. I. R.* 1927 *All.* 771 and *A. I. R.* 1928 *Lah.* 137, *Ref.*; 33 *Cal.* 11 and 29 *Cal.* 167, *Dist.* [P 282 C 2]

L. S. Misra—for Appellants.

Judgment.—In this case there was a reference to arbitration without the intervention of the Court. The plaintiff-respondent made an application under R. 20, Sch. 2, Civil P. C., to have the award filed in Court. The Court after necessary inquiry ordered the award to be filed and pronounced judgment according to the award. Upon the judgment so pronounced a decree was prepared in due course. The defendants-appellants have filed an appeal against the order of the Additional Subordinate Judge of Gonda ordering the award to be filed and have paid a court-fee of Rs. 2 on the memorandum of appeal. The taxing officer has reported that the memorandum of appeal ought to bear an ad valorem court-fee on the value of the appeal and has relied on a decision of the Calcutta High Court in *Hari Mohan Singh* v. *Kali Prasad Chaliha* (1) in support of his report. We are of opinion that the court-fee paid is correct. R. 21, Sch. 2, Civil P. C., shows that the Court if it is satisfied that the award should be enforced, shall in the first place order the award to be filed and then proceed to pronounce judgment according to the award. Thus it will appear that the rule provides for two distinct steps, one being described as an order and the other a judgment followed with a decree. Cl. (2) of the same rule further provides that no appeal shall lie from the decree following the judgment except in so far as the decree is in excess of or not in accordance with the award. S. 104 which provides for appeals from certain orders has by its Cl. (f) allowed an appeal against orders filing or refusing to file an award in an arbitration without the intervention of Court. Turning to the definition of decree given in S. 2, Cl. (2), Civil P. C., it will be noticed that the word "decree" does not include "(a) any adjudication from which an appeal lies as an appeal from an order."

Thus it seems perfectly clear that an order filing the award cannot be regarded as a decree and therefore special provision has been made for appeal against it as an order. It is not possible to say that such an order has the force of a decree because R. 21, Sch. 2, Civil P. C., has, as stated before, made express provision for a decree to be passed in accordance with the judgment following the order directing the award to be filed. We are therefore of opinion that the order under appeal can neither be regarded as a decree nor as an order having the force of a decree. This being so the case falls within the purview of Art. 11, Sch. 2, Court-fees Act, and is therefore chargeable with a court-fee of Rs. 2

(1) [1905] 33 Cal. 11.

only. The same view appears to have been taken by the Allahabad High Court in *Sarwan Pande* v. *Jagat Pande* (2) and by the Lahore High Court in *Agya Singh* v. *Sundar Singh* (3). As regards the decision in *Hari Mohan Singh* v. *Kali Prosad Chaliha* (1), it was passed in a case arising under S. 526 of the old Civil P. C. (Act 14 of 1882). The definition of decree in the Civil Procedure Code of 1882 provided that orders not specified in S. 588 were within the definition. S. 588 shows that an order directing an award to be filed under S. 526 was not provided for in that section. Thus there was very good reason for holding that an order under S. 526 was a decree within the definition of it as given in S. 2, Act 14 of 1882, but the position under the provisions of the Civil Procedure (Act 5 of 1908), as pointed out above, is quite different. The decision of their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (4), which was relied upon by their Lordships of the Calcutta High Court, was also passed under the old Civil P. C, and cannot therefore afford any guidance in determining whether an order passed under order R. 21, Sch. 2, is or is not to be regarded as a decree within the definition of it as given in Act 5 of 1908. For the above reasons we are of opinion that the court-fee of Rs. 2 paid on the memorandum of appeal is correct.

K.N./R.K. *Appeal allowed.*

(2) A. I. R. 1927 All. 771=103 I. C. 315.
(3) A. I. R. 1928 Lah. 137 =9 Lah. 380 = 107 I. C. 756.
(4) [1901] 29 Cal. 167=29 I. A. 51=8 Sar. 154 (P. C.).

A. I. R. 1932 Oudh 283

NANAVUTTY, J.

Imperial Bank of India, Lucknow—Defendant—Applicant.

v.

V. H. Roberts — Plaintiff — Opposite Party.

Civil Revn. No. 8 of 1931, Decided on 20th April 1931, against order of Second Addl. Judge, Small Cause Court, Lucknow, D/- 2nd December 1930.

(a) Provincial Small Causes Courts Act (1887), S. 25—High Court can interfere only if the case is mismanaged by trial Court.

High Courts should not ordinarily exercise the powers under S. 25, Provincial Small Causes Courts Act, unless they had reasons to suppose that there had been a real mismanagement of the case or actual perversity in the decision by the trial Court: 15 *O. C.* 319 and *A. I. R.* 1926 *Oudh* 264, *Foll.* [P 284 C 1,2]

(b) Civil P. C. (1908), S. 100—Question of law—What is, stated.

Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other. But the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact: *A. I. R.* 1918 *P. C.* 92, *Foll.* [P 284 C 2]

(c) Deed—Construction—Rule as to.

The expression "construction" as applied to a document includes two things: first, the meaning of the words, and secondly their legal effect or the effect which is to be given to them. The meaning of the words is a question of fact; the effect of the words is a question of law. The inference drawn from the words contained in a document is a pure question of law: *Chatenay* v. *Brazilian Submarine Telegraph Co*, (1891) 1 *Q. B.* 79, *Rel. on.* [P 285 C 1]

Quaere.—Whether the receipt of a cheque drawn by Government in favour of a Government servant on account of his salary is actual payment of his salary to that servant.

St. G. Jackson—for Applicant.

Ram Prasad Verma — for Opposite Party.

Judgment.—This is an application for revision under S. 25, Provincial Small Causes Courts Act, against an order of Mirza Mohammad Munim Bakht, Judge of the Small Causes Court at Lucknow, decreeing the plaintiff's suit. The facts out of which this application for revision has arisen are briefly as follows: Lt-Col. V. H. Roberts, I. M. S., brought a suit for recovery of Rs. 477-3-0 as damages from the Imperial Bank of India, Lucknow Branch, on the allegations that the defendant Bank cashed a cheque for his pay for March 1929 on 22nd March 1929 and credited the amount to the plaintiff's account; that by this act of the defendant Bank the annual income of the plaintiff for the financial year 1928-29 came to exceed Rs. 30,000 and as a consequence plaintiff had to pay an extra sum of Rs. 477-3-0 by way of additional income-tax; that the defendant Bank ought not to have cashed this cheque for Rs. 1,491-14-0 till after the expiry of the financial year 1928-29 on 1st April 1929; that by the negligent and careless handling of affairs on the part of the defendant Bank the plaintiff had to suffer a loss of Rs. 477-3-0, and hence the plaintiff filed this suit for a decree for Rs. 477-3-0 with costs and interest pen-

dente lite as well as future interest. The defendant Bank denied the liability and urged that it cashed the cheque for Rs. 1,491-14-0 in the ordinary course of business in the absence of any special instructions to the contrary and that the payment of any additional income-tax to the extent of Rs. 477 odd, which the plaintiff had to pay was a matter to be settled purely between him and the Income-tax Department with which the Bank had no concern whatsoever, and that the Bank indignantly repudiated the charge brought against it of negligence and carelessness in their business dealings with the plaintiff.

The learned Judge of the Small Causes Court framed five issues and held that the plaintiff had given the defendant Bank instructions not to credit the cheque before 1st April 1929, that the defendant Bank did act against the instructions of the plaintiff and thus caused loss to him, that it was the duty of the defendant Bank not to cash the cheque till 1st April 1929, that the Bank could have easily postponed crediting the cheque till 1st April 1929 without the endorsement of the Controller of Military Accounts and without any instructions from the plaintiff, and that the receipt of a cheque drawn by Government in favour of a servant of theirs is not payment of his salary to that servant. He accordingly decreed the plaintiff's suit in full with costs. Dissatisfied with the judgment and decree of the trial Court the defendant Bank has filed this application in revision under S. 25, Provincial Small Causes Courts Act.

At the commencement of the hearing of this application the learned counsel for the plaintiff opposite party strenuously objected to the defendant Bank being allowed to reopen questions of fact decided by the trial Court. He cited a ruling of the late Judicial Commissioner's Court reported in *Raghuraj Singh* v. *Sahib Din* (1) in which it was held that S. 25, Small Causes Courts Act, did not give any right of appeal on law or fact, and that the powers conferred by the section were purely discretionary and were not to be exercised unless it appeared that some substantial injustice had resulted from the decree of the Court of Small Causes. The learned counsel also cited a ruling of this Court reported in *Mahabir* v. *Ram Saran Singh* (2) in which the late Stuart, C. J., of this Court, laid down that High Courts should not ordinarily exercise the powers under S. 25, Provincial Small Causes Courts Act, unless they had reason to suppose that there had been a real mismanagement of the case or actual perversity in the decision by the trial Court. The contention of the learned counsel for the plaintiff opposite party is perfectly valid so far as it goes, but it seems to me from a mere perusal of the judgment of the lower Court that there has been a real mismanagement of the present case in the trial Court and that in consequence thereof substantial injustice has resulted to the defendant Bank from the decree of the Court of Small Causes.

The learned Judge of the trial Court has not kept the acts of the parties apart from any unfortunate incidental consequences that may have flowed therefrom to the plaintiff and has, it seems to me, arbitrarily made the defendant bank compensate the plaintiff for consequences which it (the bank) could never have anticipated and for which it could never be held legally responsible. The learned counsel for the plaintiff has in this connexion invited my attention to a ruling of their Lordships of the Privy Council reported in *Nafar Chandrapal Chaudhri* v. *Shukur Sheikh* (3) in which their Lordships delivered themselves of the following weighty pronouncement :

"Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other. But the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact."

Applying this golden rule to the admitted facts of the present case, I find that the plaintiff, Lt. Col. V. H. Roberts, admits that he gave no instructions verbal or in writing to the defendant bank that it should not cash the cheque for Rs. 1,491-14-0 before 1st April 1929. In the absence of any such instructions it was the bounden duty of the defendant bank to cash the cheque within 24 hours because if it failed in this duty and the customer suffered a loss the bank would have been legally liable to make good that

(1) [1912] 15 O. C. 319=17 I. C. 470.

(2) A. I. R 1926 Oudh 264=93 I. C. 108.

(3) A. I. R. 1918 P. C. 92=51 I. C. 760=45 I. A. 183=46 Cal. 189 (P.C.).

loss : see Banking Law and Practice in India by Mr. M. L. Tannan, 1927 Edn., Butterworth & Co., Calcutta, p. 174. Thus upon the evidence of the plaintiff his suit ought to have been dismissed. The learned trial Judge has however relied upon Exs. 1, 13 and A-2 and has drawn from these documents the inference that they amounted to a positive instruction to the defendant bank that it should not cash the cheque in question till 1st April 1929. The learned counsel for the plaintiff opposite party has argued before me that it is not open to this Court in this revision application to go behind the conclusion arrived at by the trial Judge in respect of this documentary evidence. This contention of the learned counsel for the plaintiff is, in my opinion, untenable, and I cannot do better · than quote in this connexion the pregnant observation of a great English Judge, Lord Lindley, L. J., in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (4).

> "The expression "construction," as applied to a document, at all events as used by English lawyers, includes two things : first the meaning of the words, and secondly their legal effect or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law."

Now it is admitted that Exs. 1, 13 and A-2 do not contain any instruction to the defendant bank by the plaintiff not to cash the cheque in question till 1st April 1929. It is however the inference drawn from the words contained in these documents which has been held to support the plaintiff's claim. According to the dictum of Lord Lindley cited above, this inference drawn from these documents Exs. 1, 13 and A-2 is a pure question of law. That being the case it is open to this Court in this revision application to consider whether the inference drawn by the lower Court from these documents has been correctly drawn or not. (After discussing the evidence, his Lordship found that no definite instructions were given by the plaintiff to withhold the encashment of the check). In this connexion the law of agency and the provisions of the Contract Act have been invoked by the learned counsel for the plaintiff. It has been argued before me that the provisions of Ss. 211 and 214, Contract Act. made it imperative for the defendant bank to obtain the instructions of the plaintiff as regards the encashment of the cheque for Rs. 1,491-14-0. In my opinion these provisions of the Contract Act have no relevency to the question in issue between the parties. The defendant as a collecting bank did its ordinary duty of collecting the pay of the plaintiff when it received back the cheque from the Controller of Military Accounts. It was no part of the duty of the defendant bank to act as legal adviser to the plaintiff nor was it called upon to give any expert advice to the plaintiff in the matter of circumventing the income-tax department, all the more so as plaintiff had not chosen to take the defendant bank into his confidence and revealed to it his object for asking that the Controller of Military Accounts should endorse the cheque in question as not payable till 1st April 1929. For the reasons given above I hold that the lower Court drew wrong inferences from Exs. 1, 13 and A-2, that the interpretatation and construction of documents is a pure question of law which entitles this Court to interfere even in revision with the findings of the trial Court, and that upon a true interpretation of these documents and upon the oral evidence of the plaintiff himself my finding on issue 1 is that plaintiff did not give the defendant bank any instructions not to credit the cheque for Rs. 1,491-14-0 before 1st April 1929. My finding on Issue 2 is that as no instructions were given by the plaintiff to the defendant bank in the matter of cashing the cheque for Rs. 1,491-14-0 the defendant bank was not liable for any payment on account of income-tax that the plaintiff might have had to make.

As between the defendant bank and its customer the plaintiff there has been no loss occasioned to the plaintiff by any act of the defendant. It is a curious commentary on the mental outlook of the plaintiff that he considers the payment of additional income-tax to Government (a subject with which the defendant bank has no concern) a matter of grievance against the offending bank. He has brought himself to this frame of mind because he has been told by an Income-tax Officer that if the pay of March 1929 had been drawn in April 1929 he would successfully have avoided liability to pay the additional income-tax.

(4) [1891] 1 Q. B. 79=60 L. J. Q. B. 295=63 L. T. 739=39 W. R. 65.

It is a moot point whether the receipt of a cheque drawn by Government in favour of a Government servant on account of his salary is actual payment of his salary to that servant. So far as I am aware this matter has not been decided by any High Court and the learned counsel of both parties who appeared before me were unable to cite any ruling one way or the other. The matter appears to be res integra. I do not however propose in this judgment to discuss this very wide subject, because the plaintiff's suit can be disposed of on the first four issues framed by the trial Court and because this matter which is embodied in issue 5 was not fully thrashed out before me in the arguments at the Bar. My finding on issue 3 is that in the absence of any instructions given to the defendant bank by the plaintiff there was no duty imposed on the bank not to cash the cheque till 1st April 1929. On the contrary I hold that it was the duty of the bank in accordance with souud business practice to cash the cheque as soon as it was received back from the Controller of Military Accounts.

My finding on issue 4 is that the defendant bank could have deferred crediting the cheque till 1st April 1929 without the endorsement on it by the Controller of Military Accounts, but only if the bank had received definite instructions to that effect from the plaintiff and only after the plaintiff had upon the request of the defendant bank written a letter of protection indemnifying the bank against any loss caused by the delay in the encashment of the cheque. Upon my findings on these four issues the plaintiff's suit fails. For the reasons given above I allow this application for revision, set aside the judgment and decree of the lower Court and dismiss the plaintiff's suit with costs of both Courts.

K.N./R.K. *Application allowed.*

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* A. I. R. 1932 Oudh 286

RAZA AND SMITH, JJ.

Beni Madho and *another*—Plaintiffs—Appellants.

v.

Ch. Muhammad Ishrat Ali and *others*—Defendants—Respondents.

First Appeal No. 114 of 1930, Decided on 13th October 1931, against decree of Addl. Sub-Judge, Hardoi, D/- 29th October 1930.

*** Limitation Act (1908), Art. 73—Suit on pro-note, accompanied by security bond, can be maintained after three years but more interest than is legally recoverable on it cannot be claimed—Negotiable Instruments Act (1881), S. 79.**

A suit based on a pro-note, accompanied by a security bond of the same date, hypothecating certain property specified in the deed, brought after three years after the execution of the pro-note is within time by virtue of the securitybond though brought after the pro-note bas become barred by time. But the plaintiff cannot claim more interest on the pro-note than what is legally recoverable under it in spite of the security bond which is intended to be limited to the amount due on account of the principal and interest on the pro-note which could be legally recoverable. [P 286 C 2]

Judgment.—This is a plaintiffs' appeal arising out of a suit based on a pro-note dated 3rd July 1926. The pro-note was executed by defendant 1 for Rs. 4,000 bearing interest at 2 per cent per mensem compoundable six-monthly. He executed a security bond also in favour of the plaintiffs on that very date hypothecating certain zamindari shares specified in the deed. The plaintiffs brought the present suit on 31st July 1930, to recover Rs. 9,983 6-6 on the basis of the pro-note and the security bond mentioned above. The defendants failed to appear in the lower Court and so the case proceeded ex parte against them. However the learned trial Judge thought it proper to see whether the plaintiffs' claim on the pro-note was within limitation, having been brought about four years after the execution of the pro-note, and whether the plaintiffs could claim interest on the pro-note after three years. He held on the first point that the plaintiffs' claim was within time by virtue of the security bond, though it was brought after the pro-note had become barred by time. He however decided the second point against the plaintiffs on the ground that the security bond was intended to be limited to the amount due on account of the principal and interest on the pro-note which could be legally recoverable. He found that the security bond gives the plaintiffs security for realization of their money, but in no way extends the defendants' liability. We have examined the pro.ncte and the security bond. We are not prepared to disagree with the finding of the learned trial Judge on the point under consideration. The plaintiffs have got a decree for Rs. 7,895-3-0 and propor-

tionate costs by sale of the property hypothecated in the security bond. They should be content with what they have got. The appellants' learned counsel has asked us to allow the plaintiffs future interest. We are not prepared to do so as we find that the rate of interest provided by the pro-note is very high. The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal. The respondents have failed to appear and have therefore incurred no costs.

K.N/R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 287

SMITH, J.

Sheo Sahai and *others*—Accused—Applicants.

v

Emperor—Opposite Party.

Criminal Revn. No. 104 of 1931, Decided on 5th October 1931, against order of Sess. Judge, Bara Banki, D/- 1st August 1931.

Criminal Trial—Evidence — Identification —Principles stated.

Apart from seeing that the jail identification proceedings were conducted with the proper care and precautions, the main points to be attended to in considering such evidence are : (1) the number of "wrong," i. e., persons other than suspected persons picked out by the identifying witnesses, (2) the consistency of identification made at different times, i. e., did the various witnesses pick out the same men alike in the jail identification proceedings, before the committing Magistrate and in the Sessions Court. Other points requiring attention are : (1) Was a sufficiently large number of men paraded along with the suspects ? (2) Did any witness pick out a large number of men so as to create suspicion that he was picking out men at random ? [P 287 C 2]

Qutbuddin Ahmad—for Applicants.

H. K. Ghosh—for the Crown.

Judgment.—This is an application in revision against a decision by the Sessions Judge of Bara Banki. The facts are, briefly, that there was seroius trouble at a village called Rajnapur on 15th February last. A largely attended festival, it seems, takes place there each year on the Sheoratri day, and on the last occasion there was trouble in the morning between some of the visitors and the village people. It arose out of a dispute about fuel, and there was a preliminary phase in which nothing very serious happened. A little later however a large crowd went to the village, set fire to houses, and assaulted the inhabitants; one woman was seriously injured, and died the same evening. 22 arrests were made in the afternoon, and 13 men were committed for trial. The case was tried by the Assistant Sessions Judge, who convicted only five of the 13; they were convicted under Ss. "147, 436 304, I. P. C. read with S. 149, I. P. C." Each of them was sentenced to three years' rigorous imprisonment and a fine of Rs. 100, in default, to six months' rigorous imprisonment further. On appeal, the learned Sessions Judge allowed two of the appeals. He dismissed the appeals of the other three men; the convictions he described as being under Ss. 147, 436 and 304, I. P. C., and rightly pointed out that a separate sentence should have been passed under each section. He "modified" the sentences as follows: (1) under S. 304, he imposed sentences of three years rigorous imprisonment; (2) under S. 436, he imposed sentences of three years' rigorous imprisonment and fines of Rs. 100, in default of payment, three months' rigorous imprisonment; (3) under S. 147, he imposed sentences of two years' rigorous imprisonment.

The sentences were ordered to run concurrently, so substantially there was no enhancement of the sentences passed by the Assistant Sessions Judge. The three men whose appeals were dismissed were Bali, Sheo Sahai and Rampher, all residents of a village called Jagdishpur, in the Sultanpur District. They have come with an application in revision. The 22 arrested men were put up for identification at the Bara Banki Jail on the morning of 28th February. The magisterial inquiry began on 20th March, and the Sessions trial on 1st June. The trial, it should be mentioned, was confined to the events of the second phase of the occurrence, that is to say, the more serious phase. The evidence against the three applicants whose cases are before me consisted entirely of identification evidence. Apart from seeing that the jail identification proceedings were conducted with the proper care and precautions, the main points to be attended to in considering such evidence are: (1) the number of "wrong" persons picked out by the identifying witnesses, by "wrong" persons of course I mean persons other than suspected persons; (2) the consistency of the identifications made at different times, that is, did the various witnesses pick out the same men alike in the jail identification proceedings, before the committing Magis-

trate, and in the Sessions Court? Other points requiring attention are: (1) Was a sufficiently large number of men paraded along with the suspects? (2) Did any witnesses pick out a large number of men, so as to create a suspicion that he was picking out men at random?

In the present case, 70 other persons were paraded with the suspects, and the note of the Magistrate shows that the proceedings were conducted with the usual precautions. As an instance of a witness picking out a large number of men, I may cite the case of Badlu, who picked out no less than 36, of whom 12 were suspects, and 24 were "wrong" men. That is a very good illustration of one of the points I have referred to above. Obviously, Badlu's identifications are entitled to no weight. Having made these preliminary observations, I proceed to consider the cases against the three men concerned in this revisional application. (After considering the identifying evidence regarding Bali Sheo Sahai, and Rampher, his Lordships concluded). I set aside Rampher's conviction and sentence, and direct that he be released forthwith. The revisional application is thus allowed in the cases of Bali and Rampher, but rejected in the case of Sheo Sahai.

R.M./R.K. *Application allowed.*

A. I. R. 1932 Oudh 288

SRIVASTAVA, J.

Muniruddin Kedwai — Defendant — Appellant.

v.

Mt. Raisulnisa and *others* — Plaintiffs—Respondents.

Second Appeal No. 98 of 1931, Decided on 1st August 1932, against order of Dist. Judge, Bara Banki, D/- 5th December 1930.

Civil P. C. (1908), O. 41, R. 20 — Application by six persons for partition of mahal—Objection by *A* that certain land be treated as shamilat land of cosharers — Partition officer holding that partition should be in accordance with entries in khewat—Appeal by *A* — Only six applicants for partition impleaded as respondents—Court could not at request of *A* implead other cosharers under O. 41, R. 20.

Six persons applied to the Revenue Court for partition of mahal. *A* filed an objection that 17 bighas of land recorded as his exclusive property should be treated as shamilat land of the cosharers. The partition officer holding that the partition should be made in accordance with the entries in the khewat dismissed the objection. *A* treating it as a decision on question of title appealed to the District Judge making only the six applicants to partition respondents in appeal. On a preliminary objection that the appeal was incompetent as the other cosharers were not made parties to appeal, *A* requested that the Court might implead them under O. 41, R. 20.

Held: that the appeal was incompetent. That the Court could not implead the other cosharers as respondents, as it would deprive them of the right which they had acquired by reason of the decision of the partition officer becoming final in their favour. The order passed by the partition officer being an order jointly in favour of the whole body of cosharers, all the cosharers were necessary parties to the appeal and an appeal having been framed without making them respondents there was no proper appeal before the Court. The cosharers against whom *A's* objection had been dismissed and against whom the right of appeal had become barred by time could hardly be regarded as being interested in the result of the appeal: *A. I. R.* 1927 *P. C.* 252; *A. I. R.* 1927 *Pat.* 23 and *A. I. R.* 1926 *Lah.* 499, *Rel. on.* [P 289 C 2]

H. Husein—for Appellant.

K. D. Sinha and *Akhtar Husein*—for Respondents.

Judgment.—This is a defendant's appeal against the decision dated 5th December 1930 of the learned District Judge of Bara Banki, upholding the order dated 5th March 1930, of an Assistant Collector First Class, of that district.

The facts of the case are that six persons applied to the Revenue Court for partition of a mahal. The defendant-appellant filed an objection that 17 bighas odd land which was recorded as his exclusive property should be treated as the shamilat land of all the cosharers. The partition officer held that the partition should be made in accordance with the existing entries in the khewat and dismissed the objection. The defendant-appellant treating this as decision of a question of title by the partition officer appealed to the Court of the District Judge making only the six applicants for partition as respondents to the appeal.

At the hearing of the appeal a preliminary objection was raised to the effect that the appeal was incompetent as the other cosharers had not been made parties to the appeal and the order of the lower Court in their favour had become final. The learned District Judge accepted the objection observing that if the appeal is entertained and happens to be successful, it would lead to the absurd result that as against the cosharer who are respondents now, the partition would have to proceed in one way while as against those who are not parties, the partition would proceed in quite a different man-

ner. As regards the request of the defendant-appellant that the Court might implead the other cosharers as respondents to the appeal under O. 41, R. 20, Civil P..C., the learned District Judge was of opinion that the defendants who had not been impleaded in the appeal and against whom the appellant's right of appeal had become barred by limitation had acquired a valuable right of which they should not be deprived by the Court exercising its powers under O. 41, R. 20, Civil P. C. He also remarked that as the appellant had deliberately and not inadvertently chosen not to make the other cosharers respondents it was not a proper case in which he should exercise the discretion allowed to him by O. 41, R. 20, Civil P. C., in favour of the appellant. In the result he upheld the preliminary objection and dismissed the appeal.

The only contention urged before me is that the appellant by mistake did not implead the other defendants in the appeal and that it was a fit case in which the lower appellate Court ought to have joined the other cosharers as respondents in the appeal under the provisions of O. 41, R. 20, Civil P. C. In *Chokalingam Chetty* v. *Seethai Ache* (1) their Lordships of the Judicial Committee referring to the provisions of O. 41, R. 20 remarked as follows:

"That rule empowers the Court to make such party a respondent when it appears to the Court that 'he is interested in the result of the appeal.' Giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom these suits have been dismissed and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants."

In *Badri Narayan* v. *E. I. Ry.* (2), a Bench of the Patna High Court held that O. 41, R. 20 will only apply where there is an appeal pending in the Court on which a decision may be given by the Court. Therefore when the appellant impleaded only some of the persons holding a joint decree, there is no proper appeal before the Court and the Court has no jurisdiction to implead other persons who have been omitted beyond limitation under O. 41, R. 20. In *Maharaja of Faridkot* v. *Anant Ram* (3) a Bench of the Lahore High Court observed that:

"to hold that an appellate Court can implead a person who has acquired an absolute right as he has in this case by the lapse of time orby the omission of his name from the decree would be tentamount to denying all finality to litigation.',

In the present case it is perfectly clear that the effect of the order of the partition officer was that the partition was to be carried out in accordance with the share of each cosharer as entered in the khewat. If the defendant's appeal was to succeed the result of it would have been that the defendant-appellant would secure 17 bighas land from the share of all the other cosharers in lieu of the 17 bighas which he wanted to be treated as shamilat land. In consequence of the defendant's failure to implead a number of his cosharers the order of the partition officer in their favour had become final at the time when the appeal came up for hearing. If the learned District Judge had acceded to the appellant's request to join them as parties to the appeal, the result would clearly have been to deprive these cosharers of the right which they had acquired by reason of the order of the partition officer having become final in their favour. Moreover, the appeal as it was framed without all the parties in whose favour the order had been passed by the lower appellate Court being made respondents was not in order and so there was no proper appeal before the lower Court. The order of the partition officer being an order jointly in favour of the whole body of cosharers all the cosharers were necessary parties to the appeal. The cosharers against whom the appellant's objection had been dismissed and against whom his right of appeal had become barred by time can as observed by their Lordships of the Judicial Committee hardly be regarded as interested in the result of such an appeal to which they were no parties. Viewed from another standpoint it may be possible to say that being necessary parties they were much more than merely "interested in the result of the appeal" within the meaning of O. 41, R. 20, Civil P. C. I can under the circumstances see no sufficient grounds for interference with the discretion exercised by the learned District Judge in this matter.

(1) A. I. R 1927 P. C. 252=107 I. C. 237=6 Rang 29=55 I. A. 7.

(2) A. I. R. 1927 Pat. 23=98 I. C. 1003=5 Pat. 755.

(3) A. I. R. 1926 Lah. 499=97 I. C. 338=8 Lah. 161.

The appeal therefore fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Oudh 290

SRIVASTAVA, J.

Jamwanti Kunwar— Plaintiff—Appellant.

v.

Chetan Das and *another*—Defendants—Respondents.

Second Appeals Nos. 343 and 344 of 1931, Decided on 10th August 1932, against order of Sub-Judge, Gonda, D/- 15th August 1931.

Oudh Sub-Settlement Act (26 of 1866), Sch. 1, R. 10—Holding land previously as *sir* or nankar is necessary for subsequently claiming under-proprietary title—Hence such title cannot be claimed in abadi unless grant is proved.

One of the conditions laid down in R. 10 of the rules in the schedule attached to Act 26 of 1866 necessary to establish under-proprietary title is that the land in question had been held by the claimant or his ancestors as sir or nankar when they were in proprietary possession. Hence in the case of abadi land in the absence of proof or presumption of grant of under-proprietary rights, such title cannot be established: *S.O.C.* 145 and *A.I.R.* 1930 *P.C.* 179, *Ref.* [P 291 C 2]

K. P. Misra—for Appellant.

H. D. Chandra—for Respondents.

Judgment—These are two appeals by the plaintiff arising out of two suits which were consolidated and disposed of by the two Courts below by one judgment Village Baunriha, Pargana Mahadeva, in the district of Gonda is included within the taluka of the plaintiff. The defendants in the two suits made certain constructions on the abadi plot No. 962 of the said village. The plaintiff instituted the two suits for demolition of the constructions made by the defendants on the ground that they had been put up without her permission, and for recovery of possession of the land on which the constructions had been made. The defendants admitted the plaintiff being the talukdar of the village but resisted the suit on the ground that one Jagmohan Singh was in possession of the abadi land as an under proprietor and that they had made the constructions in dispute with the permission of Jagmohan Singh. They also pleaded that the suit was barred by time. Thereupon Jagmohan Singh was impleaded as defendant 2 in both the suits. He supported the other defendant about the constructions having been made with his permission. He also pleaded that the entire abadi land in village Baunriha was in his possession as an under-proprietor and that he had all along been exercising the right to populate riyayas on the abadi land.

The learned Munsif held that the defendants had failed to prove that Jagmohan Singh possessed under-proprietary rights in the abadi land. He further held that if Jagmohan Singh's ancestors possessed any under-proprietary rights they were wiped out as a result of the general confiscation of all proprietary rights in the soil of Oudh by Lord Canning's proclamation of 1858. On appeal the learned Subordinate Judge has found that Jagmohan Singh and his ancestors have been in undisturbed possession of the abadi land and have been taking zamindari dues from riyayas. Relying on the decision of a Bench of this Court in *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (1) he has further held that the ancestors of Jagmohan Singh having continued to enjoy the under-proprietary rights possessed by them at the time of Lord Canning's proclamation, it should be taken that the said rights were restored afterwards when there was a restoration by the Crown of the proprietary rights. Further he was of opinion that the principle laid down in that case was applicable to the facts of the present case and applying that principle he held that Jagmohan Singh should be deemed to be the under-proprietor of the abadi lands, of which he had been in undisturbed possession all along.

In my opinion this appeal must succeed. It is the common case of both parties that the ancestors of Jagmohan Singh were originally the full proprietors of village Baunriha. The first summary settlement of the village was made with them. At the second summary settlement which followed the general confiscation, the village was settled with the plaintiff's ancestor Raja Kishen Dat. The latter was also granted a sanad and the village was included in his taluka. At the first settlement the ancestors of Jagmohan Singh made a claim for sub-settlement of the whole village. Subsequently the claim was confined to a claim for under-proprietary rights in 1602 bighas of *sir* land. This claim was ulti-

(1) A. I. R. 1927 Oudh 74=99 I. C. 876=2 Luck 4.

mately decreed by the Commissioner of Fyzabad. In the course of his judgment the learned Commissioner observed as follows:

"No reference was made to village site, zemindari fees, tanks or groves to which in greater or less degree the under-proprietors are probably entitled."

At best this might be taken to mean that the question as regards the rights of defendant 2's ancestors in the abadi land was left open. We have therefore to see whether the defendants have succeeded in substantiating the claim of Jagmohan Singh to under-proprietary rights in the abadi land. The decision in *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (1) does not seem to have been correctly understood by the learned Subordinate Judge. What this case decides is that where proprietary rights were restored, the rights of subordinate proprietors which had been held against the proprietors before the confiscation were also restored. This decision was confirmed by their Lordships of the Judicial Committee in *Bishnath Saran Singh* v. *Sheo Bahadur Singh* (2). Their Lordships held in agreement with this Court that the confiscation included not only the proprietary but also the under-proprietary rights and observed that one of the conditions of the grant made to the talukdar was that all persons holding under him

"should be secured by him in the possession of all the subordinate rights which they formerly enjoyed."

The necessary condition therefore for the application of the principle governing this decision is that the existence of the subordinate or under-proprietary rights at the time of the confiscation should be established. In the present case Jagmohan Singh's ancestors were admittedly full proprietors at the time of the confiscation. It is impossible to suppose that they held any under-proprietary rights at that time. No question of restoration of under-proprietary rights therefore arises.

In the case of *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (1) it was further held that claims for sub-settlement or for under-proprietary rights could be entertained and decided now by the civil Courts of the province of Oudh regardless of the fact that such claims were not recognized by the settlement Courts. As the settlement Court had expressly left the question of under-proprietary rights in the abadi lands open for decision afterwards, it is no doubt open to the defendant to establish in the present case the under-proprietary rights claimed by Jagmohan Singh. This in my opinion they have clearly failed to do. One of the conditions laid down in R. 10, Rules in the schedule attached to Act 26 of 1866 necessary to establish under-proprietary title is that the land in question had been held by the claimant or his ancestors as *sir* or nankar when they were in proprietary possession: see *Maharaja Jagatjit Singh Bahadur* v. *Suraj Bakhsh Singh* (3). As the land was admittedly abadi, it could not possibly have been held as *sir* or nankar. It is not suggested that the talukdar ever made a grant of any under-proprietary rights in the abadi lands in favour of Jagmohan Singh or any of his predecessors-in-title nor is there any room for presumption of a grant in the circumstances of the case.

The learned counsel for the defendants-respondents as a last resort claimed that Jagmohan Singh had acquired under-proprietary rights by adverse possession. No such claim was set up in the pleadings, nor was any issue framed about it. The learned Munsif also did not go into that question observing that adverse possession was never pleaded. I am therefore of opinion that the defendant has entirely failed to make out the under-proprietary rights claimed by Jagmohan Singh. Hence I allow the appeals and decree the plaintiff's claim in both the suits. As the case of the defendants is one of considerable hardship I order that the parties shall bear their own costs throughout.

M.N./R.K. *Appeals allowed.*

2) A.I.R. 1930 P.C. 179=124 I.C. 904 (P.C.).

(3) [1905] 8 O.C. 145.

A. I. R. 1932 Oudh 291

WAZIR HASAN, C. J. AND KISCH, J.

Parsotam Dass and *others* — Decree-holders—Appellants.

v.

Mohammad Hamid Mirza Beg and *others*— Judgment-debtors and Objectors —Respondents.

Appeal No. 33 of 1931, Decided on 26th April 1932, against order of Sub-Judge, Sitapur, D/- 11th February 1932.

Civil P. C. (1908), Ss. 151 and 152—Clerical error resulting in wrong order — Court may correct such error and pass proper order independently of fact that such error could have been corrected by Court of appeal.

Where there is a clear case of a clerical or arithmetical mistake or of an error arising from an accidental slip or omission in judgments, decrees or orders, the Court may correct the mistake or the error independently of the fact that the same mistake or error could have been corrected by the Court of appeal. It will be reading S. 152 out of the Code and not interpreting it if it were held that it would not apply to a case where the mistake of error could be corrected on appeal but was not so corrected or where no appeal was preferred. The procedure is intended to provide for a speedy and inexpensive relief to a party affected by any such mistake or error and does not contemplate to impose upon him the necessity of preferring an appeal as regards such a matter which in the very nature of things must entail large expenditure of money and time. [P 293 C 1, 2]

Radha Krishna and *S. N. Shrivastava*—for Appellants.

H. Hussain—for Respondents.

Judgment.—This is the decree-holders' appeal from the order of the Subordinate Judge of Sitapur dated 11th February 1931 in proceedings relating to the execution of the decree held by the appellants against the judgment-debtors respondents. It is necessary that the material facts of this case should be stated in a chronological order. The decree in question was obtained on 14th September 1918 against one Hamid Mirza Beg. Several applications for execution were made but without any result. The third application for execution was made on 7th August 1926 but was disposed of by an order consigning it to record on 24th November 1926. The fourth application for execution was presented on 25th November 1929. In respect of that application the office made the following report on the same date:

"The application for execution is barred by time because the application for execution was dismissed on 24th November 1926. The applicant has made this application on 25th November 1929 after the expiry of the period of limitation."

The report was placed before the presiding Judge on 28th November 1929 and the learned Judge endorsed the following order on the application. "Rejected with reference to the office report." The applications out of which these proceedings have arisen is the 5th application and it was made on 15th December 1930. On the same date the office reported that as the previous application had been rejected as barred by limitation the last application was not maintainable. The office report was placed before the presiding officer on 16th December 1930. Thereupon he made the following order: "Rejected as barred by time as per office report." On this date the decree-holders made an application under Ss. 151/152, Civil P. C., with a prayer that the orders dismissing the previous application as barred by time was not a proper order and was due to an accidental mistake of the office. This is the substance of the application though its language is different. The Court passed the following order on this application:

"The order dated 15th December 1930 is set aside. The execution application was presented within limitation as 24th November was a Sunday and the application was presented on the 25th the next working day. Issue attachment asked for 20th December 1930."

This is the date on which one Munshi Lal, who is apparently one of the decree-holders, filed a petition of objections in which he questioned the propriety of the order of 20th December 1930. This petition was disposed of by the order of 11th February 1931, against which the present appeal is preferred. Under that order the learned Subordinate Judge held that the order of 20th December 1930 was not binding on the judgment-debtors as it was passed without notice having been issued to them and also because the provisions of S. 151/152, Civil P. C., were inapplicable to such a case. He accordingly decided that the present application for execution was barred by time both on its merits and on the principle of res judicata. We are of opinion that the order of the learned Subordinate Judge under appeal is not right and should be set aside. It is obvious that the report made by the office on 25th November 1929 that the application for execution of that date was barred by time was clearly due to an error arising from an accidental lapse of memory that the preceding day, that is 24th November 1929 was a Sunday. It is also clear that the Subordinate Judge in passing the order of 28th November 1929 did not bring to bear his own judgment on the question of limitation. He simply followed and repeated the error which the office had made. It is also obvious that the order of 20th December 1930 corrected

that error and was eminently just and proper. We are of opinion that the case falls within the letter and spirit of the provisions of S. 152, Civil P. C.

The argument that an appeal could have been preferred from the order of 25th November 1929 and that therefore the application of the provisions of Ss. 151 and 152 of the Code is excluded does not appear to us to be sound. As we have already said the error was due to an accidental slip of memory. It could therefore be corrected in the exercise of the inherent jurisdiction of the Court as provided for in Ss. 151 and 152, Civil P. C. It is true that the error could also have been corrected by a Court of appeal if an appeal had been preferred from that order but the fact that it could have been so corrected does not in our opinion in a matter of this nature debar the exercise of jurisdiction with which the Court was clearly vested under the provisions of those sections. R. 2, O. 28 of the Rules of the Supreme Court in England is as follows:

"Clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court or a Judge on motion or summons without an appeal."

Section 152, Civil P. C., is substantially the same except that the last three words in R. 2 "without an appeal" are omitted in the section. This however does not in our opinion alter the substance of the rule. In *Hatton* v. *Harris* (1), Lord Watson said that:

"the correction ought to be made upon motion to that effect and is not matter either for appeal or for rehearing."

In *E.* v. *E.* (2) rectification was allowed even where the order was under appeal and though the request for alteration was made by the party who had given notice of the appeal against the order as originally drawn up. It seems to us that where there is a clear case of a clerical or arithmetical mistake or of an error arising from an accidental slip or omission in judgments, decree or orders the Court may correct the mistake or the error independently of the fact that the same mistake or error could have been corrected by the Court of appeal. In our judgment it will be reading S. 152 out of the Code and not interpreting it were we to hold that it would not apply to a case where the mistake or error could be corrected on appeal but was not so corrected or where no appeal was preferred. The procedure is intended to provide for a speedy and inexpensive relief to a party affected by any such mistake or error and does not contemplate to impose upon him the necessity of preferring an appeal as regards such a matter which in the very nature of things must entail large expenditure of money and time. The argument that the order of 29th December 1930 was passed without notice to the judgment-debtors does not lead to anything further than giving the judgment-debtors an opportunity to be heard. They had that opportunity now, but the order of 20th December 1930 should have been maintained on its merits and we so maintain it. It is agreed that on this conclusion the present application for execution is in time and should be proceeded with. We accordingly set aside the order under appeal and remand the case to the Court below for disposal according to law. The appellants are entitled to their costs in both Courts from Munshi Lal as well as from the judgment-debtors.

B.V./R.K. *Appeal allowed.*

(1) [1892] A. C. 547=62 L. J. P. C. 24=67 L. T. 722.

(2) [1903] P. 88=72 L. J. P. 44=88 L. T. 570.

A. I. R. 1932 Oudh 293

NANAVUTTY, J.

Mohammad Mumtaz Ali Khan—Plaintiff—Applicant.

v.

Syed Mohammad Saadat Ali Khan—Defendant—Opposite Party.

Civil Misc. Appln. No. 356 of 1932, Decided on 22nd August 1932, in Original Suit No. 7 of 1928.

(a) Civil P. C. (1908), S. 151—Code is not exhaustive—Inherent power can be invoked for doing justice.

The Code of Civil Procedure is not exhaustive and judicial tribunals have always, when the necessity arose, acted upon the assumption of their being possessed of an inherent power "to act ex debito justitiae and to do that real and substantial justice for the administration of which they alone exist." [P 295 C 2]

(b) Civil P. C. (1908), Ss. 151 and 152—Clerical slip in decree and award on which it was based can be amended—Civil P. C. (1908), Sch. 2, Para. 12 (c).

An applicant who satisfies the Court that a decree based upon an award contains some obvious clerical slip and errors has got the right to invoke the inherent jurisdiction of this Court to amend the decree and the award which is the basis of that decree so as to bring them in con-

formity with the original intention of the arbitrators and do substantial justice between the parties : *A. I. R.* 1920 *All.* 45 ; *A. I. R.* 1921 *Bom.* 191 ; *A.I.R.* 1927 *Mad.* 720, *Ref.*

[P 295 C 2]

H. Husain and *Mahabir Prasad*—for Applicant.

M. Wasim and *Khaliquzzaman*—for Opposite Party.

Judgment.—This is an application filed on behalf of the Raja of Utraula, the plaintiff in Original Suit No. 7 of 1928, under Ss. 151 and 152, Civil P. C., read with para. 12, Sch. 2, Civil P. C., praying for amendment of the decree in the suit and of the award upon which it was based in respect of certain obvious clerical mistakes contained therein. This application is vehemently opposed by the defendant Raja of Nanpara who is the nephew of the plaintiff. The facts out of which this application for amendment arises are as follows : The Court of Wards released the Nanpara Estate from its superintendence on 3rd November 1925 and immediately Raja Saadat Ali Khan, the defendant in the present suit, who attained his majority on that day, stopped payment of Rs. 600 a month to his uncle the Raja of Utraula who was granted this pension under the compromise entered into by the mother of the defendant. The profits of the Nanpara Estate to which the Raja of Utraula was also entitled were also denied to him. Thereupon the Raja of Utraula filed this Suit No. 7 of 1928, in this Court against the Raja of Nanpara, on 16th October 1928 claiming Rs. 20,00,000 as due to him under the said compromise decree of 4th November 1911. He claimed profits for 3 years, namely, from the Kharif harvest of 1925 to the Rabi harvest of 1928. The arbitrator found that for the last 3 years of the Court of Wards' management the Raja of Utraula drew on the average Rs. 1,72,092. He therefore awarded the Raja of Utraula Rs. 5,16,276, i.e., arrears of profit for the three years in suit at the rate of Rs. 1,72,092 a year. The profits for these 3 years in suit were for the following kists (revenue instalments) : Kharif kist for 1925-26 due on 1st January 1926 ; Rabi kist for 1925-26 due on 30th June 1926; Kharif kist for 1926-27 due on 1st January 1927 ; Rabi kist for 1926-27 due on 30th June 1927 ; Kharif kist for 1926-28 due on 1st January 1928; Rabi kist for 1927-28 due on 30th June 1928.

Unfortunately the arbitrator by a slip of the pen wrote in his award : "Arrears of profits are due from the year 1925-26 to 1928-29", instead of writing that the arrears of profits were due from the year 1925-26 to 1927-28. The mistake is obvious, and purely clerical, because the arbitrator goes on to say in his award : "This amounts to Rs. 5,16,276 three years at Rs. 1,72,092 a year." If arrears of profits up to 1928-29 had been intended to be awarded by the arbitrator then he would have said that he was giving profits for four years at the rate of Rs. 1,72,092 a year, and then the amount of arrears of profits would have been more than Rs. 5,16,276; it would have been Rs. 5,16,276 plus Rs. 1,72,092 i. e., it would have come to Rs. 6,88,368.

This mistaken notion in the mind of the arbitrator that the three years in respect of which arrears of profits were claimed by the Raja of Utraula also included the year 1928-29 is accountable for the mistake in the last paragraph of the award that the payment of the instalment in respect of the Raja of Utraula's share of profits for the years following the years in suit was to start from the year 1929-30. There was obviously no intention on the part of the arbitrator to deprive the Raja of Utraula of his share of profits for the year 1928-29, which came on his calculation to to Rs. 1,72,092 plus Rs. 600 a month pension or Rs. 7,200 a year, i. e. a total of Rs. 1,79,292. If however payment of future instalments of profits is to start from the year 1929-30 as set forth in the award as it now stands, the Raja of Utraula loses for no rhyme or reason and for no fault of his a sum of Rs. 1,79,292. The present application is therefore filed on his behalf praying for amendment of the decree and of the award so as to rectify the clerical mistakes thoughtlessly made by the arbitrator in his award.

The first point for determination in this application is whether this Court has got any power to grant such an application to amend the decree and the award as prayed for by the applicant. The learned counsel for the Raja of Nanpara has strenuously argued that when once the award has been accepted by the parties and by the Court and embodied in a decree of the Court this Court was not competent to alter it any way, seeing that no appeal and no revision was al-

lowed by law from a decree based upon an award. He further pointed out that the claim of the Raja of Utraula for profits for 1928-29 had now become barred by limitation and that if the amendment prayed for were granted then limitation would run from the date of the order allowing amendment under Art. 182, Cl. (4), Sch. 1, Lim. Act. In support of his contention the learned counsel for the Raja of Nanpara has cited *Janardan Kishore Lal* v. *Shib Pershad Ram* (1), in which it was held that no amendment of a plaint could be allowed where the proposed amendment would take away from the defendants, if allowed, a right that they would have if the plaintiff had proceeded against them by way of original suit. A decision of the Allahabad High Court reported in *Balkaran Upadhya* v. *Gaya Din Kulwar* (2), was further cited by the learned counsel for Nanpara. In this latter decision it was held that the Court had no power to allow amendment of the plaint by introducing a new cause of action after the period of limitation in respect of such cause of action had expired.

Another line of reasoning advanced by the learned counsel for the Raja of Nanpara was that even if it be assumed that the arbitrator had made a mistake in his award, such a mistake could not be corrected by the Court, and in support of this contention reliance was placed upon a ruling of the Allahabad High Court reported in *Shiam Lal* v. *Parshotam Das* (3), and stress was laid upon an observation of Piggott, J., to the effect that:

"when parties submit a particular matter to the final decision of an arbitrator selected by themselves, they take their chance of his making a clerical or arithmetical error, just as much as they take their chance of his misinterpreting a document or refusing to believe the oral evidence of a perfectly trustworthy witness."

Following this line of reasoning Mr. Wasim, the learned counsel for the Raja of Nanpara, vehemently contended that whatever intentional or unintentional mistake Mr. Walton, the arbitrator in the present suit, may have committed in the award in wrongly considering that the Raja of Utraula had also asked for arrears of profits for the year 1928-29, this Court was not competent to go into this matter now, and parties having accepted the award must content themselves with it and rest satisfied with whatever gain or loss accrued to them uuder it. In support of this contention reliance was also placed upon a ruling of the Bombay High Court reported in *Gopal Dinkar* v. *Ganesh Narayan* (4), in which the ruling of the Allahabad High Court *Shiam Lal* v. *Parshotam Das* (3) cited above was cited with approval. A judgment of a single Judge of the Madras High Court reported in *Lakshmi Narayanappa* v. *Batchyya*, *A. I. R.* 1927 *Mad.* 720, was further cited by the learned counsel for Nanpara in support of his contention that when a decree had been passed in accordance with the award an arithmetical mistake contained in documents on which the award was based could not be corrected by the Court on an application under S. 152, Civil P. C., but the remedy of the aggrieved party was by appeal or revision. I have carefully considered the arguments of the learned counsel for the Raja of Nanpara and I have come to the conclusion that this Court has power to amend the decree in this case as well as the award upon which it is based. The Code of Civil Procedure is not exhaustive and judicial tribunals have always, when the necessity arose, acted upon the assumption of their being possessed of an inherent power

"to act ex debito justitiae and to do that real and substantial justice for the administration for which they alone exist : see *Hukum Chand Boid* v. *Kamalanand Singh* (5)."

It is therefore that the new S. 151, Civil P. C., lays down that civil Courts have power to make such orders as may be necessary for the ends of justice and to prevent any abuse of the process of the Court ; and it has been held that the Court has an inherent power to amend decrees and orders even in cases not covered by S. 152, Civil P. C.

Section 152, Civil P. C., lays down that clerical or arithmetical mistakes in judgments, decree or orders or errors arising therein from any accidental slip or omission may at auy time be corrected by the Court either on its own motion or on the application of any of the parties.

(1) [1916] 43 Cal. 95=36 I. C. 179.
(2) A.I R. 1914 All. 80=24 I. C. 255=36 All. 370.
(3) A.I.R. 1920 All. 45=58 I. C. 585=42 All. 277.
(4) A.I.R. 1921 Bom. 191=59 I. C. 785=45 Bom. 512.
(5) [1906] 33 Cal. 927=3 C. L. J. 67.

Article 182, Sch. 1, Lim. Act lays down that where a decree has been amended the period of limitation for the execution of such a decree runs from the date of the amendment; but where the Court allows an amendment of a merely clerical error such an amendment does not furnish a fresh starting point of limitation for execution of the decree: see *Ramchandra* v. *Jaimal* (6). I confess I could not follow the reasoning of the learned counsel for Raja of Nanpara when he argued that to grant the present application for amendment would be to revive the time-barred claim for profits for the year 1928-29. The decree in the present suit was passed by me on 22nd April 1930 and so the decree-holder, the Raja of Utraula, has still got about seven or eight months more within which to execute the present decree, limitation for which would expire on 22nd April 1933. There is no question here of the profits for the year 1928-29 being barred by time because the limitation for bringing a suit for profits for that year expired on 30th June 1932. With the consent of parties the arbitrator had decided that all claims for profits subsequent to the years in suit and for the pension of Rs. 600 a month granted to the Raja of Utraula must be calculated at the rate of Rs. 1,79,292 a year, and this sum was to be paid in two equal instalments on 1st January and 30th June of each year and all future instalments were to bear interest at 6 per cent. per annum and the Raja of Utraula was further given the power to apply for execution if payment of any instalment was not made by the due date. In this manner with the consent of both parties the learned arbitrator settled the dispute between uncle and nephew for all times so far as the claim of the Raja of Utraula to a half of the Nanpara estate was concerned.

This award was acquiesced in by both the Rajas and has been embodied in a decree of this Court. It is not therefore open to the learned counsel for the Raja of Nanpara to argue that profits for 1928 29 were never claimed by the Raja of Utraula and were never awarded to him by the arbitrator. The arbitrator with the full concurrence of both sides decided that so long as the Raja of Utraula lived he would get every year Rs. 1,79,292 from his nephew, the Raja of Nanpara, in full satisfaction of all his claims against the Nanpara estate, and the Raja of Utraula was precluded from bringing any fresh suit against the Raja of Nankara but could only apply in execution of the decree based upon the arbitrator's award for the sums due to him from the Nanpara estate. That is the plain, obvious meaning of the award to which neither party can take any exception now and from which neither party can now resile.

Paragraph 12 (c), Sch. 2, Civil P. C., expressly lays down that where the award contains a clerical mistake or an error arising from an accidental slip or omission the Court may by order modify or correct such an award. It is true that the Allahabad High Court in *Shiam Lal* v. *Parshottam Das* (3) quoted above did lay down that an arithmetical error was no ground for setting aside the award; but it is to be noted that the application in that case was made under para. 20, Sch. 2, Civil P. C.; in other words, in the Allahabad case the matter in dispute was referred to arbitration without the intervention of the Court whereas in the case before me the arbitrator was appointed through this Court. In this connexion it is significant to note that para. 21, Sch. 2, Civil P. C., while referring to paras. 14 and 15 omits all mention of para. 12, Sch. 2. This omission to my mind leads one inevitably to the conclusion that the Court's power to modify or correct an award on the three grounds mentioned in para. 12, Sch. 2, even after it has been embodied in a decree of the Court has been left untouched.

It therefore seems to me upon a careful consideration of the provisions of para. 12, Sch. 2, Civil P. C., as well as of Ss. 151 and 152, Civil P. C., that this Court has got the power to amend the decree in this case although it is based upon an award and to correct the accidental slips in the award itself. In so doing neither the decree nor the award is so altered as to affect the original intention of the arbitrator and the decision arrived at by him. By allowing this application and correcting the accidental slips made by the arbitrator in his award substantial justice is done to both parties and the Raja of Utraula is, as I have pointed out above, saved from a very

(6) A. I. R. 1923 All. 22=69 I. C. 199.

substantial loss of a lac and three quarters of rupees. In this connexion I cannot do better than quote the very noble words of Lord Penzance in *Kendal* v. *Hamilton* (7) at p. 525:

> "In this state of things I confess I am unwilling that your Lordships should confer the High sanction of this, the ultimate Court of appeal, upon a rule of procedure which, without affecting to assert any just rights on the part of the defendant, denies the aid of the law to enforce those of the plaintiff. Procedure is, but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern where it ought to subserve."

In *Indrajit Pratap Bahadur Sahai* v. *Amar Singh* (8) at p. 191 (of 50 *I. A.*) their Lordships of the Privy Council delivered themselves of similar sentiment when they laid down that "rules of procedure are not made for the purpose of hindering justice." In *Hyder Saheb* v. *Giria Chettiar* (9), Bakewell, J., of the Madras High Court, laid down that a Court was bound to correct any obvious mistake or slips in an award which were brought to its notice in the same manner in which it would correct mistakes in its own decrees, and the learned Judge further held that the award in accordance with which the Court had to pronounce judgment under R. 16, Sch. 2, Civil P. C., was that which contained the real intention of the arbitrator and that the Court should take into consideration any facts which went to show that the award filed did not actually embody such intention. In *Nga Tok* v. *Nga Kasim* (10), the Judicial Commissioner of Upper Burma held that paras. 12 and 14, Sch. 2, Civil P. C., referred to awards made on a reference under para. 3 of the said schedule and did not apply to an award made without the intervention of the Court and that in the latter case the Court had no power to amend or remit the award of the arbitrator. In the present case the arbitration was made through this Court and so it seems to me that this Court has the power to amend the award of the arbitrator. Now coming to the decisions of this Court and of the Court of the late Judicial Commissioner of Oudh, I find that the first in priority of time is that of *Shiv Darshan Singh* v. *Mata Din Singh* (11), in which it was held that there were certain limitations to the powers of the Court even under Ss. 151 and 152, Civil P. C., and that even an accidental error could not be amended if third parties had in the meantime acquired rights under the erroneous judgment. That decision is not germane to the present case since in the present suit no third party has acquired any rights under the decree based on the award.

A Full Bench of this Court has held in *Mohammad Raza* v. *Ram Saroop* (12), that where a decree was passed on the basis of a compromise verified by a person having no authority to enter into it on behalf of a party to the suit, it was open to that party to the suit to invoke the inherent powers of the Court under Ss. 151, 152 and 153, Civil P. C., quite apart from the question of limitation applicable to the institution of an appeal or review. On the same or similar reasoning it seems to me that it is open to the Raja of Utraula to apply for amendment of the decree based upon the award of the arbitrator and to invoke the inherent powers of this Court to correct the obvious slips made by the arbitrator in his award for the ends of justice. In a recent decision of a (Full?) Bench of this Court reported in *Parshottam Das* v. *Mohammad Hamid Mirza* (13) it was held that an error due to an accidental slip of memory could be corrected in the exercise of the inherent jurisdiction of the Court as provided for in Ss. 151 and 152, Civil P. C., and that the fact that the error could also have been corrected by a Court of appeal if an appeal had been preferred did not debar the exercise of jurisdiction with which the Court was clearly vested under the provisions referred to above. It follows therefore from these decisions which are binding upon me sitting as a single Judge of this Court, that they are not in pari materia that an applicant who satisfies the Court that a decree based upon an award contains some obvious clerical slips and errors has got the right to invoke the in-

(7) [1830] 4 A. C. 504=48 L. J. C. P. 705=41 L. T. 418=28 W. R. 97.
(8) A. I. R. 1923 P. C. 128=74 I. C. 747=50 I. A. 183=2 Pat. 676 (P.C.).
(9) [1913] 19 I. C. 196.
(10) [1912] 14 I. C. 978.
(11) A. I. R. 1924 Oudh 408=80 I. C. 833.
(12) A. I. R. 1929 Oudh 385=118 I. C. 753=4 Luck. 562 (F.B.).
(13) A. I. R. 1932 Oudh. 291.

herent jurisdiction of this Court to amend the decree and the award which is the basis of that decree under the provisions of S. 151 and 152, Civil P. C., read with para. 12 (c), Sch. 2, Civil P. C. For the reasons given above I would answer the question of law involved in this application in favour of the applicant and hold that the Raja of Utraula is competent to invoke the inherent jurisdiction of this Court to amend the decree in this suit as well as the award which is the basis of that decree. (His Lordship indicated the amendments necessary and allowed the application without costs.)

M.N./R.K. *Application allowed.*

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* A. I. R. 1932 Oudh 298

SRIVASTAVA AND KISCH, JJ.

S. Mohamed Hussain Afqar Mohani—Applicant.

v.

Mirza Fakhrullah Beg—Opposite Party.

Criminal Revn. No. 55 of 1932, Decided on 23rd August 1932, against order of Sess. Judge, Lucknow, D/- 26th May 1932.

(a) Criminal Trial—Evidence—Oral testimony of witnesses is evidence only when right and opportunity to cross-examine exists—Otherwise it is mere statement.

Per *Srivastava, J.*—The juristic conception of the term "evidence" in the case of the oral testimony of witnesses is that the party against whom it is used has had the right and opportunity of cross-examining the witnesses. So long as the accused is not allowed the right and opportunity of cross-examining the witnesses any statements made by them can only be described as statements but cannot be dignified with the name of evidence. [P 299 C 1]

*** (b) Criminal P. C. (1898), S. 252 - (Per *Srivastava, J.*)—Accused has absolute right to cross-examine prosecution witnesses before charge—Proceedings are judicial proceedings governed by Evidence Act (1872), S. 138—(Per *Kisch, J.*, Contra.)—Accused has no such absolute right — Proceedings are in nature of enquiry only.**

Per *Srivastava, J.*—When S. 252 requires the Magistrate to "take all such evidence as may be produced in support of the prosecution" such evidence must be taken in the manner laid down in S. 138, Evidence Act, and if the accused so desires he cannot be refused an opportunity to cross-examine the witnesses produced in support of the prosecution. The opportunity allowed by the legislature to the accused in S. 256 of cross-examining the witnesses for the prosecution after the charge-sheet has been framed cannot be substituted for the opportunity to which he is entitled when the witnesses are examined and before the charge-sheet is framed. Whether the proceedings in a warrant case which precede the framing of a charge are in the nature of inquiry or part of the trial, they are undoubtedly judicial proceedings and are governed by the provisions of the Evidence Act. These proceedings are held in the presence of the accused and as a result thereof the charge is framed against him. The accused cannot therefore be denied the right of cross-examining the witnesses produced against him in the course of the proceedings. [P 299 C 2]

Per *Kisch, J.*, Contra.—The accused has no absolute right of cross-examination before the framing of the charge though Magistrates would generally be exercising a proper discretion if they permit cross-examination at that stage. The proceedings before a Magistrate in a warrant case are of the nature of an inquiry until the charge has been framed and that they only become a trial on a charge being framed. (*Case law discussed.*) [P 303 C 2; P 305 C 2]

(c) Criminal P. C. (1898), S. 439—Prosecution witnesses examined before charge—Only complainant allowed to be cross-examined and charge framed—No ground for interference in absence of prejudice.

Where the Magistrate allowed the complainant to be cross-examined before charge and refused to allow the witnesses to be cross-examined and framed a charge and there was no prejudice to the accused by this procedure.

Held: that there was no ground for interference in revision [P 302 C 1]

*** (d) Criminal P. C. (1898), S. 4 (k)—Possibility of proceedings ending in discharge—Proceedings are enquiry—Acquittal or conviction necessary—They become trial.**

The distinction between inquiry and trial would appear to be that up to the stage when the proceedings can result in a discharge they are only an inquiry, and from the point at which they must result in conviction or acquittal they become a trial. [P 303 C 2]

Sri Ram—for Applicant.

A. N. Mulla—for Opposite Party.

Srivastava, J.—This is an application for revision by S. Mohammad Afqar Mohani against whom Mr. T. C. Jaini, Special Magistrate, first class has framed a charge sheet in respect of offences under S. 500, I.P.C. The applicant complains that the learned Magistrate refused to allow him to cross-examine before the charge, the witnesses for the prosecution other than the complainant P.W. 1. His argument is that he had a right to cross-examine all the prosecution witnesses before the charge was framed and that the learned Magistrate acted illegally in refusing to allow cross-examination except in the case of the first witness. It is further argued that this illegality on the part of the Magistrate has materially prejudiced him inasmuch as if all the prosecution witnesses had been cross-examined it would have been possible for

him to satisfy the Magistrate that no case had been made out against him and to claim a discharge under S. 253, Criminal P. C.

The reply of the opposite party is that as the legislature has made express provision for cross-examination after the charge is framed, under S. 256 the accused cannot claim to eross-examine the witnesses as of right before the framing of the charge. It is also contended that in any case the refusal to allow cross-examination was a mere irregularity which is cured by the provisions of S. 537, Criminal P. C. The principal question therefore which we are called upon to decide is whether an accused person has an absolute right of cross-examination before the framing of the charge in a warrant case.

The determination of the question at issue turns mainly on the interpretation to be placed on the words "take all such evidence as may be produced in support of the prosecution" used in S. 252. Are these words to be interpreted to mean merely the examination in-chief or also the cross-examination and re-examination (if any)? The identical words have been used also in S. 244 which lays down the procedure for trial of summons cases. As in the case of the trial of summons cases, there is no express provision anywhere in the Code of Criminal Procedure for cross-examination of the prosecution witnesses, these words as used in S. 244, cannot but be construed as including cross-examination by the accused. This much being clear, should the same words when used in reference to the trial of warrant cases be given a different meaning? I think not. It is the elementary right of every litigant to have the opportunity of cross-examining witnesses whose testimony is to be used against him. The juristic conception of the term "evidence" in the case of the oral testimony of witnesses is that the party against whom it is used has had the right and opportunity of cross-examining the witnesses. So long as the accused is not allowed the right and opportunity of cross-examining the witnesses any statements made by them can only be described as statements but cannot be dignified with the name of evidence. S. 254 shows that the charge sheet is framed on the basis of the evidence produced in support of the prosecution under S. 252. There can therefore be no doubt that the evidence recorded under S. 252 is made use of against the accused when the charge is framed against him. In my opinion this cannot be justified unless the accused is allowed the right and opportunity of cross-examining the prosecution witnesses before the charge is framed.

The law of evidence applicable to this country is contained in the Evidence Act 1 of 1872. S. 1 of this Act provides that it applies to all judicial proceedings in or before any Court. S. 138 of this Act provides that witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. It seems to me that when S. 252, Criminal P. C. requires the Magistrate to "take all such evidence as may be produced in support of the prosecution," such evidence must be taken in the manner laid down in S. 138, Evidence Act and if the accused so desires he cannot be refused an opportunity to cross-examine the witnesses produced in support of the prosecution. The opportunity allowed by the legislature to the accused in S. 256, Criminal P. C. of cross-examining the witnesses for the prosecution after the charge sheet has been framed cannot, in my opinion be substituted for the opportunity to which he is entitled when the witnesses are examined and before the charge sheet is framed. It might have been possible to construe S. 256 as deferring the stage of cross-examination till after the framing of the charge sheet if the prosecution evidence was not to be used against the accused until after the charge sheet has been framed. I have already shown that the prosecution evidence is intended to be used and in fact forms the basis of the charge sheet framed against the accused. Therefore the right of cross-examination allowed by S. 256 cannot be used to deprive the accused of the right of cross-examination to which he is entitled before the statements of the prosecution witnesses are used as evidence against him.

It has been contended that the interpretation which I have placed on the provisions of S. 252 would entitle the accused in a warrant case to cross-examine the prosecution witnesses twice. It is pointed out that the accused has no right to cross-examine the prosecution

evidence in sessions trials more than once and there is no reason why the accused in a warrant case should receive more favoured treatment. The reason for this is not far to seek. When the prosecution witnesses are examined in a warrant case the accused is in all fairness entitled if he so wishes, to cross-examine each individual witness in order to put his testimony to test and to demolish the prosecution case, if possible, in order to entitle him to claim a discharge. But the case for the prosecution is not completely developed until the Magistrate finds himself in a position to frame the charge sheet. When this is done the accused is expected to know the complete case for the prosecution in its full perspective. When this stage is reached and the cumulative effect of the prosecution evidence is known to the accused, he might see lines of cross-examination which would not have been foreseen when each individual prosecution witness was placed in the witness box. It is therefore necessary that the accused should be given a further right of cross-examination after the charge has been framed against him. It is important to note that S. 256 provides that the accused should be asked whether he wishes to cross-examine any of the witnesses for the prosecution

"at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks, forthwith."

One object of this rule may well be that the accused should have an interval of time to take stock of the position and to decide what witnesses he should further cross-examine. The tenor of this section also shows that it is not expected that ordinarily the accused should cross-examine all the prosecution witnesses. This seems to presuppose that the accused has had an opportunity of cross-examining all the witnesses before the charge sheet was framed. On the other hand the position in the case of a sessions trial is materially different. The prosecution have to put all their cards on the table in the course of the inquiry before committing Magistrate. So when the order of commitment is passed and before the commencement of the sessions trial the accused is in full possession of the complete prosecution case. Thus it seems to me that there was good reason for the legislature to allow the accused in a warrant case an opportunity for a second cross examination after the framing of the charge sheet. In fact the legislature in pursuance of the policy of allowing the fullest lattitude to the accused, have given him a third opportunity for cross-examination under S. 257 of the Code. The opportunity so provided being in the nature of a concession and intended to be used only in special cases, the Magistrate has been given the discretion to refuse the application if it is made for the purpose of vexation or delay or for defeating the ends of justice.

It was also argued that if S. 256 intended to give the accused a second right of cross-examination the legislature could easily have used the word "further" before the word "cross-examine." The argument was that the absence of the word "further" indicates that the accused has only one right of cross-examination and that is under this section. It would be enough to point out that the word "further" has not been used even in S. 257 which undoubtedly gives the accused an additional right of cross-examination. The argument is in my opinion, far from conclusive and has left me unimpressed.

The learned counsel for the opposite party alao invited our attention to S. 208, Criminal P. C. This section lays down the procedure to be observed in inquiries before Magistrates preparatory to commitment to the Court of Session or High Court. In Cl. (1) of the section it is provided that the Magistrate

"shall take in manner hereinafter provided all such evidence as may be produced in support of the prosecution"

It will be noticed that the words

"shall take . . . . . all such evidence as may be produced in support of the prosecution."

are identical with the words used in Ss. 244 and 252 in relation to summons and warrant cases. Sub-S. (2), S. 208 lays down that:

"the accused shall be at liberty to cross-examine the witnesses for the prosecution and in such case the prosecution may re-examine them."

It was argued that if the word "evidence" used in sub-S. (1) was sufficient to carry with it the right of cross-examination, there was no need for the legislature to make express provision for it in sub-S. (2). I should have thought that the inquiry being a judicial proceeding even in the absence of sub-S. (2) the accused would have had the right of cross-

examining the witnesses produced by the prosecution. But it is possible that in order to remove all room for misconception on the point, the legislature thought it fit that in the provisions relating to an inquiry as distinguished from a judicial trial they should make express provision on the subject. In my opinion the provisions of sub-S. 2, S. 208, cannot justify the argument that the accused cannot claim any right of cross-examination unless there is express provision to that effect. If such an argument were permissible the accused would be denied the right of cross-examination in the trial of summons as well as of sessions cases because no such express provision is to be found either in Ch. 20 or Ch. 23, Criminal P. C.

Section 202 contemplates a preliminary inquiry before issue of process to the accused. The evidence produced in such inquiry is recorded in the absence of the accused. So by the very nature of the case no question of cross-examination arises. Whether the proceedings in a warrant case which precede the framing of a charge are in the nature of inquiry or part of the trial, they are undoubtedly judicial proceedings and are governed by the provisions of the Evidence Act. These proceedings are held in the presence of the accused and as a result thereof the charge is framed against him. The accused cannot therefore be denied the right of cross-examining the witnesses produced against him in the course of the proceedings. Lastly it might be pointed out that if the accused is denied the right of cross-examination before the charge is framed, it would for all practical purposes have the effect of nullifying the provisions of S. 253 relating to discharge. It is rarely conceivable that the prosecution should fail to make out a prima facie case against the accused when the only material before the Magistrate is the examination in chief of the prosecution witnesses.

The weight of judicial opinion also appears to be in favour of the applicant's contention. In *Queen-Empress* v. *Sagal Samba Sajao* (1) the question which the Court had to decide was as regards the right of an accused person to cross-examine the witnesses for the prosecution after their examination at the judicial inquiry before the Magistrate previous to commitment. The question had to be determined with reference to the provisions of the Criminal Procedure Code, 1882. Their Lordships of the Calcutta High Court (Prinsep and Ameer Ali, JJ.) in the course of their judgment made a reference to the provisions of S. 256, Criminal P. C., 1882, which for the purpose of the present argument may be treated as substantially the same as S. 256 of the present Code. They observed as follows:

"The reference made by Mr. Hill to S. 256 as to cross-examination after charge has been drawn in a warrant case does not really affect this point for it does not prohibit cross-examination before a charge. As we understand the law it permits a further cross-examination expresly directed to the case found and embodied in the charge. . . . We are surprised to find that in this case the Magistrate should have deprived the accused of a right which is in accordance with elementary principles of judicial procedure."

In *Ashirbad Muchi* v. *Maja Muchini* (2) another Bench (Pratt and Handley, JJ.) of the same High Court held that an opportunity should be given to an accused if he so desires to cross-examine the prosecution witnesses even though a charge may not be framed. In *W. H. Lockley* v. *Emperor* (3) at 415 (of 43 *Mad.*) Seshagiri Ayyar, J. remarked as follows:

"An accused has the right to cross-examine the witnesses before the charge is framed; he has a right of re-cross-examining the witnesses present in Court after the charge is framed; he has a further right subject to certain conditions of re-summoning the prosecution witnesses after entering upon his defence."

A similar view has been expressed by Devadoss, J. in the Full Bench case of the Madras High Court in *Varisai Rowther* v. *Emperor* (4) at p. 463 (of 46 *Mad.*). He stated the law on the subject in the following words:

"The accused in a warrant case has three opportunities of cross-examining the prosecution witnesses, once before the charge is framed, secondly under S. 256 and thirdly after he has entered on his defence."

And *In re, Muthiah Chetty, A. I. R.* 1924 *Mad.* 735, Wallace, J. held that:

"no Magistrate or Court can refuse to allow an accused person to cross-examine prosecution witnesses before charge is framed, and the Magistrate's procedure in refusing to allow such cross-examination was most irregular and in contravention of the law.

In *Ramyad Singh* v. *Emperor*, *A. I. R.* 1920 *Pat.* 149, Sultan Ahmad, J. discuss-

(1) [1894] 21 Cal. 642.

(2) [1904] 8 C. W. N. 838.

(3) A. I. R. 1920 Mad. 201=55 I. C. 345=43 Mad. 411.

(4) A. I. R. 1923 Mad. 609=24 Cr. L. J. 547=46 Mad. 449=73 I. C. 163 (F.B.).

ing the provisions of Ss. 256 and 257, Criminal P. C. observed as follows:

"The accused have got the right to cross-examine the prosecution witnesses once before the charge is framed and secondly after the charge is framed under S. 256 and no Court can legally refuse this application for cross-examination of the prosecution witnesses for the first time, after charge. Under S. 257 the accused are given the third opportunity of cross-examining the prosecution witnesses. They are entitled to this right except when the Magistrate finds and records so in writing, that the application for further cross-examination is made for the purpose of vexation or delay or for defeating the ends of justice."

The only cases cited on behalf of the opposite party in which a contrary view has been taken are *Emperor* v. *C. A. Mathews*, *A. I. R.* 1929 *Cal.* 822, and *Lachmi Narain* v. *Emperor*, *A. I. R.* 1931 *All.* 621. In *Emperor* v. *C. A. Mathews*, *A. I. R.* 1929 *Cal.* 822, the question was about the admissibility in evidence under S. 33, Evidence Act, of a statement of a witness made before the Police Magistrate when the case was being treated as a warrant case. At the trial in the Court of Session to which the accused was subsequently committed when the witness was not available for examination in the Sessions Court, their Lordships (Cuming and Lort-Williams, JJ.) held that until the stage of the case provided for in S. 256 is reached the accused has no right to cross-examine and therefore the statement made before the Police Magistrate was not admissible in evidence under S. 33. It may be observed that their Lordships while holding that the accused in a warrant case has no right to cross-examine the prosecution witneses until after the charge has been framed observed that :

" the Magistrate may in his discretion allow him to do so and probably if the accused requested would allow him to do so."

In *Lachmi Narain* v. *Emperor*, *A.I.R.* 1931 *All.* 621 which is very similar to the present case, King, J., hold that the accused has no absolute right of cross-examination before the framing of the charge but Magistrates would generally be exercising a proper discretion if they permit some cross-examination at least at that stage. With all respect to the learned Judges who decided these two cases, I find myself unable to accept their view. I have indicated my grounds in support of the contrary view at some length and I would be only repeating much of what I have already said if I enter upon a detailed examination of the reasoning of these cases. The next question is whether the refusal of the Magistrate to allow the accused to cross-examine the witnesses other than the complainant constitutes an illegality such as vitiates the charge sheet framed. The complaint in the present case was lodged on 21st November 1931. The prosecution evidence commenced on 4th February 1932 and the charge sheet was framed on 16th April 1932. The prosecution has therefore been hanging fire now for nearly ten months. I should be reluctant to prolong the agony even at the request of the accused himself a day longer than possible. If the Magistrate had refused to allow the accused to cross-examine any of the prosecution witnesses I should have held that the action of the Magistrate being in contravention of the law constituted an illegality which vitiated the framing of the charge sheet. In this case however the Magistrate did allow the accused to cross-examine at least one prosecution witness. The evidence of even one witness could be sufficient under S. 254, Criminal P. C., to justify the Magistrate in framing a charge. The fact that the charge was not framed, as it could have been, immediately after the evidence of the first witness for the prosecution had been completed and a few other prosecution witnesses were examined-in-chief before the framing of the charge can at best be regarded as an irregularity which would call for an interference by us only if it has occasioned a failure of justice. I am not satisfied that the accused has been materially prejudiced or that his interests would suffer if we refused to interfere. I would accordingly dismiss the application.

Kisch, J.—(After stating facts his Lordship proceeded.) The first question to be decided is whether the action of the Magistrate in denying to the accused an opportunity to cross-examine some of the prosecution witnesses before the charge was framed was illegal. On behalf of the applicant it is contended that the word "evidence" in S. 252, Criminal P. C., must be taken to include examination-in-chief, cross-examination and re-examination, if any, and the wording of S. 138, Evidence Act, is referred to as showing that the examination of a witness includes examination-in-chief, cross-examination and re-examination. It is

further pointed out that the words used in S. 252 namely :

" the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution,"

are identical with the words used in S. 244, which deals with the procedure for examination of witnesses in summons cases. In summons cases it cannot be doubted that these words include the cross-examination of the prosecution witnesses, there being no further provision for their cross-examination in summons cases. It is accordingly contended that the same words in S. 252 must be given the same meaning, in spite of the provisions of S. 256 providing for cross-examination, or further cross-examination, of the prosecution witnesses after the charge has been framed. While I am of opinion that no opportunity should always be given to an accused, if he so desires, to cross-examine immediately the prosecution witnesses who are examined before the charge is framed, I am not prepared to go so far as to hold that the law gives him an absolute right to do so, such as it gives him to cross-examine the prosecution witnesses after the charge in accordance with the provisions of S 256. The word "evidence" in S. 252 of the Code taken by itself cannot be held to confer such a right. The word also appears in sub-S. 2-A, S. 202, in which context it does not include cross-examination as the section deals with proceedings before the accused person is called to attend the Court. S. 138, Evidence Act, does not advance the matter any further. It merely lays down the order of the examination of the witnesses. The words of this section can hardly be construed to mean that the right to cross-examine arises immediately after the examination-in-chief, particularly where express provision is made for exercising the right of cross-examination at a later stage.

The argument based upon the similarity of the language in S. 244 to the language of S. 252 is one that prima facie would appear to have considerable force, but on closer examination it seems to me to be far from conclusive. The very same language is to be found again in S. 208 of the Code, which deals with the procedure in inquiries into cases triable by the Court of Session, but sub-S. (2) of that section expressly provides that the accused shall be at liberty to cross-examine the witnesses for the prosecution. If it is to be held that the words in question confer a right of cross-examination wherever they occur, then sub-S. (2), S. 208, would be wholly superfluous. Thus, the phrase :

" the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution,"

occurs in three places in the Code, Ss. 208, 244 and 252. In two out of the three express provision for cross-examination is made in Ss. 208 (2) and 256 respectively. In these circumstances it seems to me difficult to resist the conclusion that the legislature only intended the phrase to include the right to cross-examine the witnesses when no express provision is made for cross examination that is in S. 244 alone. It is contended on behalf of the applicant that the provisions of Ss. 202 and 208 of the Code are irrelevant to the present argument as these deal with inquiries whereas S. 252 deals with a trial. I am not prepared to accept this contention. It seems to me clear that the proceedings before a Magistrate in a warrant case are of the nature of an inquiry until the charge has been framed and that they only become a trial on a charge being framed. "Inquiry" is defined in S. 4 (K) of the Code as including every inquiry other than a trial, but "trial" is not defined in the Code. The distinction between inquiry and trial would appear to be that up to the stage when the proceedings can result in a discharge they are only an inquiry and from the point at which they must result in conviction or acquittal they become a trial. The very wording of S. 254 supports this view. This section lays down that :

" If . . . . . the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused."

It is at the point when the Magistrate considers that there is ground for trying the accused and that he is competent to try him that he is to frame a charge. There is also a great weight of authority in support of the above view. It will be sufficient to mention *Hari Dass Sanyal* v. *Saritulla* (5) and *Narayanaswamy*

(5) [1888] 15 Cal. 608 (F.B.).

Naidu v. *Emperor* (6) both Full Bench cases. In the latter case it was observed by Wallis, J., that :

" trial begins when the accused is charged and called on to answer and then the question before the Court is whether the accused is to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged. These, as observed by Wilson, J., in *Hari Dass Sanyal* v. *Saritulla* (5) are questions which arise at the stage of inquiry."

In warrant cases an absolute right has been given to the accused by S. 256 to cross-examine the prosecution witnesses after the charge has been framed while S. 257 gives a further right of cross examination if the Magistrate thinks it necessary in the interests of justice. It seems to me very doubtful that the legislature should have intended to allow that witnesses examined before the charge should be cross-examined twice as a matttr of right. It is to be noted that the fact that an accused has cross-examined the prosecution witnesses before the charge does not deprive him of his right under S. 226 to cross-examine them again after the charge has been framed. Nor does it deprive him of his limited right under S. 227. Of the various decided cases that have been cited before us, in only two was the question whether an accused had a right to cross-examine the prosecution witnesses in a warrant case before the framing of the charge directly under consideration and in both these cases it was held that he had no such right.

In *Emperor* v. *Mathews*, *A. I. R.* 1929 *Cal.* 822, a Divisional Bench of the Calcutta High Court was called upon to decide whether the statement of a witness for the prosecution, in a case that was being tried by a Magistrate as a warrant case could be utilized as evidence under S. 33, Evidence Act, when the accused had subsequently been committed for trial before the Sessions Judge, the witness in question having meanwhile left the country. In the Magistrate's Court after the examination in chief of the witness had been completed, but before any charge had been framed, the accused were called upon to cross-examine the witness which they refused to do. Under the terms of S. 33, Evidence Act, the deposition recorded by the Magistrate could only be used as evidence at the trial before the Sessions Judge if the accused " had the right and opportunity to cross-examine." The learned Judges held that the accused had clearly had the opportunity to cross examine the witness but until the stage of the case provided for in S. 256 is reached the accused had no right to cross-examine. They accordingly held the deposition in question to be inadmissible in evidence under S. 33.

In *Lachmi Narain* v. *Emperor*, *A. I. R.* 1931 *All.* 621, which was a case before a single Judge, it was held that the accused has no absolute right of cross examination before the framing of the charge though Magistrates would generally be exercising a proper discretion if they permit cross-examination at that stage. I find myself in agreement with the views expressed by the learned Judges in these two cases and with the reasoning on which those views are based. On behalf of the applicant a reference has been made to *Ramyad Singh* v. *Emperor* (*A. I R.* 1920 *Pat.* 149). This was also a case before a single Judge. In this case the only point for consideration was whether an accused person had an absolute right to have a prosecution witness re-summoned for cross-examination after the charge was framed. It was held that he had such right. In the course of his judgment the learned Judge observed that :

" The accused have got the right to cross-examine the prosecution witnesses once before the charge is framed, and secondly, after the charge is framed under S. 256 and no Court can legally refuse this application for cross-examination of the prosecution witnesses for the first time after charge."

The first portion of this observation, namely, with regard to the right to cross-examine before the charge is framed had no concern with the point before the Court. It was an obiter dictum and no reasons were given in support of it. A reference has also been made on behalf of the applicant to *Ashirbad Muchi* v. *Maju Muchini* (2). In this case a Bench of the Calcutta High Court held that opportunity should be given to an accused, if he so desires, to cross-examine the prosecution witnesses, even though a charge may not be framed. This case was referred to in *Emperor* v. *Mathews* (*A. I. R.* 1929 *Cal.* 822) which has been cited above, and it was pointed out that to hold that the Magistrate should give

(6) [1909] 32 Mad. 220=1 I. C. 228 (F.B.).

the accused an opportunity to cross-examine before the charge is framed is not the same as saying that the Court must give an opportunity.

The learned counsel for the applicant has also referred to *Queen-Empress* v. *Sagal Samba Sajao* (1) a case decided by a Bench of two Judges of the Calcutta High Court. This case, which was one under the Code of Criminal Procedure of 1882, dealt with the right of an accused person to cross-examine the witnesses for prosecution after the examination by the Magistrate in the inquiry previous to commitment to the Court of Sessions. In the Code of 1882 there was no provision in S. 208 for the cross-examination of the prosecution witnesses before commitment. In this case the Magistrate had refused to allow any cross-examination of prosecution witnesses before commitment. It was held by the learned Judges that such a course besides being obviously unfair was also illegal. There is no doubt that the remarks of the learned Judges would be equally applicable to a claim to cross-examine immediately witnesses produced under S. 252. The reasoning of the learned Judges was based on the fact that while the previous Code of Criminal Procedure of 1872 contained a provision in S. 191, giving the accused the right to cross-examine the prosecution witnesses before commitment no such provision was included in S. 208 of the Code of 1882. They considered that this omission in the Code of 1882 was due to the fact that the Evidence Act, which was enacted in the same years as the Code of 1872, provided in S. 138, for cross-examination as part of the record of evidence taken in a judicial proceeding and that therefore in re-enacting the Code of Criminal Procedure, the provision specifically allowing cross-examination of the prosecution witnesses before commitment was regarded by the legislature as redundant. The soundness of this reasoning is in the light of subsequent events open to doubt. In the present Code, the provision giving the accused a right to cross-examine before commitment, which appeared in the Code of 1872, but was omitted from the Code of 1882 has been re-enacted, and it has been held in a number of cases that the interpretation that was placed in the above cited cases on the wording of S. 138, Evidence Act, is not correct : *Moti Singh* v. *Dhanukdhari Singh* (7), *Emperor* v. *Mathews*, *A. I. R.* 1929 *Cal.* 822 and *Lachmi Narain* v. *Emperor*, *A. I. R.* 1931 *All.* 621.

My conclusion therefore is that although a Magistrate would be well advised to allow cross-examination before the charge is framed until the charge is framed the accused has no absolute right in law to cross-examine the prosecution witnesses. In the present case however there appear to me to be other reasons also why this revision should not be entertained. The accused did cross-examine the complainant before the charge was framed. S. 254 empowered the Magistrate to frame a charge as soon as he was satisfied that a prima facie case which the accused should be called upon to answer had been made out. If the charge had been framed immediately after the examination aud cross-examination of the complainant the accused could have had no grievance, and it is difficult to see how the accused's position is affected by the fact that the Magistrate examined-in-chief other prosecution witnesses without permitting cross-examination, before he actually framed the charge.

Further I cannot see that the accused has been actually prejudiced by the procedure adopted by the Magistrate. It is contended in this connexion that if all the prosecution witnesses had been cross-examined he might have secured a discharge under S. 253. In the circumstances of the case it seems to me a very far-fetched argument. If the accused succeeds in establishing his innocence he will be acquitted. I am certainly not prepared to hold that the prejudice, if any suffered by him is such as would justify the interference of this Court. In my opinion therefore the application should be rejected.

M.N./R.K. *Application rejected.*

(7) A. I. R. 1923 Pat. 53=24 Cr. L. J 595=73 I. C. 339.

A. I. R. 1932 Oudh 306

KISCH, J.

S. Yusuf Husain — Accused — Applicant.

v.

Emperor — Opposite Party.

Criminal Ref. No. 27 of 1932, Decided on 27th August 1932, Reference made by Sess. Judge, Lucknow, D/- 4th August 1932.

(a) U. P. Municipalities Act (1916), Ss. 180, 186, 307, and 318 — Constructive sanction under S. 180 (3) — Notice under S. 186 is unwarranted — Disobedience of such notice is not offence under S. 307—No appeal under S. 318 was preferred is immaterial—Plea of illegality of notice can be taken as defence to prosecution under S. 307.

It would be most unfair to the public and completely defeat the object of sub-S. (3), S. 180, if when the Board by its own laches has given the constructive sanction provided for in that subsection to an applicant for permission to build, it should then be able to retrieve its position and withhold sanction by issuing a notice under S. 186 unwarranted by the Act. Once the sanction of the Board is deemed to have been given to the proposed construction under sub-S. (3), S. 180, the Board has no right to issue a notice under S. 186 and the disobedience of such notice is not an offence under S. 307 (b). The fact that the applicant did not appeal against the notice under the provisions of S. 318 is quite immaterial. The wording of S. 318 does not preclude a person setting up the plea of the illegality of the notice as a defence when he is criminally prosecuted under S. 307 (b). [P 307 C 2]

(b) U. P. Municipalities Act (1916), S. 320—Scope of, enunciated.

Section 320 only provides for costs in appeal from orders of the Board made in accordance with S. 318 of the Act and has no application to the case of reference on conviction under S. 307. [P 308 C 2]

Habib Ali Khan—for Applicant.

Mohammad Ahmad — for Opposite Party.

Asst. Govt. Advocate—for the Crown.

Order.—This is a reference made by the learned Sessions Judge of Lucknow recommending that the conviction and sentence passed on one S. Yusuf Husain by the Special Honorary Magistrate for an offence under S. 307 (b), United Provinces Municipalities Act, 1916, be set aside.

On 12th September 1930, S. Yusuf Husain gave notice in accordance with the provisions of S. 178, Municipalities Act, of his intention to erect a house on a piece of land belonging to him within the Municipal limit. He waited for nearly five months for the order of the Board under S. 180 (1) of the Act. He then on 6th February 1931 sent a written communication to the Board calling the Board's attention to their omission to reply to his notice of 12th September 1930. He waited for nearly a month more and then having received no order from the Board he commenced the construction of the house about 3rd March 1931. It appears that about a month after Yusuf Husain had made his original application to the Board for sanction to build the house, certain residents of the locality had objected that there was a right of way over the land in question on which the Board had considered the advisability of acquiring a portion of the land to maintain it as a way but no communication had been made to Yusuf Husain. After Yusuf Husain had commenced his construction the Board served a notice under S. 186 of the Act directing him to stop the construction. To this notice Yusuf Husain replied that the notice was an illegal one as, having sent no reply for over fifteen days to his reminder under sub-S. 3, S. 180 of the Act, the Board must be regarded as having sanctioned the building mentioned in his application under S. 178.

This representation was made on 9th March 1931. On 20th June 1931 Yusuf Husain was informed that his objection to the notice had been disallowed. Meanwhile the building had been completed. Thereafter on 27th June 1931 the Board issued another notice to Yusuf Husain under S. 186 of the Act, requiring him to demolish the house that he had built. To this notice Yusuf Husain replied in the terms in which he had replied to the previous notice. He was informed on 21st August 1931 that his objection to the second notice had also been disallowed. On 8th March 1932, the Board ordered his prosecution under S. 307 (b) of the Act for disobedience of the notice dated 27th June 1931 to demolish the house. He was convicted by the Magistrate under this section and fined Rs. 10. On an application in revision being made to the learned Sessions Judge of Lucknow, the learned Judge has recommended that the conviction be quashed and the sentence set aside on the ground that the notice in question was an illegal one and there was no obligation on Yusuf Husain to comply with it.

The above facts speak for themselves, and I am glad to find the learned Government Advocate appearing to support the reference on the ground that the action of the Board is not supported by law and has been very unfair to Yusuf Husain. Sub-S. (3), S. 180, Municipalities Act runs as follows :

"Should the Board neglect or omit for one month after the receipt of a valid notice under S. 178 to make and deliver to the person who has given such notice an order of the nature specified in sub-S. (1) in respect thereof, such person may by a written communication call the attention of the Board to the omission or neglect, and, if such omission or neglect continues for a further period of fifteen days, the Board shall be deemed to have sanctioned the proposed work absolutely."

On the date therefore on which Yusuf Husain commenced the construction of his house his position in law was precisely the same as if he had received the sanction of the Board under sub-S. 1, S. 180. to build, the house in accordance with the application made by him under S. 178, and it was no longer within the competence of the Board to issue either the notice of 3rd March 1931 to stop the construction or the notice of 27th June 1931 to demolish the completed building. It has been contended by the learned counsel, who has appeared on behalf of the Municipal Board to oppose the reference, that as an appeal against the notice under S. 186, was open to Yusuf Husain in accordance with S. 318 of the Act and he did not appeal, the illegality of the notice cannot be considered in the present proceedings. The learned counsel points out that under S. 147 of the previous Municipalities Act 1900, which corresponds with S. 307 of the present Act a penalty is provided for disbedience of

"any lawful direction given by the Board by public notice . . . . or any written notice lawfully issued by it . . . .",

and he concedes that if the prosecution had been one under the old Act, the insertion of the words "lawful" and "lawfully" in S. 147 of that Act would have entitled a person to set up the defence of the illegality of the notice in a prosecution for the disobedience of a notice which was, in fact, illegal. He however contends that the omission of any such words as "lawful" or "lawfully" in the present S. 307, no longer leaves such a defence open to a person prosecuted for disobedience of a notice issued by the Board and that his only remedy is by way of an appeal against the notice under S. 318. There appears to me to be no substance in this argument. On the face of it, it would be most unfair to the public and completely defeat the object of sub-S. (3), S. 180, if when the Board by its own laches had given the construtive sanction provided for in that subsection to an applicant for permission to build, it should then be able to retrieve its position and withhold sanction by issuing a notice under S. 186 un warranted by the Act. If the matter be examined more closely it will also be apparent that the contention of the learned counsel for the Municipal Board has also no substance in law. The absence of the word "lawful" or lawfully" from S. 307, has made no change in the law, at any rate for the purposes of the present case. Under S. 307 the notice must have been given "under the provisions of this Act." When we turn to S. 186, we find that a notice under that section can only be issued, if the construction for the demolition of which the notice is issued is considered by the Board te be an offence under S. 185. Under S. 185 a construction is only an offence if it has been made without giving the notice required by S. 178 or in contravention of any written direction made by the Board under S. 180 or of any by-law, or if the work has been commenced before sanction has been given or has been deemed to have been given under S. 180. In the present case no such offence had been committed in respect of the construction in question and it would be allowing an abuse of the process of the Court to hold that the Board can have considered in good faith that the construction in question did constitute an offence under S. 185.

It is therefore clear to me that the notice which has been disobeyed was not a notice given, or a notice that could be given under the provisions of the Act. Once the sanction of the Board was deemed to have been given to the proposed construction under sub-S. (3), S. 180, the Board had no right to issue a notice under S. 186. The fact that Yusuf Husain did not appeal against the notice under the provisions of S. 318 of the Act appears to me to be quite immaterial. The wording of that section does not appear to me to be such as to

preclude a person setting up the plea of the illegality of the notice as a defence when he is criminally prosecuted under S. 307 (b). It can hardly have been the intention of the legislature in framing S. 318, nor does the wording of the section support the view, that a person should be debarred from setting up the plea of the illegality of a notice issued under 186, when prosecuted for disobedience thereof, however capricious, unreasonable and unwarranted by law such notice may be. I should certainly feel most reluctant to take such a view unless forced to do so by the insertion in the Act of such words as

"in the absence of such appeal the order or direction of the Board shall not be open to question in any Court of law."

I accordingly accept the reference, set aside the conviction of Yusuf Husain and acquit him of an offence under S. 307 (b), Municipalities Act. The fine if paid, will be refunded.

The learned counsel for Yusuf Husain has asked this Court to award his client costs against the Board under S. 320 of the Act. I wish I could do so, but it seems to me that S. 320 only provides for costs in appeal from orders of the Board made in accordance with S. 318 of the Act and therefore has no application to the present case.

R.K. *Reference accepted.*

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* A. I. R. 1932 Oudh 308

KISCH, J.

Rae Bajrang Bahadur Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 69 of 1932, Decided on 5th September 1932, against order of Dist. Magistrate, Partabgarh, D/- 12th May 1932.

(a) Criminal P. C. (1898), S. 197—Canvassing of members of Board day prior to election—Defamatory statements made are not in discharge of duties as members of Board and no sanction is necessary.

The canvassing of a member of District Board on the day before the election in order to persuade him to join in an application against another candidate cannot reasonably be an act done or purporting to be done in the discharge of the duties of the members of the District Board, and no sanction under S. 197 is necessary for prosecution of the member. [P 309 C 2]

***(b) Criminal P. C. (1898), S. 197—Defamatory application presented to presiding officer at the time of election by members of Board—Offence is committed not in discharge of official duty—No previous sanction under S. 197 is necessary.**

If the act complained of as an offence was done, or purported to be done in the discharge of a duty laid upon the person doing the act in virtue of his official position, previous sanction is required, otherwise not.

At the time fixed for the meeting for the election of a Chairman of a District Board and just before the proceedings commenced, two members presented a written application to the presiding officer, which was signed by nine members of the Board. The petition contained some damaging imputations against the character of the candidate for the post. On complaint by the candidate against the nine members under S. 500, Penal Code:

Held: that no previous sanction under S. 197 was necessary It would be doing violence to the language of S. 197 to hold that the offence committed by the nine members was committed either while acting or while purporting to act in the discharge of their official duty within the meaning of S. 197. The duty of the accused as members of the Board was, if they wished to oppose the election to have voted against him. There was no other duty cast upon them in the matter by the provisions of the District Board Act: (*Case law discussed*). [P 311 C 1]

***(c) Criminal P. C. (1898), S. 197—"Official duty" explained.**

"Official duty" is something that a person is under an obligation to do in virtue of his official capacity. [P 311 C 1]

K. D. Malaviya and *A. N. Mulla*—for Applicant.

Hyder Husein—for the Crown.

Order.—It is necessary to state briefly the facts that have given rise to these applications. A new District Board had been elected for the Partabgarh District. 8th January 1932, was the date fixed for the election of a chairman in accordance with S. 35, U. P. District Board Act (10 of 1922), B. Bhagwati Prosad, Subordinate Judge of Partabgarh being appointed to preside as Chairman of the meeting under sub-Cl. (2), S. 35-A. At the meeting Rae Bajrang Bahadur Singh, Talukdar of Bhadri, was proposed and seconded for the chairmanship and, as his was the only name proposed, he was elected as Chairman, 20 out of the 30 members of the Board being present at the time of the the election. Rae Krishnapal Singh, a member of the Board was apparently desirous of being himself elected as Chairman. It would appear that he had not been able to secure sufficient supporters to give him any prospect of success. At the time fixed for the meeting, and just before the proceedings commenced. Mr. Rukunnudin Khan, another member of the Board, who was one of the sup-

porters of Rae Krishnapal Singh, presented a written application to B. Bhagwati Prasad, the presiding officer, which was signed by nine members of the Board including Mr. Rukuunnuddin Khan and Rae Krishnapal Singh. This petition contains some damaging imputations against the character of Rae Bajrang Bahadur Singh. After presenting this petition, the nine members walked out of the District Board Hall and took no part in the proceedings for the election of Chairman. Apparently the said persons took no further steps to have the election of Rae Bajrang Bahadur Singh declared invalid on account of the illegal proceedings to secure votes or to prevent the rival candidate from securing votes imputed to him in the application presented to Babu Bhagwati Prasad.

On 21st April 1932, Rae Bajrang Bahadur Singh presented a complaint of an offence under S. 500, I. P. C., in a Magistrate's Court against the said nine members of the Board. He also included in his complaint a charge that Rae Krishnapal Singh and some other of the accused had on the day previous to the election approached Thakur Chandra Bahadur Singh, another member of the Board, to join as a signatory in the application they intended to present and made similar defamatory allegations against Rae Bajrang-Bahadur Singh to this gentleman. He also included in his complaint a charge that on the evening previous to the election, Rae Krishnapal Singh and Mr. Rukunnuddin Khan had made similar defamatory allegations against him to B. Rajendra Bahadur Singh who is not a member of the Board, and that after the election Raja Amarpal Singh, another of the accused, had made similar defamatory imputations against him to Babu Bindeshwari Saran Singh and B. Rajendra Bahadur Singh already mentioned, neither of whom was a member of the Board. The learned Magistrate, who was seized of the case, came to the conclusion that the previous sanction of the Local Government was required for the prosecution of the accused person in accordance with the provisions of S. 197, Criminal P. C. On this ground he refused to entertain the complaint and dismissed it under S. 203 of the Code. On an appeal by Rae Bajrang Bahadur Singh to the District Magistrate, the learned District Magistrate held that no previous sanction of the Local Government was required for the prosecution of certain of the accused for the offences alleged to have been committed before and after the meeting. He held however that the application presented to Babu Bhagwati Prasad was presented by the nine members of the Board acting in the discharge of their official duty and therefore the previous sanction of the Local Government was required for the prosecution of the accused on this count.

Rae Bajrang Bahadur Singh has applied to this Court in revision against this portion of the District Magistrate's order and Mr. Rukunuddin Khan and Rai Krishnapal Singh have applied to this Court in revision against the portion of the District Magistrate's order holding that sanction was not required in respect of the remaining three counts. With regard to these three counts, there can be no question but that the learned District Magistrate is right. Two of the alleged defamatory statements were made to persons who were not even members of the District Board ; and it is clearly impossible by any stretch of language to hold that the acts of the accused persons were done or purported to be done in the discharge of their official duties as members of the District Board. Similarly the canvassing of Thakur Chandra Bahadur Singh on the day before the election in order to persuade him to join in the application cannot reasonably be held to have been an act done or purporting to be done in the discharge of the duties of the accused concerned as members of the District Board. In my opinion therefore the application of Mr. Rukunuddin Khan and Rae Krishnapal Singh has no substance and it is dismissed accordingly. The question of the application presented by the nine members of Babu Bhagwati Prasad is not so simple, but, after giving my careful consideration to the case, I am of opinion that the previous sanction of the Local Government was also not required for the prosecution of the accused persons under S. 500, I. P. C., for the defamatory allegations alleged to be contained in that application.

There can be no doubt that members of the District Board are public servants within the meaning of S. 197. Under the terms of the section when such public servant :

"is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government."

A very large number of authorities have been cited on both sides in connexion with the question whether the act committed by the accused was committed while they were acting or purporting to act in the discharge of their official duties as members of the District Board. Many of these authorities relate to the law as it stood in the Criminal Procedure Codes of 1872, 1882 and 1898, before the amendment of S. 197 was introduced by the Amendment Act 18 of 1923. I do not think that the rulings under the earlier Codes are of much assistance in elucidating the meaning of S. 197 as it now stands after the amendment of 1923. I agree with the observations of a Bench of the Calcutta High Court in *Amanat Ali* v. *Emperor* (1) that :

"the proper method of approaching the matter is to take the language of the section as it now stands without reference to changes in the wording or comparison with corresponding sections in previous statutes and then to see what the application of it would be in the present case, taking the language in its ordinary and natural meaning."

On this view, it is only the cases decided after the amendment of 1923 that can be usefully referred to. None of such cases cited before me, nor for the matter of that any of the cases under the earlier Codes that have been cited at the hearing, deals with the facts in any way resembling the facts of the present case. The purport however of all the rulings cited on either side, based on the wording of S. 197 as it now stands, is that if the act complained of as an offence was done, or purported to be done, in the discharge of a duty laid upon the person doing the act in virtue of his official position, previous sanction is required, otherwise not. Thus in *Kamisetty Raja Rao* v. *T. Ramaswamy* (2) and *N. Panakalu* v. *Subba Rao* (3), it was held that where a Chairman of a Municipal Board threatened a voter with certain injury, if he did not vote for a candidate as the Chairman desired, the protection of S. 197 could not be invoked. Similarly in *Muhammad Ismail* v. *Emperor* (4), it was held that, where a member of a Municipal Board exercised undue influence on a sub-overseer of the Board to make him buy bricks from the said member and not from another person, he would not be protected, when prosecuted by S. 197.

On the other hand in *M.L. Shivaramakrishna Ayyar* v. *Esshappa Naidu* (5) and *J. Gangaraju* v. *Venki* (6), it was held that sanction under S. 197 was required for the prosecution of a Village Munsif or a Village Magistrate for fabricating a record in a proceeding before him. In *Emperor* v. *Krishna Kant* (7), it was held by the late Court of the Judicial Commissioner of Oudh that sanction under S. 197 was required for the prosecution of a member of the District Board who had been duly appointed to conduct the sale of impounded cattle and who had closed the sale in the name of his own servant for his own benefit. In *Bhagirath* v. *Ali Hamid Saheb* (8), it was held by a single Judge of this Court that sanction under S. 197 was required for the prosecution for defamation of a Subordinate Judge for making certain observations, alleged by the complainant to be defamatory, in his order rejecting an application presented to the Subordinate Judge in the course of his duties.

In all these cases, it will be observed, the decision turned on whether the act of the public servant complained of was an act that formed part of his official duty. The preparation of the record of the proceedings before a Village Munsif or a Village Magistrate, the closing of the sale of impounded cattle by a member of the District Board duly appointed on that behalf and the passing of orders on the application presented to the Subordinate Judge were all part of the official duty of the public servant concerned. They were therefore held to be entitled to the protection of S. 197. The intimidation of voters by Chairman of a Municipal Board and the exercise of undue influence over a servant of a Municipal Board by a member of that Board in order to secure

(1) A. I. R. 1929 Cal. 724=1929 Cr. C. 360=122 I. C. 627.
(2) A. I. R. 1927 Mad. 566=28 Cr. L. J. 539=50 Mad. 754=102 I. C. 347.
(3) A. I. R. 1928 Mad. 1158=52 Mad. 695=113 I. C. 625.
(4) A. I. R. 1928 Lah. 72=29 Cr. L. J. 511=8 Lah. 647=109 I. C. 239.
(5) A. I. R. 1929 Mad. 172=30 Cr. L. J. 396=52 Mad. 347=115 I. C. 248.
(6) A. I. R. 1929 Mad. 659=1929 Cr. C. 140=52 Mad. 602=118 I. C. 102.
(7) A. I. R. 1925 Oudh 565=26 Cr. L. J. 1157=28 O. C. 155=88 I. C. 517.
(8) A. I. R. 1931 Oudh 392=1931 Cr. C. 824=32 Cr L. J. 991=132 I. C. 783.

a contract for himself were no part of the official duty of the public servant concerned. They were therefore held not to be entitled to the protection of S. 197. Now "duty" is a well understood term. It is something that person is under an obligation to do, "official duty" is something that a person is under an obligation to do in virtue of his official capacity. This seems to me to be the sense in which the expression "official duty" has been interpreted in every one of the above quoted cases.

Let us apply this test to the present case and consider whether the presentation of their application to B. Bhagwati Prasad by the nine members can be said to have been part of their official duty as members of the District Board. Clearly their duty as members of the Board was, if they wished to oppose the election, of Rae Bajrang Bahadur Singh, to have voted against him. There was no other duty cast upon them in the matter by the provisions of the District Board Act. B. Bhagwati Prasad was not the person to whom such an application should have been presented. His sole business was to preside at the meeting and carry out the very specific directions laid down in S. 35-A, District Board Act, for conducting the election of a Chairman. The members who presented the application did not even wait for any orders to be passed on their application. They simply walked out of the Hall and took no further part in the proceedings. They did not follow up the application by any action to question the validity of Rae Bajrang Bahadur Singh's election. Obviously their action was merely a gesture. It seems to me that it would be doing violence to the language of S. 197 to hold that, if the act of the nine members constituted an offence, it was an offence committed either while acting, or while purporting to act, in the discharge of their official duty within the meaning of that section. In my opinion therefore the prosecution of the nine members for defamation in respect of the subject-matter of the application in question does not require the previous sanction of the Local Government. The application of Rae Bajrang Bahadur Singh is accordingly allowed and the Magistrate is directed to proceed with the disposal of the case according to law.

R.K. *Order accordingly.*

A. I. R. 1932 Oudh 311

SRIVASTAVA AND KISCH, JJ,

Daulat Shah—Plaintiff—Appellant.

v.

Deputy Commissioner of Bahraich—Defendant—Respondent.

Second Appeal No. 91 of 1930, Decided on 8th April 1931.

Court of Wards Act (4 of 1912), S. 18—Claim not notified as sought to be made out in suit—Claim is deemed to be discharged.

In a claim on a bond against a person whose estate was under the management of Court of Wards it was found that the bond sued upon was not produced before the Manager under S. 17 nor was any good cause shown for its non-production. The bond was alleged to have been executed in satisfaction of a previous pro-note which also was not produced before the manager. The notice of claim stated that it was due on the bond only. The suit was dismissed and in appeal the plaintiff contended that he was entitled to fall back upon the original consideration of money advanced on pro-note.

Held: that this claim not having been notified it should be deemed to be discharged. [P 312 C 2]

Hyder Hussain—for Appellant.

H. K. Ghose—for Respondent.

Judgment.—This is a plaintiff's appeal against the judgment and decree, dated 31st July 1930, passed by the Subordinate Judge of Bahraich. It arises out of a suit based on a simple money bond, dated 16th March 1921, executed by Sardar Gulzar Singh, Taluqdar of Pipri in favour of the plaintiff. Sardar Gulzar Singh died in 1922 leaving a minor son Daljit Singh. For a time the estate of the minor was managed by his mother as guardian appointed by the District Judge. Subsequently the management was transferred to the hands of a receiver appointed under the Guardian and Wards Act. Ultimately on 5th November 1928, the Court of Wards assumed superintendence of the estate. The usual notification under S. 15, Court of Wards Act, was issued and the Deputy Commissioner of Bahraich who was the Manager of the Court of Wards published notices calling upon all petsons having claims against the ward or his property to notify them to him. The plaintiff notified his claim under the bond in suit by a notice, dated 3rd January 1929, Ex. A1. He sent another notice, Ex. 13 on 7th January 1929 which is practically to the same effect as the previous one. But he did not produce the original bond or any copy of it with the statement of his claim as required by S. 17, Cl. (4), Court of Wards Act (4 of 1912). The Duputy Commissioner on 21st February 1929, disallow-

ed the plaintiff's claim by reason of his failure to produce the bond for inspection by him. The plaintiff instituted the present suit on 5th March 1929, on the allegation that he was going from his village to Bahraich with the original bond in suit on 22nd February 1929, in order to produce it before the Deputy Commissioner on that date as he had been required to do by an order made the previous day but unfortunately dropped the bond in the way. He made a search for it but without success and lodged a report of the loss of the document the same day at the police station. He therefore alleged that he was entitled to produce a certified copy of the bond as secondary evidence of it and claimed a decree on the basis of the certified copy produced by him. The Court of Wards resisted the suit on the ground that the plaintiff having failed to produce the bond before the Deputy Commissioner, the certified copy was inadmissible in evidence. The alleged loss of the original was also denied.

The learned Subordinate Judge in an elaborate judgment in which he has discussed with care the entire evidence, oral or documentary, produced in the case, has found that the story told by the plaintiff about the loss of the original bond is palpably false and the plaintiff has failed to prove the loss of document. He has therefore held that the plaintiff is not entitled to produce secondary evidence in support of the claim. He has further found that the document was inadmissible by reason of the provisions of S. 22, Court of Wards Act. As a result of these findings he has dismissed the suit. The learned counsel for the plaintiff-appellant has not seriously disputed the findings of the learned Subordinate Judge on the question of the loss of the original bond. He merely relied on the observations of their Lordships of the Judicial Committee in *Ehtisham Ali* v. *Jamna Prasad* (1). We think that the case is distinguishable. In the present case the plaintiff had a very good motive for putting forward the false story about the loss of the bond on 22nd February, (The Court upheld the lower Court's finding on this point and proceeded.) It follows that he cannot be permitted to produce secondary evidence of it in support of his claim. We have also no hesitation in agreeing with the learned Subordinate Judge that the case clearly falls within the terms of S. 22, Court of Wards Act, and that the plaintiff has failed to show any good cause for the non-production of the bond before the Deputy Commissioner.

The learned counsel for the plaintiff-appellant has however strongly contended that the bond in suit was executed in consideration of four previous pro-notes executed by Sardar Gulzar Singh in favour of the plaintiff in 1919 and 1920, and that even if the bond cannot be produced and the certified copy is inadmissible, he is entitled to fall back on the original consideration. This is an entirely new case which was never raised in the Court below. But apart from it, we are satisfied that such a claim based on the original consideration is also barred by the provisions of the Court of Wards Act. It is admitted that the pro-notes in question were not produced before the Deputy Commissioner and therefore the pro-notes would be inadmissible in evidence just as much as the bond in suit by reason of the provisions of S, 22 of the Act. Confronted with this difficulty the learned counsel for the plaintiff asked us to allow him to rely upon the debt independent of the pro-notes. Such a claim also if otherwise admissible would be barred by S. 18, Court of Wards Act. The notices issued by the plaintiff refer specifically to the loan advanced on 16th March 1921, and evidenced by the bond of that date. It is impossible to read these notices as having any reference to the loan advanced under the pro-notes much less to any loan independent of them. Thus it is clear that the plaintiff never gave any notice to the Deputy Commissioner in respect of the loan which he now seeks to set up independent of the pro-notes. The effect of failure to notify such claims is that under S. 18, Court of Wards Act all such claims shall be deemed to have been duly discharged. We are therefore of opinion that the plaintiff cannot improve his position by being allowed to fall back on the original consideration even if such a course were otherwise permissible. We are satisfied that the decision of the learned Subordinate Judge is correct. The appeal fails and is dismissed with costs.

M.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1922 P. C. 56=38 I. A. 365=64 I. C. 299=24 O. C. 272 (P.C.).

A. I. R. 1932 Oudh 313

SRIVASTAVA AND KISCH, JJ.

Adya Dat Ram—Judgment-debtor—Appellant.

v.

Gopal Das—Decree-holder—Respondent.

Execution Decree Appeal No. 1 of 1931, Decided on 14th April 1931, against order of Sub-Judge, Fyzabad, D/- 19th December 1930.

(a) Oudh Estates Act (1 of 1869), Ss. 13 and 14 — Estate under Act bequeathed to possible but not immediate heir — Heir holds bequeathed property as estate—Civil Court cannot sell it — Oudh Chief Court Rules (Civil), R. 190.

So long as the property continues to be governed by the provisions of the Oudh Estates Act, it must be considered to form an estate or part of an estate as defined.

A judgment-debtor was not the immediate heir of his grandfather, who was a Talukdar and had bequeathed the estate to him but he was a possible heir.

Held: that the judgment-debtor is clearly one of the persons mentioned in Cl. 2, S. 13 (A) of the Act and holds the bequeathed estate subject to the same conditions and to the same rules of succession as the testator, under S. 14, Amended Act and the civil Court has no jurisdiction to sell the estate: *A.I.R.* 1925 *Oudh* 709, *Dist.* and *A.I.R.* 1929 *Oudh* 459, *Foll.* [P 314 C 1]

(b) Civil P. C. (1908), S. 11—Order without jurisdiction cannot operate as res judicata—Consent cannot confer jurisdiction—Oudh Chief Court Rules (Civil), R. 190.

Any acquiescence or consent of parties cannot confer jurisdiction. Even if a debtor acquiesces in a previous order of the civil Court it cannot invest the civil Court with jurisdiction to sell ancestral property which is possessed exclusively by the Collector. The previous order being without jurisdiction cannot operate as res judicata. [P 314 C 2]

K. P. Misra and *Ram Bharose Lal*—for Appellant.

P. N. Chaudhri—for Respondent.

Judgment. — This is the judgment-debtor's appeal against the decision, dated 19th December 1930, of the Subordinate Judge, Fyzabad, dismissing certain objections raised by him in the course of execution proceedings. One of these objections was that the property sought to be sold by the decree-holder-respondent was ancestral within the meaning of para. 190 of the Oudh Civil Rules and the execution of the decree must therefore be transferred to the Collector.

The learned Subordinate Judge relying on *Mirza Beg* v. *Udit Pershad* (1) held that the interest of the judgment-debtor by reason of S. 15, Oudh Estates Act 1 of 1869 has ceased to be an estate within the meaning of that Act, and cannot therefore be regarded as ancestral land within the definition contained in R. 190 of the Oudh Civil Rules. We are of opinion that the opinion of the learned Subordinate Judge is not correct.

Rai Sri Ram Bahadur, the grandfather of the judgment-debtor was admittedly the heir of a talukdar and the estate held by him as such was subject to the provisions of Act 1 of 1869. He acquired considerable property including the six villages put to sale by the decree-holder respondent. The Government Notification contained in the United Provinces Gazette, deted 27th July 1911 at p. 1301 shows that he made a declaration under S. 32-A, Act 1 of 1869, that the lands and villages detailed in the schedule forming part of the Notification shall form part of his estate for the purpose of Act 1 of 1869 as amended by Act 3 of 1910. The villages in dispute are entered at Nos. 4, 12, 13, 14, 15 and 16 of the schedule forming part of the Notification. Thus there can be no doubt that the villages in question must be treated as part of his estate for the purpose of the Oudh Estates Act 1 of 1869. On 21st May 1911, Rai Sri Ram Bahadur executed a will, a certified copy of which is on the record. Under para. 6 of this will he bequeathed these villages to his eldest son Sitapat Ram for his life without any power of transfer. He further provided that after the death of Sitapat Ram, Adya Dat Ram, Vidya Dat Ram and Shanta Dat Ram, the three sons of Sitapat Ram, would be entitled to the aforementioned villages in equal shares, and that Adya Dat Ram will not have any power of transfer and will only remain in possession for his life of his share. The learned Subordinate Judge has given no reasons for holding that the share possessed by Adya Dat Ram in the villages in dispute since the death of his father was governed by S. 15, Oudh Estates Act. S. 15 applies to persons who had not at the time when the bequest took effect belonged to any of the classes specified in S. 14 If we turn back to S. 14, we find that it applies to transfers or bequests made to two classes of persons, namely, (a) to another talukdar or grantee or his heir or legatee or (b) to any of the persons mentioned in

(1) A.I.R. 1925 Oudh 709=90 I.C. 779.

Cls. (1) and (2), S. 13-A, Cl. (2), S. 13-A is to the following effect:

"To a person who might, in the absence of other heirs, have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate at the time when the bequest took effect."

Adya Dat Ram, judgment-debtor, is admittedly one of the sons of Sitapat Ram, who was the eldest son of Rai Sri Ram Bahadur. Thus he was a grandson who, though not the immediate heir, was certainly within the category of possible heirs contemplated by Cl. (2), S. 13-A. It seems therefore to be clear beyond doubt that S. 14 and not S. 15 applies to the bequest in favour of Adya Dat Ram. The case is fully covered by the decision of a Bench of this Court in *Muhammad Usman Khan* v. *Bankey Lal* (2) to which one of us was party. In this case also certain property had been bequeathed by a talukdar to one of his grandsons. The question arose whether the property in the hands of the grandson could be regarded as ancestral property within the meaning of Cl. (b), R. 190 of the Oudh Civil Rules. We might usefully reproduce some of the observations made in that case:

"In our opinion, so long as the property continues to be governed by the provisions of the Oudh Estates Act, it must be considered to form an estate or part of an estate as defined in the Oudh Estates Act, but it cannot be considered to be such estate or a part of an estate when it ceases to be governed by that Act. The parties are agreed before us that the judgment-debtor appellant was not the immediate heir of his grand-father, but there can be no doubt that he was a possible heir. Ss. 14 and 15, Amended Oudh Estates Act, have been given retrospective effect. The judgment-debtor is clearly 'a person who might, in the absence of other heirs, have succeeded to such estate or portion under the provisions of the Oudh Estates Act' and is therefore one of the persons mentioned in Cl. (2), S. 13 (A), Oudh Estates Act. It follows that he holds the village in question which had been bequathed to him by his grandfather, subject to the same conditions and to the same rules of succession as the testator, under S. 14, Amended Oudh Estates Act."

The case of *Ammir Mirza Beg* v. *Udit Pershad* (1) relied upon by the lower Court is quite distinguishable inasmuch as the property which was sought to be sold in that case was governed by S. 15 of the Act and had therefore ceased to be subject to the provisions of the Oudh Estates Act.

The learned counsel for the decree-holder respondent contended that the plea about the property being ancestral was barred by the principle of res judicata. His argument was that on 11th November 1927, the learned Subordinate Judge had, in a proceeding arising out of a previous objection raised by the judgment-debtor, decided that the property was not ancestral. The learned counsel for the judgment-debtor sought to meet this contention by pointing out that subsequently the parties had made a compromise and therefore it was not possible for the judgment-debtor to file any appeal against the said order, and consequently it could not have the force of res judicata. Apart from the compromise it is quite clear that the question involved is one of jurisdiction. It is not denied that the civil Court has no jurisdiction to sell ancestral property. The execution of decree in the case of ancestral lands must, under the provisions of the Code of Civil Procedure read with R. 189 of the Oudh Civil Rules, be transferred to the Collector. It is a well settled rule that any acquiescence or consent of parties cannot confer jurisdiction. Even if the judgment-debtor acquiesced in the wrong order of the Subordinate Judge it cannot invest the civil Court with jurisdiction to sell ancestral property which is possessed exclusively by the Collector. As we are satisfied that the property in question forms part of an estate as defined in the Oudh Estates Act, it must be held to be ancestral land within the definition contained in Cl. (b), R. 190 of the Oudh Civil Rules. The learned Subordinate Judge had therefore no jurisdiction to proceed with the execution, and the execution of the decree must be transferred to the Collector. We accordingly allow the appeal and set aside the order of the lower Court. We make no order as to costs of the appeal.

M.N. *Appeal allowed.*

(2) A.I.R. 1929 Oudh 467=121 I.C. 91.

A. I. R. 1932 Oudh 314

RAZA AND SRIVASTAVA, JJ.

Ram Sahai and *others* — **Appellants.**

v.

Kunwar Sah and *others*—**Respondents.**

First Appeal No. 183 of 1930, Decided on 16th February 1931, against decree of Dist. Judge, Hardoi, D/- 18th February 1930.

(a) Limitation Act (1908), S. 19—Acknowledgment—Who can make, explained.

For an acknowledgment under S. 19 it is enough that it is made by the party against whom the right is claimed or by some person through whom he derives his right or liability. Such acknowledgment is effective against the other party even though it is made after party derives its title from the person making it. If the operation of S. 19 in case of acknowledgment made by some persons through whom a party derives title or liability is to be confined to acknowledgments made before such title or liability was derived it would be necessary to introduce words in the section which are not there: *A.I.R.* 1930 *Oudh* 56, *Rel. on.* [P 316 C 2]

(b) Transfer of Property Act (1882), S. 101—Scope.

Payments made to the prior mortgagee are to be regarded as purchases pro-tanto of the prior mortgage. [P 317 C 1]

(c) Limitation Act (1908), Art. 132 — Suit by sub-mortgagee claiming priority over intermediate mortgagee is governed by Art. 132.

A suit by a subsequent mortgagee paying off an earlier mortgage claiming priority over intermediate mortgagee is governed by Art. 132. It is immaterial whether the priority is claimed by a mortgagee or his sub-mortgagee: *A. I. R.* 1924 *P. C.* 36, *Rel. on.* [P 371 C 1]

(d) Interpretation of Statutes—Section.

The function of the Court is to interpret a section of an Act as it stands. [P 316 C 2]

Hyder Hussain—for Appellants.

A. P. Sen, *S. C. Dass* and *Mohan Lal*—for Respondents.

Judgment.—This is a second appeal by the plaintiffs against the decision dated 18th February 1930, passed by the District Judge of Hardoi reversing the decision, dated 22nd August 1929, passed by the Munsif, North Hardoi. It arose out of a suit for sale on foot of a mortgage deed, dated 8th August 1923, executed by Dharam Singh, defendant 1 in favour of Ram Sahai, plaintiff 1 and his brothers Rameshwar and Sheo Bakhsh who are represented by plaintiffs 2 to 7. Defendants 2 to 5 are members of the joint Hindu family of which defendant 1 is the manager. Kunwar Sah, defendant 6, was impleaded as a puisne mortgagee of the property in suit.

The suit was contested by Kunwar Sah alone on the ground that he was a prior mortgagee. This contention was repelled by the trial Court but has found favour with the lower appellate Court. The only question which arises for decision in this appeal is whether Kunwar Sah is the prior or the subsequent mortgagee. The facts relevant to the determination of this question are not in dispute. Sadho Singh on 10th August 1909, executed a mortgage deed in favour of Khushal Sah for Rs. 700. The term fixed in this mortgage was two years (Ex. 2). On 16th May 1911, Mt. Gayani, widow of Khushal Sah, made a sub-mortgage of her rights under the deed, Ex. 2, in favour of plaintiff 1, Ram Sahai and his brothers Rameshwar and Sheo Bakhsh (Ex. 3). The deed in suit (Ex. 1) was executed on 8th August 1923, by Dharam Singh, son of Sadho Singh for Rs. 975, the whole of the consideration being appropriated in payment of the earlier mortgage of 10th August 1909 (Ex. 2). The suit which has given rise to this appeal was instituted on 15th January 1929 on the basis of the mortgage deed, dated 8th August 1923.

Kunwar Sah, defendant 6, bases his title on two mortgages. The first of these, Ex. F, is dated 15th January 1910, and was executed by Sadho Singh in favour of Kunwar Sah for Rs. 3,000. The second mortgage (Ex. F-2) is dated 20th September 1913, and was executed between the same parties for Rs. 2,000 the balance due on that date in respect of Ex. F-1. It may be mentioned that Kunwar Sah had obtained a decree for sale on the basis of this latter mortgage on 16th March 1925. The plaintiff's case was that they had been subrogated to the rights possessed by Khushal Sah under the mortgage deed, dated 10th August 1909, by reason of the consideration of the mortgage deed in suit having been applied, in payment of that mortgage and that the said rights had been kept alive till the date of the institution of the present suit by reason of an acknowledgment contained in the mortgage deed Ex. 1. The learned District Judge has held that the statement contained in the mortgage deed in suit cannot be treated as an acknowledgment of liability under the deed of 1909 so as to keep it alive and that the plaintiffs' claim for priority against Kunwar Sah based on the mortgage deed, dated 10th August 1909, was therefore barred by time. He has further found that as the plaintiffs at the date of the mortgage deed were also the sub-mortgagees in respect of the mortgage deed, dated 10th August 1909 therefore they could not claim priority in respect of their own previous mortgage debt which had been paid off by the mortgage in suit.

We are of opinion that the view taken by the learned District Judge on both these points is unsound and erroneous.

His attention does not seem to have been drawn to a ruling of a Bench of this Court which fully covers the first point and to a ruling of their Lordships of the Judicial Committee which is conclusive, on the second point. There can be no doubt that the plaintiffs' claim to enforce priority under the deed Ex. 2 in this suit is governed by Art. 132, Lim. Act: *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (1). The term fixed in this mortgage deed as stated before was two years. The period prescribed by Art. 132, Lim. Act therefore expired on 10th August 1923. The present suit which was instituted on 15th January 1929 would therefore be barred by time unless the plaintiffs can claim extension of limitation by reason of any acknowledgment.

The acknowledgment relied on is contained in the deed in suit Ex. 1. In this deed there is a recital by Dharam Singh mortgagor that a sum of Rs. 975 were due from him under the mortgage deed dated 10th August 1909 in favour of Khushal Sah, the mortgagee rights in respect of which had been mortgaged by Mt. Gayani widow of Khushal Sah under the sub-mortgage dated 15th May 1911. We are of opinion that this statement in Ex. 1 constitute a clear acknowledgment of liability in respect of the mortgage deed dated 10th August 1909. In fact this point has not been disputed by the learned counsel for the defendant-respondent. The only contention seriously pressed in this behalf by the learned counsel for the respondent is that the acknowledgment in question was made after the mortgage in favour of Kunwar Sah. It is contended that an acknowledgment made by Dharam Singh subsequent to the mortgage by his father Sadho Singh in favour of Kunwar Sah should not be regarded as an acknowledgment by a person through whom the defendant derives title or liability within the meaning of these words as used in S. 19, Lim. Act. The question is not altogether free from difficulty. A similar question arose in *Nigah Ali Khan* v. *Aquiullah Khan* (2) a case decided by a Bench of this Ccurt to which one of us was a party. It was held that for an acknowledgment under S. 19, Lim. Act, it was enough that it was made by the party against whom the right is claimed or by some person through whom he derives title or liability and therefore the acknowledgment relied upon in that case was held effective against the defendants-appellants even though it was made after they had derived their title from the persons making the acknowledgment. This decision is supported by a decision of Sir Francis Maclean, C. J., and Mitra, J., of the Calcutta High Court in *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (3) which was referred to and followed. In two later cases of the Calcutta High Court though they are cases arising under S. 20, Lim. Act namely, in *Domi Lal Sahu* v. *Roshan Dobay* (4) and *Hem Chandra Chaudhuri* v. *Purna Chandra Chaudhuri* (5), the view taken in *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (3) was approved and followed. The same view has been adopted by a Bench of the Allahabad High Court in *Roshan Lal* v. *Kanhaiya Lal* (6).

Therefore the view taken in *Nigah Ali Khan* v. *Aquiullah Khan* (2) is supported by authority and is also in consonance with the precise language of S. 19, Lim. Act. If the operation of this section in the case of acknowledgments made by some persons through whom a party derives title or liability is to be confined to acknowledgments made before such title or liability was derived it would be necessary to introduce words in the section which are not there. Our function is only to interpret the language of the section as it stands. We think therefore that unless the legislature intervenes, we must follow the interpretation put upon the section in *Nigah Ali Khan* v. *Aquiullah Khan* (2). Under the circumstances we can see no sufficient grounds to refer the matter to a Full Bench as requested by the respondents for reconsideration of the decision in *Nigah Ali* v. *Aquiullah Khan* (1). We accordingly hold that the acknowledgment contained in the mortgage deed Ex. 1, is valid and extends the limitation in respect of the plaintiffs' claim to

(1) [1912] 39 Cal. 527=39 I. A. 68=14 I. C. 496 (P. C.).
(2) A. I. R. 1930 Oudh 56=124 I. C. 435=5 Luck. 444.
(3) [1905] 32 Cal. 1077=9 C. W. N 868.
(4) [1906] 33 Cal. 1278=11 C. W. N. 107.
(5) A. I. R. 1915 Cal. 5=22 I. C. 510.
(6) A. I. R. 1918 All. 61=41 All. 111=47 I. C. 845.

enforce priority under the deed 10th August 1909.

As regards the second point the matter is concluded by the decision of their Lordships of the Judicial Committee in *Malireddi Ayyareddi* v. *Gopala Krishnayya* (7). Assuming that the plaintiffs' position as sub-mortgagees is identical with the position of the mortgagee Khushal Sah there is no reason why they should not be assumed to have intended to act in the way most beneficial to themselves and to have kept the mortgage alive to be used as a shield against an intermediate incumbrancer like the defendant-respondent. In the words of their Lordships of the Judicial Committee payments made to the prior mortgagee are to be regarded as purchases pro tanto of the prior mortgage and there is nothing in law or good sense to eliminate the plaintiff's from the list of possible purchasers. For the above reasons we allow the appeal with costs, set aside the decision of the lower appellate Court and restore that of the first Court. The plaintiffs-appellants will recover their costs in all the Courts as part of the decretal amount of the mortgage.

R.K. *Appeal allowed.*

(7) A. I. R. 1924 P. C. 36=51 I. A. 140=47 Mad. 190=79 I. C. 592 (P. C.).

A. I. R. 1932 Oudh 317

RAZA AND SRIVASTAVA, JJ.

Emperor

v.

Maqbool Ahmad Khan—Accused.

Criminal Appeal No. 295 of 1931, Decided on 23rd November 1931, from order of Addl. Sess. Judge, Hardoi, D/- 13th July 1931.

(a) Evidence Act (1872), Ss. 30 and 114, Illus. (b)—Statement by approver and retracted confession do not form basis of conviction unless sufficiently corroborated—Evidence Act, S. 133.

A statement of an approver and a retracted confession of an accused cannot be made the basis of conviction of a co-accused unless they are corroborated sufficiently by material evidence against him: *A. I. R.* 1929 *Oudh* 167 and *A. I. R.* 1932 *Oudh* 11, *Foll.* [P 319 C 1]

(b) Penal Code (1860), S. 391—Evidence as to identification must be looked at with caution.

In dacoity cases evidence adduced as to identification of dacoits ought not to be accepted too readily, but should be looked at with great caution: 39 *I. C.* 296 *Foll.* [P 319 C 2]

(c) Criminal P. C. (1898), S. 417—Appellate Court ought not to set aside acquittal unless judgment of lower Court is manifestly wrong.

In an appeal from acquittal, as in a trial, the accused must be presumed to be innocent until the charge against him is established, and he is entitled to any reasonable doubt that may exist as to his guilt. In addition he is entitled to the benefit of the opinion of the trial Court as to the credibility of the witnesses and is entitled to ask the appellate Court not to set aside the acquittal unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion. It is not the practice of the High Courts to interfere in an appeal from acquittal unless the judgment of the Court below is manifestly wrong: *A. I. R.* 1922 *P. C.* 39; *A. I. R.* 1929 *Pat.* 491; *A. I. R.* 1931 *Oudh* 116 and *other cases relied on.* [P 320 C 1, 2]

(d) Evidence Act (1872), S. 133—Accomplice—Testimony of—Corroboration necessary.

The corroboration necessary in order to give effect to the testimony of an accomplice against an accused person must be with regard to circumstances showing that the particular accused was connected with the crime: *A. I. R.* 1932 *Oudh* 11, *Foll.* [P 321 C 1]

H. K. Ghose—for the Crown.

R. F. Bahadurji and *M. N. Telha*—for Accused.

Judgment.—Six persons were committed to the Court of Sessions at Hardoi for trial in respect of an offence of dacoity alleged to have been committed at the house of Hira Chamar in village Narahaiya, a hamlet of Bhogiyapur, District Hardoi, on the night between 28th and 29th November 1930. The learned Additional Sessions Judge by his judgment dated 13th July 1931, acquitted four of the accused, namely, Maqbul Ahmad Khan, Sheo Ram, Hulas and Mumtaz, and convicted the other two, Jaswant and Bashir, under S. 395, I.P.C. and sentenced each of them to rigorous imprisonment for four years. Bashir and Jaswant have appealed against their convictions and sentences and their appeals are Nos. 214 and 246 of 1931 respectively. The Government has also appealed against the acquittal of Maqbul Ahmad Khan and Sheo Ram and this appeal has been registered as Appeal No. 295 of 1931. The case for the prosecution is that the six persons who were committed to the Court of Session together with five others, Ram Dayal, Ram Jas Singh, Rohan, Raghubar and Babu Lal participated in the dacoity. Two of them, Ram Dayal and Ram Jas Singh, were not sent up for trial for want of evidence; Rohan and Raghubar were discharged by the committing Magistrate.

The fifth man, Babu Lal, was made an approver.

The story told by the approver which substantially represents the case for the prosecution is that the eleven persons named above under the leadership of Maqbul Ahmad Khan conspired to commit dacoities; that on the morning of 28th November 1930 in obedience to a message received from Maqbul, Babu Lal came to Hardoi. Maqbul met him at the motor stand with a single barrel breach loading gun in his hand and told him to go to the railway station as all the comrades had gone there. He met Mumtaz in the railway bazar and went with him to the waiting room where they met Rohan Bashir and Raghubar, Hulas, Sheo Ram and Maqbul with some companions whose names he did not know also arrived there some time later. Hulas and Sheo Ram stayed back promising to come in the evening; the rest of them purchased tickets for Todarpur. They met Bija, P. W. 37, at the railway station and Gaya Singh P. W. 35 and Niaz Ali Khan, P. W. 40, in the train. They got down at Todarpur before midday. The party broke up into batches of two and three and sat in differant places in the locality up to 8 p. m. when Jaswant, Havaldar and Ram Dayal came there with food. Sheo Ram and Hulas arrived later by the 9 p. m. train when all of them took their dinner close to a canal bridge. Then they left the place for Narhaiya which was at a distance of ten miles from there. They walked by the side of the canal and reached Narahaiya after midnight.

They put their superfluous luggage under a neem tree and went to the house of Hira where the dacoity was to be committed. At first Hulas got on the wall of a cattle shed and from there he climbed the north-eastern wall of Hira's house. He got down inside the house and opened the door which was towards the south. Maqbul and his companion whose name Babu Lal did not know remained at the outer door of the house; the remaining persons went inside the house. A lantern was hanging in a chappar. Raghubar lighted it and gave it to Babu Lal to hold. Raghubar, Hawaldar and Maqbul's companion entered the kothri in the house where they found a wicker basket containing some clothes and a small bundle of ornaments. Raghubar handed it over to the companion of Maqbul. When they were inside the house a man with a lathi attacked Hawaldar, but he was soon levelled to the ground by Bashir and Mumtaz. Maqbul fired his gun several times as the villagers had begun to gather and were preparing to attack. Then they decamped and reached the neem tree where they picked up the clothes they had left there. They found one of their companions, Jaswant, missing. He had been caught by Baldeo, P. W. 26 and Tilak, P. W. 27. They found it unsafe to make any attempt to rescue Jaswant; therefore leaving him behind the rest of the party made good their escape to Todarpur. At Todarpur Ramdayal, Hulas and Hawaldar branched off towards their houses from the canal turning; the rest of them went to Todarpur Railway Station and early in the morning boarded a train for Hardoi. On reaching Hardoi they separated at the railway station. On the 29th November Hira made a report of the armed dacoity committed in his house, at the police station of Pihani. In this report it was stated that the shots fired by one of the dacoits had wounded Tilak and Balao Chamars. The complainant also handed into the custody of the police Jaswant whom they had succeeded in capturing. Jaswant made a confession, Ex. 14, which was recorded by a Magistrate on 2nd December 1930. Babu Lal was arrested on 6th December 1930. He made a confession Ex. 10, which was recorded in jail on 9th December 1930. He was subsequently made an approver and granted a conditional pardon on his speaking the entire truth. Sheo Ram was arrested on 8th December 1930. He also made a confession Ex. 15, which was recorded by a Magistrate on 11th December 1930. Maqbul was arrested on 5th December and Bashir on 6th December 1930.

The learned counsel for the accused have not disputed before us that a dacoity did really take place as set up by the prosecution. We need not therefore refer to the evidence which establishes beyond all doubt the factum of dacoity. The only question in controversy in the appeals before us is as regards the identity of persons who participated in the crime. We will now deal with each of the three appeals in the order of their numbers.

Criminal Appeal No. 214 *of* 1931.—This is an appeal by Jaswant who was arrested on the spot. He admitted that he was caught on the spot at the time of the dacoity but pleaded that he had nothing to do with it and was on his way to village Manjihya; that he was mistaken as one of the dacoits and was caught by the villagers. He has not examined any witness in support of his defence. The evidence of Hira, P. W. 23, Baldeo P. W. 26, Tilak, P. W. 27, Chaturi, P. W. 28 and Jeorkhan, P. W. 29, establish beyond the shadow of a doubt that he was one of the party of dacoits. He also made a confession (Ex. 14), which though it has been found to be false in some particulars, is effective against him. His counsel pointed out that he was 50 years old and that he had no lathi in his hand when he was caught in the house. We are unable to draw any inference about his innocence from either of these facts. He also appealed to us for reduction of sentence but in our opinion the sentence of four years inflicted by the lower Court is not by any means excessive. This appeal must therefore fail.

Criminal Appeal No. 246 *of* 1931.—The case against Bashir, who is the appellant in this appeal rests on the confessions of Babu Lal, approver and Sheo Ram. The confession made by Sheo Ram was retracted before the committing Magistrate. It is not disputed that the statement of the approver or the retracted confession of Sheo Ram cannot be made the basis of conviction unless they are corroborated sufficiently by material evidence against the co-accused: see *Sheo Ratan* v. *Emperor* (1) and *Jai Singh* v. *Emperor* (2). The corroboration relied upon by the lower Court consists of the fact of the appellant Bashir having been identified by Hira, P. W. 23 and Chaturi, P. W. 28, in jail, before the committing Magistrate and before the Court of Session. Hira claims to have seen him in the house when the dacoity was being committed and Chaturi says he saw him running away from the distance of two or four paces. Admittedly there was no moon at the time when the dacoity was committed. It is also admitted that Bashir has prominent marks of leucoderma on his hands and legs. No doubt when the identification was carried out in jail, the Magistrate who conducted the proceedings took the precaution of getting Bashir and the other persons to cover up their legs but it is not suggested that the hands were also covered up. It may be noted that Hira when he made the report did not mention that he had recognized any of the dacoits. This report shows that he himself did not recognize any of the dacoits on that occasion. In dacoity cases evidence adduced as to identification of dacoits ought not to be accepted too readily, but should be looked at with great caution: see *Kallu* v. *Emperor* (3).

Taking all the circumstances into consideration we are of opinion that the identification made by Hira and Chaturi is of little value. All the four assessors were unanimous in holding that Bashir was not guilty. We think that this verdict is correct. This appeal must therefore be allowed.

Appeal No. 295 *of* 1931.—This is the Government appeal against the acquittal of Maqbul Ahmad Khan and Sheo Ram. Before we discuss the evidence against each of these persons, it will be convenient to consider the grounds which would justify interference by us in such a case. In most of the civilized countries a verdict of acquittal once given in favour of an accused is final. But in this country S. 417, Criminal P. C., allows an appeal against an order of acquittal passed by any Court other than a High Court. However such an appeal can be entertained only at the instance of the Local Government. The object clearly is to prevent private persons from questioning orders of acquittal from personal motives. The restriction of the right of appeal to the Local Government is intended to insure that motions for such appeals should be made only when there has been a grave miscarriage of justice. But the Code does not lay down any special rules for dealing with such appeals. So far as the Statute law goes, it makes no distinction between a Government appeal from an acquittal and a convict's appeal against his conviction. Yet the High Courts in this country, in view of well-recognized principles of criminal jurisprudence have always insisted that the Public Prosecutor must make out strong and cogent

(1) A. I. R. 1929 Oudh 167=114 I. C. 771=30 Cr. L. J. 360.
(2) A. I. R. 1932 Oudh 11=1932 Cr. C. 43=136 I. C. 321=33 Cr. L. J. 287.
(3) [1917] 18 Cr. L. J. 456=39 I. C. 296.

grounds to justify interference with a judgment of acquittal. One of the cardinal principles of criminal law is that an accused is presumed to be innocent until his guilt is established. If there is any room for reasonable doubt, the accused must have the benefit of it. It is also a well-established principle which has been frequently applied both in civil and criminal cases that on questions of fact the trial Court which has the opportunity of seeing the witnesses is in a much better position to judge of their veracity than Court of appeal and the appellate Court should therefore be slow to differ from the opinion of the trial Judge as regards the value of their testimony unless there are good grounds for it. Similarly there is the principle applicable as much to criminal as to civil appeals that the burden of showing that the judgment appealed from is wrong lies upon the appellants.

"If all he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the other being right, he has not succeeded (*Nabakishore Mandal* v. *Upendra Kishore Mandal* (4)."

The position therefore is considerably stronger in favour of the accused when he has succeeded in obtaining a verdict of acquittal in his favour from the trial Court. The onus lies very heavily on the appellant to show that the judgment of the lower Court is manifestly wrong or unreasonable. In *Empress of India* v. *Gayadin* (5), which was referred to with approval in a later decision of the same Court in *Queen-Empress* v. *Robinson* (6) their Lordships of the Allahabad High Court went the length of observing as follows:

"The powers given to the Local Government by S. 272, Criminal P. C. (Act 10 of 1872 which corresponds to S. 417 of the present Code) are of an exceptional and unusual character; and while we fully recognize the necessity for their existence in this country, we are equally clear that they should be most sparingly enforced; and in respect of pure decisions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice. It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide and has acquitted accused persons, that an appeal from his decision must necessarily prevail or that this Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by S. 272. The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once, to the administration of justice and the interests of the public."

In *King-Emperor* v. *Deboo Singh* (7) a Bench of the Patna High Court held that in an appeal from an acquittal, as in the case of an appeal from a conviction, the appellant is entitled to invite the appellate Court to take a view of the facts different from that taken by the trial Court, but in an appeal from an acquittal, as in a trial, the accused person must be presumed to be innocent until the charge against him is established and he is entitled to any reasonable doubt that may exist as to his guilt. In addition he is entitled to the benefit of the opinion of the trial Court as to the credibility of the witnesses and is entitled to ask the appellate Court not to set aside the acquittal unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion. The matter was also considered by a Bench of this Court to which one of us was a party: *Ghafoor Khan* v. *Emperor* (8). The following remarks made in that case are in point:

Lastly we have to consider the fact that it is not the practice of this Court to interfere with an order of a quittal unless the judgment of the Court below is manifestly wrong. We need not go so far as some of the rulings which have discussed this point, notably that reported in *Empress of India* v. *Gayadin* (5) which would confine all cases of decision on the facts in which the Court should interfere to those where through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice. We would merely say that in such cases this Court is loath to interfere and will only do so if it is proved without any doubt not only that the accused person is guilty but that he has been acquitted on unreasonable grounds."

We must adhere to the practice referred to above and adopt it as our guide in determining the present appeal.

Maqbul Ahmad Khan:

He is a resident of Mallawan and a member of the notified area committee of that place. His brother is also an Honorary Magistrate. The principal evidence relied upon against him consists of the confessions of Babu Lal, Sheo

(4) A. I. R. 1922 P. C. 39=65 I. C. 305.
(5) [1881] 4 All. 148=(1881) A. W. N. 159.
(6) [1894] 16 All. 212.
(7) A. I. R. 1929 Pat. 491=31 Cr. L. J. 148=8 Pat. 496=120 I. C. 643.
(8) A. I. R. 1931 Oudh 116=1931 Cr. C. 276=131 I. C. 436=32 Cr. L. J. 694.

Ram and Jaswant. We agree with the learned Additional Sessions Judge that the confession of Jaswant is valueless as against him. He does not mention him by name. All that he says

"is that amongst the party of dacoits were three persons of Mallawan; of these one Mahomedan was a stout fellow who had a gun."

The learned Additional Sessions Judge has observed that Maqbul, far from being stout, is just the opposite. When the identification parade was held in jail, Jaswant was unable to identify Maqbul. We must therefore reject this evidence.

Then there remain the retracted confession of Sheo Ram and the statement of the approver, Babu Lal. A Bench of this Court recently held in *Jai Singh* v. *Emperor* (2) that the corroboration necessary in order to give effect to the testimony of an accomplice against an accused person must be with regard to circumstances showing that the particular accused was connected with the crime. We have therefore to see whether such corroboration is available in this case. (Their Lordships then discussed the evidence and proceeded as follows.) We are of opinion that the Government Advocate has failed to satisfy us that the order of the lower Court acquitting the two accused Maqbul and Sheo Ram is manifestly wrong or that the grounds on which it has based its order of acquittal are unreasonable.

The result therefore is that appeal No. 214 is allowed, the conviction and sentence of Bashir are set aside and he is ordered to be set at liberty at once. Appeal No. 146 fails and the conviction and sentence passed against Jaswant are upheld. The Government Appeal No. 295 is dismissed and the order of acquittal in favour of Maqbul and Sheo Ram is maintained. They will be released at once.

R.M./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 321

RAZA AND SRIVASTAVA, JJ.

Musaheb Ali and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 18 of 1932, Decided on 13th February 1932.

Criminal P. C. (1898), S. 164—Magistrate before recording confession taking every precaution to protect accused's interest—Accused making deliberate confession — Such confession though subsequently retracted is in absence of proof that it was forced, admissible in evidence and can be acted upon and so far as accused making the same is concerned is sufficient for his conviction — Murder case—Confession made deliberately adding to knowledge available as to cause of death and not contradicted by anything shown in evidence — Accused can be convicted on the basis of his own confession alone — Retracted confessien alone of accused is not sufficient to justify conviction of co-accused—Such confession standing unrebutted — Accused not having any reasons for falsely naming other men— His story fitting in with facts known and corroborated sufficiently by material evidence against co-accused — Such evidence is strong piece of evidence against co-accused — Penal Code (1860), S. 302—Evidence Act, Ss. 27 and 30.

Where a Magistrate before recording the confession of an accused takes every precaution to protect his interest, namely, gives him time to think over what he was going to do, warns him against the risk that he was going to incur in making a confession and obtains from him a clear statement that he had not been put in fear or received any inducement, and then the accused makes a deliberate confession of the crime, the confession, though subsequently retracted, is, in the absence of proof that it was forced out of the accused by torture, or of a satisfactory explanation as to how he came to make it, if he was not guilty, admissible in evidence. A man of sound mind and full age who makes a confession in ordinary simple language must be bound by the language of the statement and by its ordinary plain meaning. The retracted confession of an accused person, if true, is sufficient for the conviction of the accused even if there is no corroborative evidence; and when in a murder case a confession made by one of the accused is not one of those which can be considered to have been tutored or made under the influence of drugs or fear and is a confession which adds to the knowledge which is available as to the cause of death in many particulars and has not been contradicted by anything which is shown in the evidence, the Court is justified in convicting the accused on the basis of his own confession alone. Retracted confession alone of an accused is not sufficient to justify a conviction of a co-accused but where such confession stands unrebutted and there is nothing to show that the accused had any reasons for naming other men falsely and his story fits in exactly with the facts known and is corroborated sufficiently by material evidence against the co accused, the evidence is admissible and is a strong piece of evidence against the co-accused. The corroboration need not be direct evidence that the accused committed the crime: it is sufficient if it is merely circumstantial evidence of his connexion with the crime: *A. I. R.* 1927 *Oudh* 17; *A. I. R.* 1929 *Oudh* 167 and *A. I. R.* 1927 *Oudh* 369, *Rel. on.* [P 323 C 1, 2]

H. N. Das—for Appellants.

S. C. Das for *H. K. Ghosh* — for the Crown.

Judgment.—Six persons, namely (1) Jamadar Dafali aged 23, (2) Musaheb Ali Pathan aged 30; (3) Tirbeni Brahaman aged 25, (4) Goley Kahar aged 24, (5)

Bhagwati Muraoo aged 25 and (6) Chhail Behari (alias Chhailay) Dhobi aged 26, of village Garhi in the District of Bahraich have been convicted by the learned Additional Sessions Judge of Bahraich of an offence of murder under S. 302, I. P. C., and sentenced to death subject to confirmation by this Court. They appeal. The reference in confirmation is also before us. The charge against them was that they murdered Mt. Phulkora on the night of 4th and 5th July 1931 at a place outside the abadi of the village Garhi. Mt. Phulkora, who was related to Mt. Mohra (wife of Behari Pasi) and Mt. Soharta (wife of Ram Lal Pasi) was the daughter of Debi Pasi of Garhi. She was a young girl of 17 or 18 and was married to Chhedi Pasi of village, Bilas, some years ago. The gauna ceremony was performed about two years ago and then she went to her husband's house. However she used to visit her father's house every now and then. The village Bilas is some four miles only from the village Garhi. Her father Debi brought her to his house the last time in the first week of June 1931, and thus she was living at Garhi at the time of the occurrence.

The evidence on the record shows that the six accused named above were carrying on love intrigues with the three Pasi girls, namely Mt. Phulkora, Mt. Mohra and Mt. Soharta. At first Jamadar accused contracted an illicit connexion with Mt. Phulkora, Musaheb Ali, accused, with Mt. Mohra, and Chhail Behari accused with Mt. Soharta ; but subsequently the three girls became the common property of all the six accused who were friends and associates. They used to meet and enjoy themselves at a tank called Dharamdaswa Tal outside the abadi of village Garhi. Some 12 or 13 days before the occurrence Jamadar accused invited all the three girls to the Dharamdaswa Tal. Mt. Mohra and Mt. Soharta went there, but Mt. Phulkora did not go for some reason or other. The two girls met all the six accused there on that occasion. On 4th July 1931, the six accused and the three girls went to the "jabda" (lowlying land) to scrape grass there in the afternoon. One Besheshar Teli was also scraping grass there. Mt. Mohra and Mt. Soharta scraped grass near the six accused while Mt. Phulkora went near Bisheshar Teli. She laughed and addressed Bisheshar in a tone which showed her undue familiarity with him. Jamadar accused then gave vent to his suspicion that Mt. Phulkora had contracted an illicit connexion with Besheshar and so she had not come to the accused when called on the previous occasion (i. e. 12 or 13 days before the occurrence).

He said to Mt. Mohra on that occasion that Mt. Phulkora must be killed. On return from Jabda at dusk Mt. Mohra and Mt. Soharta went home with the six accused while Mt. Phulkora went home with Bisheshar Teli. Bhagwati accused went to Mt. Mohra a few "gharis" after nightfall and told her that the three girls should come to Dharamdaswa Tal where they would find all the six accused. The three girls accordingly went there and found the six accused present. Jamadar accused then caught hold of Mt. Phulkora's hand and walked away telling the other girls to wait there till they were called. The other five accused also went with Jamadar accused. All of them came back after an hour or so but Mt. Phulkora was not with them. Jamadar told Mt. Mohra and Mt. Soharta that they should run away. Mt. Mohra questioned Jamadar about Mt. Phulkora and received the reply that Mt. Phulkora had become badmash (dissolute) and so she was killed and thrown away. Mt. Mohra and Mt. Soharta left the place in fright at once. On the third day Mt. Mohra and Mt. Soharta and all the six accused met at the Dharamdaswa Tal again at night. The six accused had sexual intercourse with the two girls on that occasion. On their way back home, Mt. Mohra asked Jamadar as to what he had done with Phulkora's ornaments after killing her. Jamadar replied that the ornaments were at his house and that he would give the ornaments to her and Mt. Soharta when the 'troubles' would be over. One Goley Pasi discovered the corpse of Mt. Phulkora on 7th July near a pool. Vultures and wild animals had eaten up almost all the flesh. The 'lenhga' was on the skeleton and the 'orhni' and the shirt were lying by it. Some 'churis' and one bangle of bellmetal (phul) were also lying near the corpse and one bangle was found near the leg. Debi Pasi went there and identified the corpse to be that of his daughter Mt. Phulkora. He then proceeded to the Bhinga police station and made the report

Ex. 2 there on 7th July at about 9 p. m. Bhinga is some ten miles from Garhi. (After refering to the police investigation the confession of Jamadar and evidence regarding corroboration, the judgment proceeded). A number of decisions of this Court have laid down the principles on which a case of this nature should be approached.

In *Raj Bahadur Singh* v. *Emperor* (1), it was held that where a Magistrate before recording the confession of an accused takes every precaution to protect his interest, namely gives him to think over what he was going to do, warns him against the risk that he was going to incur in making a confession and obtains from him a clear statement that he had not been put in fear or received any in. ducement, and then the accused makes a deliberate confession of the crime, the confession, though subsequently retracted is in the absence of proof that it was forced out of the accused by torture, or of a satisfactory explanation as to how he came to make it, if he was not guilty, admissible in evidence. A man of sound mind and full age who makes a confession in ordinary simple language must be bound by the language of the statement and by its ordinary plain meaning. In *Sheoratan* v. *Emperor* (2) it was laid down that the retracted confession of an accused person if true is sufficient for the conviction of the accused even if there is no corroborative evidence and when in a murder case a confession made by one of the accused is not one of those which can be considered to have been tutored or made under the influence of drugs or fear and is a confession which adds to the knowledge which is available as to the cause of death in many particulars and has not been contradicted by anything which is shown in the evidence, the Court is justified in convicting the accused on the basis of his own confession alone. Retracted confessions alone of an accused is not sufficient to justify a conviction of a co-accused but where such confession stands unrebutted and there is nothing to show that the accused had any reasons for naming other men falsely and his story fits in exactly with the facts known and is corroborated sufficiently by material evidence against the co-accused, the evidence is admissible and is a strong piece of evidence against the co-accused. In our opinion the confession of Jamadar is corroborated sufficiently against the other accused by the evidence of Mt. Mohra and Mt. Soharta. It should also be borne in mind that the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime: see *Ram Prasad* v. *Emperor* (3).

Having considered the whole evidence on the record and all the facts and circumstances of the case we are of opinion that the learned Additional Sessions Judge was perfectly right in convicting all the six accused named above under S. 302, I. P. C. We are satisfied that all of them were concerned in the crime. Now as to the sentence: Jamadar is certainly guilty of a cruel, callous and cold-blooded murder. The evidence on the record shows that he was the prime mover in the affair. There are no extenuating circumstances so far as he is concerned. He richly deserves the extreme penalty and has been rightly sentenced to death. It appears that the other five accused had acted under the influence of Jamadar. They had participated in the commission of the crime but it is not clear what part each of them had taken in the murder. We think the ends of justice will be met by imposing on them the lesser of the two sentences allowed by the law. The result is that we dismiss the appeal of Jamadar accused, uphold his conviction, confirm his sentence and direct that he be hanged by the neck till he is dead. We allow the appeal of Musaheb Ali, Tirbeni, Goley, Bhagwati and Chhail Behari accused to this extent only: that we sentence them each to transportation for life.

P.N./R.K. *Order accordingly.*

(1) A. I. R. 1927 Oudh 17=27 Cr. L. J. 1258=98 I. C. 106.

(2) A. I. R. 1929 Oudh 167=114 I. C. 771=30 Cr. L. J. 360.

(3) A. I. R. 1927 Oudh 369=106 I. C. 721=2 Luck. 631.

A. I. R. 1932 Oudh 324

RAZA AND KISCH, JJ.

Hawaldar Singh—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 437 of 1931, Decided on 15th January 1932.

Criminal Trial — Circumstantial evidence must point unmistakably to the point sought to be proved — Little weight should be attached to extra-judicial confession — Suspicion however great is not sufficient — Evidence Act (1872), S. 24.

In cases based on circumstantial evidence, that evidence should be so strong as to point unmistakably to the guilt of the accused, that in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of their guilt. Little importance should be attached to an extra-judicial confession often found to bolster up the circumstantial evidence on which a case depends. The Court's decision should not however rest upon suspicion and that the gravest suspicion against the accused will not suffice to convict them of a crime unless evidence establishes it beyond doubt.

(P 325 C 2; P 326 C 1)

Ghulam Hasan—for Appellants.

H. K. Ghose—for the Crown.

Judgment.—Hawaldar Singh, son of Matadin Singh, aged 25, and Amaldar Singh, son of Gogan Singh, aged 24, have been convicted by the learned Additional Sessions Judge of Bahraich, of an offence of murder, under S. 302, I. P. C., and sentenced to death subject to confirmation by this Court. They appeal. The reference in confirmation is also before us. The charge against these men was that they murdered Nakched Sah of Bahraich in their village Tindwa (or Terwa), Basantpur, on 29th March 1931. That village is some four miles from the Bahraich police station in the Qaisarganj Tahsil. Amaldar Singh and Hawaldar Singh are cousins. Hawaldar Singh is the nephew of Chandu Singh. Amaldar Singh has a widowed sister, Mt. Munni.

The prosecution case may be summed up as follows:

Nakched Sah of Bahraich had money dealings with the members of the family to which the accused belong. He had twice attached and sold the properties of the accused Ajaldar Singh and his uncle Bal Singh, in execution of his decree or decrees against them, some months before the occurrence. He was also carrying on an intrigue with Mt. Munni, the sister of Amaldar Singh, accused, and a cousin sister of Hawaldar Singh, accused. On 29th March 1931 (Sunday), Nakched Sah went to the house of one Adhin Kahar of Himarya to execute a warrant of attachment against him and got some property attached in execution of a decree. He then proceeded on his bicycle to Terwa Basantpur which is about a mile from Himarya. He was seen near Bal Singh's house at about noon. Since then he has not been heard of. His younger brother, Bhusaili, had gone to Nepalganj. Bhusaili came back after three days and learnt from his mother that Nakched Sah had not returned home. He went to Himarya and Terwa Basantpur and learnt that Nakched Sah had visited Terwa Basantpur on 29th March 1931. No further trace of Nakched Sah could be found. Bhusaili then made the report, Ex. 3, at the Bahraich police station on 1st April 1931 at 5 p. m., about the disappearance of his brother Nakched Sah. Bhusaili gave in his report a description of the dress which Nakched Sah had on his person at the time he had left his house on a bicycle.

A description of the bicycle also was given in the report. The police investigation started without any unnecessary delay. The house of Bal Singh and the river Sarju and the pools near by were searched, but nothing suspicious could be found by the police. The second officer of the Bahraich police station stayed on at Terwa for about a week. A few days after 29th March 1931, Ashirbadi of Kirtanpur was directed by his master, Chandu Singh uncle of Hawaldar Singh, accused, to plough a field at the distance of about two furlongs from the houses of Bal Singh and Chandu Singh. Ashirbadi noticed blood in the field but the field was ploughed up that day. On or about the 6th or 7th April, Ashirbadi spoke of the blood stains to Ram Autar, mukhia of Terwa Basantpur. The mukhia gave the information of the fact to the police. The Police Inspector, Mathura Singh proceeded to Kirtanpur at once. He then proceeded to the field where blood had been noticed taking Ashirbadi with him. Some clods of earth stained with blood and some pieces of bones and splinters of wood were recovered from the field. These things were sent to the Chemical Examiner and then to the Imperial Serologist and it was

found that the clods of earth and the pieces of wood were stained with human blood. Amaldar Singh was arrested on the 8th April and Hawaldar Singh on 9th April 1931. They were sent to the jail lock-up at Bahraich. One Shambhu Dat, Brahman of Jaiswara, was in jail in those days. He had been convicted under Ss. 325, 147 and 452, I. P. C., and sentenced to six months' rigorous imprisonment in November 1930. In the case in which he was convicted he was also required to execute a bond for Rs. 250 with two sureties to keep the peace for a period of one year from the date of his release. The term was to expire on 1st May 1931. His license for a gun had been revoked and he had also been dismissed from mukhiaship after his conviction. It was Fazl-ul-Rahman, the station officer of Payagpur, who had got his license revoked and had also got him dismissed from mukhiaship. Shambhu Dat met the accused in jail on or about 10th or 11th April 1931 and learnt from them that they had murdered Nakched Sah. He was released on 1st May 1931, some 20 days after the accused had made the confession to him. He happened to meet Fazl-ul-Rahman, thanedar of Payagpur, in the Zila Court on 2nd June 1931.

In the course of conversation which he had with the thanedar on that occasion he spoke to him of the confession made by the accused before him in the Bahraich jail. Having given the information to the thanedar, he left the place and went to a village in the District of Lakhimpur. He returned home after twenty or twenty-five days and then the chaukidar took him to the Payagpur thana. The thanedar (Fazl-ul-Rahman) asked him to give the information about the confession to the Police Inspector. He agreed to do so and then the thanedar took him to Bahraich to see the Inspector. He gave the necessary information to the Inspector and also to the Superintendent of Police. He was then taken by the Inspector to Mr. Mujib-ul-Hasan, Sub-divisional officer of Qaisarganj. His statement was recorded by the subdivisional officer on 27th June 1931. In that statement he spoke of the confession made by the accused giving the place of occurrence and the place where the dead body of Nakched Sah, which had been cut to pieces and his bicycle which had been broken into pieces had been sunk in or buried in a bend of the Sarju river known as Kunja Kone. That place is some 2½ miles from Terwa Basantpur. The subdivisional officer took him to that place. Some men were called and sent into the river and then a broken cycle and a human skull were recovered. The skull was sent to the medical officer for examination and it was found to be the skull of an adult male. The bicycle was also identified to be the bicycle of Nakched Sah. The accused were then sent up for trial.

The evidence on which the case for the prosecution rests consists of the extra-judicial confession of the accused mentioned above, and the following circumstances:

(1) The accused had grudge against Nakched Sah as the latter had twice attached the properties of Bal Singh and Amaldar Singh in execution of his decrees some months before the occurrence and had also contracted an illicit connexion with Mt. Munni, the sister of Amaldar Singh, accused, (2) Nakched Sah was last seen in the village Terwa Basantpur near the houses of the accused on Sunday, 29th March 1931. (3) Clods of earth stained with blood were found in the field of Chandu Singh, the uncle of Hawaldar Singh, accused. (4) The skull of an adult male and the pieces of Nakched Sah's broken bicycle were recovered from Kunja Kone, the place named by the accused in their confession to Shambhu Dat in the Bahraich jail.

It is common ground that the alleged confession is the backbone of the case against the accused. If the confession in question is accepted as true, the accused may be convicted on that confession alone and the circumstances mentioned above may be left out of consideration. If the confession is rejected, then the accused cannot be safely convicted on the circumstantial evidence mentioned above. The circumstances mentioned above (taken singly or collectively) are insufficient to bring the charge home to the accused. In cases based on circumstantial evidence that evidence should be so strong as to point unmistakeably to the guilt of the accused. The fundamental rule by which the effect of the circumstantial evidence is to be estimated is well established. In order to justify the inference of guilt the in-

culpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of their guilt. Thus the most important evidence in this case is the extra judicial confession mentioned above, and if that confession is rejected the remaining evidence is entirely insufficient to sustain a conviction. (The judgment considered the evidence regarding the extra judicial confession and proceeded). When his evidence is rejected the alleged confession also must be rejected. As pointed out by Maclean, C. J., in the case of *Nazir Jharudar* v. *Emperor* (1):

"as has often been said, where the case is dependent upon circumstancial evidence we often find a confession to bolster up that circumstantial evidence."

Little if any importance should be attached to an extra-judicial confession often found to bolster up the circumstantial evidence on which a case depends. We think the confession before us is a confession of that very kind. After rejecting the confession in question we find that the circumstantial evidence mentioned above is entirely insufficient to sustain a conviction. However we would say something about the circumstantial evidence also. (Their Lordships then considered the circumstances and concluded). In our opinion the charge is not made out against the accused in this case. We agree with the assessors and disagree with the learned Additional Sessions Judge in acquitting the accused. The Court's decision should not rest upon suspicion. The gravest suspicion against the accused will not suffice to convict them of a crime unless evidence establishes it beyond doubt. The result is that we allow this appeal and setting aside the convictions and sentences direct that Hawaldar Singh and Amaldar Singh, appellants be acquitted and released.

W.D./R.K. *Appeal allowed.*

(1) [1905] 9 C. W. N. 474=2 Cr. L. J. 255.

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* A. I. R. 1932 Oudh 326

WAZIR HASAN, C. J. AND RAZA, J.

Har Charan Seth--Applicant.

v.

Md. Azizullah—Opposite Party.

Civil Revn. No. 99 of 1931, Decided on 26th September 1932.

*** (a) Civil P. C. (1908), O. 5, Rr. 9 and 27 —Defendant public officer — Service under R. 27 is discretionary — Discretion is not taken away by Oudh Civil Rules, R. 138.**

The general rule as regards the service of summons on a defendant is R. 9, O. 5 and R. 27 invests the Court with a discretion to effect service of the summons on a public servant in the manner provided by that rule. The exercise of the discretion is directed to be made on a balance of convenience and R. 138, Oudh Civil Rules has not the effect of taking away this discretionary power from the Court: 1 *I. C.* 163, *Dist.* [P 327 C 1]

(b) Civil P. C. (1908), O. 5, R. 19—Scope.

The declaration required by R. 19 is implicit in the circumstances attending the service of the summons on its return to the Court which had issued it. [P 327 C 1]

(c) Civil P. C. (1908), O. 5, R. 19—Scope

Where there is a verification by the affidavit of the serving officer, the examination of the serving officer is a matter of discretion with the Court. [P 327 C 1,2]

(d) Limitation Act (1908), Art. 164—Due service—Limitation starts from decree.

Where the summons is duly served, the starting point of limitation under Cl. 3, Art. 164, is the date of the decree. [P 327 C 2]

B. K. Dhaon—for Applicant.

Gulam Hasan—for Opposite Party.

Order.—This is an application under S. 25, Provincial Small Cause Courts Act, 1887, against the order of the Judge of the Small Cause Court, Lucknow, dated 21st November 1931. The order in question is an order under which an application praying for setting aside an ex parte decree dated 7th May 1931 was rejected. The applicant was the defendant in the suit in which the ex parte decree was passed in favour of the plaintiff of that suit for a sum of Rs. 579-12-0. In support of the present application three points were urged before us by the learned counsel for the applicant: (1) that the defendant being in the service of the East Indian Railway administration and thus a public servant the service of summons should have been made on him through the head of the office in which he is employed. In support of the contention provisions of R. 27, O. 5, Civil P. C., and of R. 138 of the Oudh Civil Rules were relied upon and a decision of the High Court at Allahabad in *Wazir Khan* v. *Naqui Yawar* (1) was cited. Now in this particular case it is found by the Court below that the service of the summons was actually made on the defendant personally though he refused to accept the delivery of the summons. The general rule as regards the service of summons

(1) [1909] 1 I. C. 163.

on a defendant is R. 9, O. 5, Civil P. C., and R. 27 invests the Court with a discretion to effect service of the summons on a public servant in the manner provided by that rule. The exercise of the discretion is directed to be made on a balance of convenience. R. 138, Oudh Civil Rules, has not the effect of taking away this discretionary power from the Court. Indeed it only lays down that a summons to a public servant

"shall ordinarily be sent to the head of the office in which he is employed."

We are satisfied that a personal and direct service of the summons on the defendant was more convenient and proper in the circumstances of the case. R. 140, Oudh Civil Rules, is another rule in subordination to R. 27, O. 5, Civil P. C., and that rule clearly prescribes the procedure of issuing a summons direct to a public servant. Rule 142 of the Oudh Civil Rules makes it perfectly clear that the special procedure with regard to the service of summons on a public servant through the head of the office in which is employed will not necessarily apply to a case where a public servant is summoned as a defendant. We have carefully read the judgment in the Allahabad case cited above and are of opinion that it is inapplicable to the facts of this case. The contention is therefore rejected. The second point urged in support of the application is that the provisions of O. 5, R. 19, Civil P. C., and of R. 120 of the Oudh Civil Rules are not complied with inasmuch as the Court charged with the service of the summons did not record a declaration that the summons had been duly served. We are of opinion that there is no substance in this argument. We think that the declaration required by R. 19 is implicit in the circumstances attending the service of the summons on its return to the Court which had issued it. Further the Court seised of the case clearly recorded in its first day's proceedings of the trial of the case "defendant sufficiently served." We accordingly reject this contention also. It was lastly contended that R. 19, O. 5, Civil P. C., has not been complied with also in the matter of the verification by an affidavit of the serving officer and his examination on oath. We think that this argument is also without any substance. As a matter of fact there is a verification by the affidavit of the serving officer and the examination of the serving officer is again a matter of discretion with the Court. In the circumstances of the case we are satisfied that the omission to examine the serving officer on oath has not resulted in any injustice to any of the parties in the case.

It may be noted that none of the points urged in this Court were urged in the lower Court in support of the application for setting aside the ex parte decree. The application was also resisted by the plaintiff on the ground of bar of limitation and the lower Court framed an issue in respect thereof but did not decide it. We are of opinion that the application is barred by limitation under Art. 164, Sch. 1, Lim. Act, 1908. The finding of the lower Court, with which we have agreed in the preceding portion of this judgment, is that the summons was duly served. The starting point of limitation under the third column of the said article is therefore the date of the decree. The decree was passed on 7th May 1931. The application to set aside the ex parte decree was made on 15th July 1931, more than 39 days after the expiry of the period of limitation prescribed by Col. 2 of the article. The application is therefore dismissed with costs.

R.K. *Application dismissed.*

A. I. R. 1932 Oudh 327

WAZIR HASAN, C. J. AND RAZA, J.

Rameshwar Bakhsh Singh and *others* —Defendants—Appellants.

v.

Balraj Kuar and *others*—Plaintiff and Defendants—Respondents.

First Appeal No 48 of 1931, Decided on 8th April 1932, against decree of Nanavutty, J., D/- 16th March 1931.

(a) Will—Construction—Will held to have devised absolute estate on devisee.

The properties in the will consisted both of talukdari and nontalukdari estates. The testator made the will, a portion of which was to the following effect: "At present I own and possess an estate in the Fyzabad District and in future after the death of my respected mother . . . the estates of Sultanpur, Jaunpur, and Azamgarh also will come into my possession and ownership: besides this any other estate . . . which . . . might be found to have been owned by me," After this description of the property and of his interest therein the testator said "in respect of all this property I make a will according to the conditions below in favour of my high placed wife Mt. Annapurna Kuar Saheba:"

Held: that in the above case in describing his own interest in the subject-matter of the devise the testator used the expression "I own and possess," "my possession and ownership" and "owned by me." Also that the testator made a devise not only of the properties described by him with reference to geographical situations but also of the same interest which he himself possessed in them in favour of his wife. That the words used by the testator in the will were of the greatest amplitude and would confer an absolute estate on the devisee: *A. I. R.* 1929 *P.C.* 282, *Ref.* [P 330 C 2]

(b) Will—Construction—Unless proved contrary, devisee gets whole interest of testator in property bequeathed.

Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him: *A. I. R.* 1929 *P. C.* 283, *Foll.* [P 331 C 1]

(c) Words and Phrases—"Ikrarnama".

The expression "Ikrarnama" literally means a deed of declaration. [P 331 C 1]

(d) Deed—Construction—Meaning doubtful—Man's own words should be taken to convey his own ideas.

It is a very good mode of construing an instrument to take a man's own words when the meaning appears doubtful; it is a good mode of getting at his meaning to see what he himself thought he had done: *Williamson* v. *Advocate-General of Scotland*, 8 *Eng. Rep.* 641, *Foll.* [P 331 C 2]

(e) Will—Construction—Interpretation of will doubtful—Codicil may be referred to, to interpret it.

Where interpretation of a will is doubtful the language of the will may be interpreted by that of the codicil. A codicil may be referred to in order to show the view which the testator himself took of the language used in his will: *Case law discussed.* [P 332 C 1]

(f) Will—Construction — Absolute estate is devised by words such as "Malik Mustaq".

Where a testator says that he has made his wife 'malik mustaqi' (permanent owner) and that she has and will have the same "ikhtiarat malikana" (proprietary powers) as the testator himself has, an absolute estate the same should be deemed to be conferred: *A. I. R.* 1922 *P. C.* 193 and 63, *Ref.* [P 332 C 1]

(g) Words and Phrases—"Imlak."

The word "Imlak" means "property owned". The words "landed property" do not fully convey its meaning in English. [P 332 C 1]

(h) Words and Phrases—"Rasnashin" and "Janashin"—Terms explained.

"Rasnashin" and "Janashin" are words of Persian language and though they are frequently used in documents written in the Indian Vernacular Urdu they retain the same meaning as they convey in Persian. The most appropriate equivalents in which they can be rendered for the purposes of the translation are "successor" and "locum tenens." [P 332 C 2]

(i) Deed—Construction—Gift for life with general power of appointment amounts to absolute gift.

A gift for life with a general power of appointment should be construed to amount to a gift of an absolute estate: *English case law referred* [P 333 C 2]

(j) Will—Construction—Devisee with general power of transfer and appointment—Devisee gets absolute estate.

Where a testator gives the devisee a general power of transfer and the liberty to appoint his or her successor the devisee gets an absolute estate. [P 333 C 2]

(k) Will—Succession—Law of inheritance applicable to devisee.

The law of inheritance applicable to a devisee has its course in spite of the wishes of the testator to the contrary: 1 *I. A. Sup. Vol.* 47; *A. I. R.* 1923 *P. C.* 160; *A. I. R.* 1929 *P. C.* 283, *Ref.* [P 334 C 1]

(l) Will—Testators in India often wish to restrict devolution of absolutely devised property.

Attempts on the part of a testator in India to restrict devolution of properties which he bequeathes to a legatee absolutely and preventing alienations of such properties are quite common. [P 334 C 1]

(m) Will—Construction — Absolute estate conferred—Gift over is void.

A gift over must be rejected as repugnant to an absolute estate conferred: *English cases referred.* [P 335 C 1]

(n) Gift—Gift over becomes void for uncertainty in subject-matter of gift.

A gift over becomes void for uncertainty in the subject-matter of the gift: *A. I. R.* 1922 *P. C.* 193 and *English cases referred.* [P 335 C 1]

Tej Bahadur Sapru, *A. P. Sen*, *M. H. Kidwai* and *L. N. Shukla*—for Appellants.

Ali Zaheer, *Ghulam Imam*, *Kanhaiya Lal*, *Ganpat Sahai*, *S. N. Srivastava* and *Bhagwati Nath*—for Respondents.

Judgment.—This is the appeal by defendants 1, 4 and 5 from the decree of our learned brother Nanavutty, J., sitting on the original side of this Court. The bulk of the property in suit is talukdari property and it is stated in Schs. A and C (i) of the schedules attached to the plaint. The property described in Sch. B is the property which the last male holder of the estate in question acquired and the property mentioned in Sch. D is the property which was acquired by the last holder of the estate, Mt. Annapurna Kuar. Schs. A and C (1) require some further elucidation. Under S. 8, Oudh Estates Act, 1869, six lists were prescribed to be prepared within six months after the passing of the Act. These lists were accordingly prepared and published under S. 9 of the Act. Under S. 10 of the same Act, persons mentioned in the lists were to be treated as talukdars or grantees as the case may be. In List 1 at No. 131 and again in List 3 at No. 47 the names of Babu Udres Singh and Babu Chandres Singh were jointly entered as talukdars

of the estate of Meopur Dhaurwa in the District of Fyzabad. At a subsequent period of time which is not known precisely the estate was divided between the two co-owners into the proportions of 1½ and 1. The larger portion went to the share of Babu Udres Singh as representing the senior and the smaller portion was allowed to Babu Chandres Singh as representing the junior line. The allotment in these proportions was, it is agreed, according to a family custom. In the present case we are not concerned with the question of succession in the junior line. In the senior line Indersen Singh, son of Udres Singh, was the last male holder of the 1½ shares of the estate. Babu Indersen Singh also acquired mostly by means of transfers large portions of another estate called Meopur Baragaon entered at No. 130 of List 1 and at No. 46 of List 3 of the lists prepared under S. 8 of the Act of 1869. This estate was originally owned by Babu Amres Singh, who was also a descendant of the same ancestor as Babu Udres Singh and Babu Chandres Singh. Sch. A attached to the plaint contains the villages of the estate of Meopur Dhaurwa which had fallen on partition to the share of Babu Udres Singh and Sch. C (1) comprises villages and shares of villages which Babu Indersen Singh had acquired out of the estate of Meopur Baragaon.

Bubu Indersen Singh died on 4th June 1918 and it is common ground that he was succeeded in the possession of the properties described in Schs. A, C (i) and B by his widow, Mt. Annapurna Kuar. Mt. Annapurna Kuar had a two-fold title to the estate of her husband: (1) as the senior surviving widow under Cl. (7), S. 22 of Act 1 of 1869, as it stood before the amendment made by the Local Legislature in the year 1910 (U. P. Act 3 of 1910) and (2) under the will of her husband dated 15th March 1899 (Ex. 4). The plaintiff, Thakurain Balraj Kuar, is the second widow of Babu Indersen Singh Thakurain Balraj Kuar was married to Babu Indersen Singh in or about the year 1909. Babu Indersen Singh had also left a daughter, Thakurain Brijraj Kuar surviving him born of Thakurain Jadunath Kuar, who had died in the year 1892. The defendants to this suit are the five sons of Thakurain Brijraj Kuar. Thakurain Balraj Kuar, the plaintiff has also a daughter, Thakurain Hemraj Kuar.

On 22nd November 1923 Mt. Annapurna Kuar executed a will (Ex. 3). There is no question in this case as to the nature of the devise contained in the will of 22nd November 1923. Admittedly Mt. Annapurna Kuar conferred a life estate on Thakurain Balraj Kuar in the whole of the estate in suit and on the determination of that estate a full and proprietary right in the same on Thakurain Brijraj Kuar the mother of the defendants and Thakurain Hemraj Kuar, the daughter of the plaintiff, in equal shares. Mt. Annapurna Kuar died on 11th June 1929. Controversy then arose in the Courts of Revenue between the plaintiff and the defendants as to the right of succession to the estate in suit and it centred on the interpretation of Indersen Singh's will dated 15th March 1899 and a document styled as ikrarnama (deed of declaration) executed by Indersen Singh on 29th September 1910. The Courts of Revenue held that under the dispositions made by Indersen Singh Mt. Annapurna Kuar had acquired a life estate only and that on the determination of that estate there was a gift over in favour of the defendants. The plaintiff Thakurain Balraj Kuar having been defeated in the Courts of Revenue has filed the suit, out of which this appeal arises.

On the question of the interpretation of the will of 15th March 1899 and the deed of declaration dated 29th September 1910 the learned trial Judge has held that Mt. Annapurna Kuar acquired an absolute estate in the subject-matter of the devise and that there was no gift over in favour of the defendants but even if there was it was invalid. On these findings the plaintiff's suit has been decreed. It will be seen from what has been stated above that if there is no gift or a valid gift in favour of the defendants and that even if Mt. Annapurna Kuar had only a life interest in the estate of her husband either under the will of 15th March 1899 or under the provisions of Cl. (7), S. 22, Oudh Estates Act 1869, the plaintiff has a title at law under Cl. (8) of the same section. The main question for decision in the appeal therefore is as to whether the interpretation placed by the learned trial Judge on Indersen Singh's will of 15th March 1899 is correct or not. We heard arguments

for several days on this question and took time to consider our judgment. We have come to the conclusion that the finding of the learned trial Judge should be affirmed.

Before we enter into the question of the interpretation of the will of 15th March 1899 we take leave to state that this will is made in a high flown Urdu language and it is agreed that Indersen Singh was well versed in it. The learned counsel, who appeared in the appeal before us on both sides, argued the question of the interpretation with reference to the original will and not its translation though the latter was looked into now and then with a view to discover whether it was correct or not in all respects. The learned counsel frequently appealed to us to bring to bear on this question our own knowledge of the language of the will. Obviously we could not but respond to that appeal. The Urdu language in which the will is made is the language of the testator. It is the language of the counsel of the parties and it so happens that it is the language of both of us. This litigation may however be carried further on appeal to their Lordships of the Judicial Committee. In this judgment therefore we would refer to the translation of the will incorporated in the judgment of the learned trial Judge, which was accepted to be correct for all practical purposes in that Court as well as before us : but we must, we think, state frankly that our own conclusions on the question of the interpretation of the will and the deed of declaration of 29th September 1910, were materially affected by our knowledge of the language of those two documents.

From the will read as a whole two circumstances of a highly significant nature emerge. The first is the testator's implicit faith and trust in his wife, Mt. Annapurna Kuar, to whom he was greatly attached. The second is his great anxiety which almost dominated the whole of his conduct in life that in no event and under no circumstances should any member of Chandres Singh's branch succeed to this estate. At the date of the will Indersen Singh was a young man of 27 years of age but had no male issue. By his first married wife who dad died Indersen Singh had a daughter Brijraj Kuar who at the time of the making of the will was an infant about eight years old. In these circumstances it is only reasonable to suppose that he would make a will of such a nature as would effectively debar the succession of the collateral branch and ensure a permanency of estate in Mt. Annapurna Kuar, which would enable her to make provision for his daughter and daughter's issue or enable the daughter and her issue to succeed by right of inheritance to the estate of his wife, Mt, Annapurna Kuar.

The will is divided into two main parts; the first part may be called the preamble. The second part consists of seven clauses or conditions. The preamble describes the properties in the possession and ownership of the testator at the date of the will and it also refers to other properties which he may acquire thereafter. These properties admittedly consist both of talukdari and nontalukdari estates :

"At present I own and possess an estate in the Fyzabad District and in future after the dsath of my respected mother .... the estates of Sultanpur, Jaunpur and Azamgarh also will come into my possession and ownership; besides this any other estate which .... might be found to have been owned by me."

It is clear that in describing his own interest in the subject-matter of the devise he uses the expressions, "I own and possess," "my possession and ownership" and "owned by me." After this description of the property and of his interest therein the testator says:

"In respect of all this property I make a will according to the conditions below in favour of my high placed wife Mt. Annapurna Kuar Saheba."

Having regard to the setting in which these last quoted words appear the interpretation which we place on the language of the will is that the testator has made a devise not only of the properties described by him with reference to geographical situations but also of the same interest which he himself possessed in them in favour of his wife. If there were nothing else in the will there could be little doubt that the words used by the testator in the preamble of the will are of the greatest amplitude and would confer an absolute estate on the devisee. The following observation of their Lordships of the Judicial Committee in the case of *Raghunath Prasad Singh* v. *Deputy Commissioner of Partabgarh* (1) (at p. 377 *of* 56 *I. A.*) is literally applicable to this case:

(1) A. I. R. 1929 P. C. 283 = 120 I. C. 641=56 I. A, 372=4 Luck 483 (P.C).

"The rule of construction embodied in S. 82, Succession Act of 1865, which applies to this will, is that where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him."

It is contended on behalf of the appellants that the clauses attached to the devise contained in the earlier part of the will indicate that only a restricted interest was intended to be conferred on Mt. Annapurna Kuar. This argument naturally takes us into the question of interpretation of the clauses but before we do so we must advert to the deed of 29th September 1910 (Ex. 1). This document is christened as ikrarnama which expression literally means a deed of declaration but it was agreed in the trial Court that it constituted a codicil to the will of 15th March 1899. In the memorandum of appeal filed by the appellants in this Court also it is described as a codicil. In the arguments before us however the learned counsel for the appellants exhibited considerable shyness in calling it a codicil. We think it matters very little as to what name is given to the document of 29th September 1910. Its contents clearly show that it is a codicil. A codicil is defined both in Act 1 of 1869 and the Succession Act (39 of 1925); in S. 2 of the former Act as such:

"Codicil means an instrument made in relation to a will and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will;"

in the latter:

"codicil means an instrument made in relation to a will, and explaining, altering or adding to its dispositions and shall be deemed to form part of the will."

The learned trial Judge has also translated this document in his judgment and his translation was accepted by both sides as substantially correct. Ex facie this deed of declaration purports to explain the devise contained in the will of 15th March 1899. It also makes provision for the succession of a son born of the womb of Mt. Annapurna Kuar in preference to the son born of the womb of Thakurain Balraj Kuar even though the former may be younger in age than the latter. The deed also reiterates the testator's anxiety to exclude the succession of his uncle's line. The testator further undertakes not to revoke the will of 15th March 1899 under any circumstances. This being the true nature of the document, it must be treated as a codicil and as such it must form part of the will of 15th March 1899 for the purposes of construction.

In explaining the nature of the devise in favour of Mt. Annapurna Kuar contained in the will of 15th March 1899 the testator says that by that will he has constituted Mt. Annapurna Kuar "malik mustaqil" (permanent owner) and that she has and will have the same "ikhtiarat malikana" (proprietary powers) as the testator himself has.

On behalf of the appellants it was argued in relation to the codicil that it contains an incorrect reference to an absolute estate as given by the will though in fact no such estate is given and therefore the codicil does not affect the nature of the estate given by the will. In support of the argument several cases, for instance *Skerratt* v. *Oakley* (2), *Mackenzie* v. *Bradbury* (3), *Darley* v. *Martin* (4) and *Lindon* v. *Ingram* (5) were cited and a passage at p. 830 in Theobald on Wills, Edn. 8, and another passage in Jarman on Wills, Vol. 2, pp. 604 and 605 Edn. 7, were read. The argument on behalf of the plaintiff-respondent is that there is no question of an inaccurate recital of the devise contained in the will and the codicil may be referred to in order to show the view which the testator himself took of the language used in his will. In support of this argument the learned counsel for the plaintiff cited the following cases: *Williamson* v. *Advocate-General of Scotland* (6), *Lindon* v. *Ingram* (5), *Ormond Investment Co.* v. *F. Betta* (7) and *Darley* v. *Martin* (8). The principle of construction involved in these arguments is we think perfectly clear and it is this:

"It is a very good mode of construing an instrument to take a man's own words when the meaning appears doubtful; I think it is a good mode of getting at his meaning to see what he himself thought he had done:" per Lord Brougham in *Williamson* v. *Advocate-General of Scotland* (6).

Our own construction of the will is, as we have already stated, that it conferred

(2) 101 E. R. 1094.
(3) 55 E. R. 1036.
(4) 138 E. R. 1368.
(5) [1904] 2 Ch. D. 52=73 L. J. Ch. 507=90 L. T. 502=52 W. R. 603.
(6) 8 E. R. 641.
(7) [1927] 2 K. B. 326=96 L. J. K. B. 634.
(8) 138 E. R. 1368.

an absolute estate on Mt. Annapurna Kuar. The arguments advanced on behalf of the appellants when given due weight may however render this interpretation doubtful. This being the situation, the language of the will may be interpreted by that of the codicil. Adopting the course we find no room left for controversy as to the nature of the estate which the testator intended to confer on Mt. Annapurna Kuar by means of the devise contained in the will of 15th March 1899. We have already stated with sufficient details as to what the testator has said in the codicil as to the estate which he had conferred on his wife, Mt. Annapurna Kuar, by the aforementioned will. Indeed on the true effect of the language used in the codicil no argument was addressed to us on behalf of the appellants and we are of opinion that there is no room for any argument. The testator says that he has made Mt. Annapurna Kuar *malik mustaqil* (permanent owner) and that she has and will have the same "*ikhtiarat malikana*" (proprietary powers) as the testator himself has—*Bahidas Shivdas* v. *Bai Gulab* (9) and *Sasiman* v. *Shib Narayan* (10). We will now go back to the clauses contained in the will.

Clause 1.—This clause again describes the subject-matter of the devise in words of sufficient amplitude to cover the proprietary interest of tha testator. Indeed one of the words used in describing it is *imlak* (property owned). The translation "landed property" does not fully convey the sense of the word *imlak*. Within this clause, in describing the nature of the estate devised in the earlier portion of the will, the testator uses the following words :

"With full power of transfer of every description,"

and again

"she may sell any share or part of the land or the entire estate or she may make any other kind of transfer."

On behalf of the appellants it was argued that the expression "on the occasion of any suitable and propor necessity arising" restricts the estate conferred on Mt. Annapurna Kuar to an estate of a Hindu widow. We are unable to accept this argument. In our opinion the expression relied upon simply connotes the wishes of the testator against an act of waste on the part of Mt. Annapurna Kuar. Further, the expression in the will is as follows :

"*hamesha is taur se qabiz wa mutasarrif rahen ki bazarurat munasib wa jaez . . .*" (always to remain in possession and enjoyment in such a manner that whenever any suitable and proper necessity arises may sell . . . . .). Thus it is the mode of possession and enjoyment which is qualified by the restriction "suitable snd proper necessity." The restriction therefore is a surplusage—*Sarju Bala* v. *Jyotirmoyee* (11). The words descriptive of the interest are the words "*ba tamami ikhtiarat intiqal har kism*" (with full powers of transfer of every description). It seems to us that the power to decide as to whether suitable and proper necessity for an alienation has arisen or not was to vest in the devisee, Mt. Annapurna Kuar, and it was never intended by the testator that recourse should be had to a Court of law for the determination of that question. With reference to the last portion of this clause it was argued on behalf of the appellants that the power conferred on Mt. Annapurna Kuar to adopt or appoint anyone as her successor is merely equivalent to a permission to make an adoption as a Hindu widow according to Hindu law. We do not think so. The words are "*kisi ko rasnashin wa janashin apna muqarrar karen*" (may appoint anyone as her successor and locum tenens). The testator has not used the technical expression of Hindu law *pusput karen* nor has he used the popular phraseology of '*gud len*' or '*mutabanna karan.*' '*Rasnashin*' and '*janashin*' are words of the Persian language and though they are frequently used in documents written in the Indian vernacular Urdu they retain the same meaning as they convey in Persian. The most appropriate equivalents in which we can render them for the purposes of the translation are "successor" "and locum tenens" as we have already said. The words "anyone" are wide enough to include a female and the testator intended to include a female. This is amply apparent from the description of the class of persons who are excluded from the largest circle of "any one :" the excluded class being the male

(9) A. I. R. 1922 P. C. 193=65 I. C. 974 = 49 I. A. 1=46 Bom 153 (P. C.).
(10) A. I. R. 1922 P. C. 63 =66 I. C. 193 = 49 I. A. 25=1 Pat. 305 (P. C.).
(11) A. I. R. 1931 P. C. 179=134 I. C. 648 = 58 I. A. 270=59 Cal. 142 (P. C.).

and the female issue of the testator's uncle, Chandres Singh. In the original of the will there are no two verbs as they are made to appear in the translation "adopt" and "appoint." There is only one verb "*muqarrar karen*" (may appoint). The verb *muqarrar karen*" is wholly inappropriate to denote the act of adoption according to Hindu law. On the other hand, it is singularly appropriate to denote a power of appointment.

The status or character of the appointee is described by two words "*rasnashin wa janashin*" (successor and locum tenens). It seems to us that both these expressions are intended to connote the same status and not two different characters, one of an adoptee and the other of an appointee. They are synonymous and in this will they are used as such. The appellants' argument is also negatived by the fact that the person appointed by Mt. Annapurna Kuar as a successor has to be her successor and not of the testator (*janashin apna*). The expression "*rasnashin*" is also used in Cls. 2 and 4 and that is the only expression on which the argument as to the power of adoption according to Hindu law can with any plausibility rest. Obviously the expression "*rasnashin*" should be interpreted as far as possible in the same sense wherever it is used in the will. In Cl. 2 Mt. Annapurna Kuar is given the power to select as *her rasnashin* (successor) and such selected person may be even the testator's daughter's son or daughter. It seem to us that the very idea of a daughter's son being taken in adoption according to Hindu law would be wholly abhorrent to the sentiments of a twice-born Hindu even if we assume that he was ignorant of the rule of law that such an adoption is invalid. In Cl. 4 the expression "*rasnashin*" is again used. The clause deals with Mt. Annapurna Kuar's power of transfer in favour of anybody and by way of amplification of that power she is also given the liberty to appoint her successor. Here again the person appointed is to be her successor and the property which is to be held by the transferee or the successor is described as her property.

Clause 2.—In the preceding paragraph of this judgment this clause has partly been dealt with. In our opinion it expresses the testator's wish that in the exercise of the power of appointment given by the preceding clause his wife, Mt. Annapurna Kuar, may, if she likes (*akhtiar hoga*) select a person from the issue, male or female, of his daughter to succeed her. The power of appointment conferred by Cl. 1 and reiterated in this clause is absolutely general and can be exercised in favour of anybody, male or female, old, adult or an infant, except a member of the excluded class specified in Cl. 1. The conferment of such a power is a strong indication of the testator's intention to confer an absolute estate on Mt. Annapurna Kuar. There are several cases decided in England in which a gift for life coupled with a general power of appointment is construed to amount to a gift of an absolute estate: *Bary* v. *Bree* (12), *Jebb* v. *Tugwell* (13) and *Re Wolston Holme Marchall* v. *Aizlewood* (14). There is one more word in this clause which is of great significance and supports the interpretation which we are placing on this will as a whole. That word is "after." This means that the appointment of her successor is to be made by means of a will and he is to come into possession and enjoyment of the estate after the death of Mt. Annapurna Kuar as her devisee. All this is wholly inconsistent with the idea of adoption of a son to the testator according to Hindu law.

With a view to test the fullest effect of the contention that by the use of the word "*rasnashin*" the testator intended to confer upon Mt. Annapurna Kuar the power of making an adoption in the character of a Hindu widow according to Hindu law, we will make the assumption that the contention is correct. Still beyond the assumption lies the question as to what was the nature of the estate conferred on Mt. Annapurua Kuar and the further question as to whether there is a gift over or not in favour of the testator's daughter's sons. On the first question, we have no doubt that the will read as a whole and particularly with the aid of the codicil conferred an absolute estate on Mt. Annapurna Kuar. It may be that for his spiritual benefit and for the fulfilment of natural desire on the part of a sonless Hindu the testator also authorized Mt. Annapurna Kuar to make an adoption according to Hindu law but

(12) 6 E. R. 1225.
(13) 44 E. R. 25.
(14) [1881] 43 L. T. 752=29 W. R. 414.

there are no words in the will indicating the intention of determining the estate conferred on Mt. Annapurna Kuar on such an adoption taking place and admittedly Mt. Annapurna Kuar has not made any adoption of that nature. On the latter question we are going to hold under Cl. 3 of the will that there is no gift over or a valid gift over in favour of the testator's daughter's sons.

Clause 3.—On this clause is founded the defendants' case of a gift over in their favour on the determination of the life estate conferred on Mt. Annapurna Kuar. Now in the first place the argument assumes that Mt. Annapurna Kuar had no higher estate under this will than a life estate. We have already rejected the assumption. In the second place we can discover no words of devise in favour of the testator's daughter's children. We are of opinion that the clause prescribes a line of descent by inheritance to Mt. Annapurna Kuar. The devolution is naturally described to take place after the death of Mt. Annapurna Kuar. The testator's desire seems to be that the course of succession by inheritance on the death of Mt. Annapurna Kuar should be the same as would have been his own. We think that there is no doubt whatsoever that this is the meaning of the clause under consideration. The law of inheritance applicable to Mt. Annapurna Kuar will however have its course in spite of the wishes of the testator to the contrary : *Ganendra Mohan Tagore* v. *Guttendra Mohan Tagore* (15), *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (16) and *Raghunath Prasad Singh* v. *Deputy Commissioner of Partabgarh* (1). As observed by their Lordships of the Judicial Committee in the lastmentioned case:

> "Attempts on the part of a testator in India to restrict devolution of properties which he bequeaths to a legatee absolutely and preventing alienations of such properties are quite common."

Emphasis was laid in the course of arguments on behalf of the plaintiff-respondent on the fact that Cl. 3 does not embrace the case of there being only one child of the testator's daughter. From this fact the inference was drawn that the child was left to succeed as an heir to Mt. Annapurna Kuar's stridhan property according to Hindu law and thus the estate would continue to remain impartible. The testator by this clause, the argument proceeds, prescribes impartibility of the estate when there are more than one child of his daughter or daughters entitled to succeed as heirs to the estate of Mt. Annapurna Kuar. We think that there is a good deal of force in this argument. Daughter's child or children could not succeed in the right of inheritance to any part of the testator's estate. The succession to the taluka would be regulated by the rule of male lineal primogeniture and in the succession to the nontalukdari property the family custom will exclude the daughter's issue: see the Wajibularz of Meopur Dhaurwa (Ex. A-1). This was agreed to on both sides. If the testator had devised only a life estate on Mt. Annapurua Kuar the result would have been that immediately on the death of Mt. Annapurna Kuar or at the latest on the death of his second wife, the plaintiff, the estate would have fallen into the hands of a member of the collateral branch which branch he was sorely anxious to exclude as is again clear from Cl. 5 of the will. The most effective way to exclude that branch was to confer an estate of inheritance on Mt. Annapurna Kuar and thus enabling the sole child of his daughter to succeed as an heir of Mt. Annapurna Kuar according to the law as then understood : *Brij Indar Bahadur Singh* v. *Janki Koer* (17), at the same time providing in this clause against partibility of the estate by laying down the condition that if there are more than one child the devolution of the estate will be according to the law applicable to himself.

Another reason in support of the view that Cl. 3 does not contain any gift over in favour of the daughter's sons is that though on the date of the will the daughter, M. Brijraj Kuar, was a mere infant but previous to the document of 29th September 1910 three sons had been born to her. One would therefore expect that by that document the testator would either explain his intention of having made a gift over by Cl. 3 of the will with specific reference to the names of the daughter's sons or would make a fresh devise by way of a gift over in favour of

(15) [1872] I. A. Sup. Vol. 47=9 Beng. L. R. 377=18 W. R. 259=2 Suth. 692=3 Sar. 82 (P.C.).

(16) A. I. R. 1923 P. C. 160=76 I. C. 922=50 I. A. 265=26 O. C. 257=45 All. 596 (P.C.).

(17) [1878] 5 I. A. 1=1 C. L. R. 318=3 Sar. 763 =3 Suth. 474 (P.C.).

those sons. He did neither. Assuming that Cl. 3 contains a devise by way of a gift over in favour of the daughter's children the gift over must be rejected as repugnant to the absolute estate which was conferred, according to our judgment, on Mr. Annapurna Kuar : *Homes* v. *Godson* (18) ; *Shaw* v. *Ford* (19) *In re* : *Dixon* (20) *In re* : *Ashton*, *Ballard* v. *Ashton* (21), *Tripurari Lal* v. *Jagat Tarini Dasi* (22), *Suresh Chandra* v. *Lalit Mohan* (23) and *Jagmohan Singh* v. *Mt. Sheoraj Kuar* (24).

It was contended on behalf of the appellants that an absolute estate can be limited by a gift over and that the latter holds good. In support of this contention the case of *Comikey* v. *Bowing Hanabury* (25) was cited. We have carefully considered the decision of the House of Lords just now referred to and have come to the conclusion that it does not at all lay down the proposition of law for which it has been cited. Indeed the decision in that case lays down no principle of law at all. It turns entirely on the construction of the particular will in that case.

We are also of opinion that the gift over, if any, is void for the uncertainty in the subject-matter of the gift. It was not disputed that the gift is to take effect only on the happening of the contingency that Mt. Annapurna Kuar shall not have exercised her power of alienation and that it can take effect only in respect of so much of the testator's estate as she does not alienate. It follows according to our judgment that on the date of the testator's death when the gift over vests, though possession is deferred to the determination of the prior life estate, the subject-matter of the gift was altogethor uncertain. She might have alienated the whole as she had the power to do. This clause, that is Cl. 3, opens with the condition "in case the said wife does not do so." It was agreed at the hearing before us and we think it is correct that the condition relates to the events specified both in Cl. 1 and Cl. 2. This principle of law is supported by a series of cases decided in England : *Horwood* v *West* (26), *Bull* v. *Kingston* (27) and *Eade* v. *Eade* (28) and was recently applied to an Indian case, *Bhaidas Shivadas* v. *Bai Gulab* (29), by Lord Buckmaster who referred to the first mentioned case in his judgment. Also see in this connexion the observations of Sir Arthur Hobhouse in *The Mussoorie Bank Limited* v. *Albert Charles Raynor* (29).

The alleged gift over fails also on another ground. It depends cn the happening of the contingency of Mr. Annapurna Kuar not making any appointment in favour of any person as she was empowered to do under Cl. 1 of the will. She has made an appointment by devising the whole of the estate in favour of the plaintiff for her life and thereafter in favour of the plaintiff's daughter and the defendants' mother in equal shares under her will of 22nd November 1923. On behalf of the plaintiff-respondent it was also argued that the gift over, if any, fails for uncertainty as to the donees in the class mentioned in Cl. 3 and also by reason of the rule against perpetuity. We do not propose to express any opinion on this part of the learned counsel's argument.

Clause 4 is as follows :

"If God forbid, there be no male or female issue even from the daughter, then the said high placed wife without regard to the conditions and limitations laid down in Cls. 2 and 3 mentioned in this instrument shall have power to transfer by any means her estate to her own family, or to any stranger or to adopt anyone for herself.'

We are of opinion that the above clause shows with sufficient certainty that in Cl. 3 the testator intended to prescribe a rule of inheritance to the estate of his wife, Mt. Annapurna Kuar, and not to make a gift over in favour of his daughter's issue on the determination of a prior life estate. The contingency that there may be any issue, male or female, of the testator's daughter is wholly indefinite as regards time. A child to the daughter may be born long after the death of Mt. Annapurna Kuar. Thus in her lifetime

(18) 44 E. R. 347.
(19) [1878] 7 Ch. D. 660=47 L. J. Ch. 531=37 L. T. 749=26 W. R. 235.
(20) [1903] 2 Ch. 458=72 L. J. Ch. 642=88 L. T. 862=51 W. R. 652.
(21) [1920] 2 Ch. 431=89 L. J. Ch. 583=124 L. T. 374=65 S. J. 44.
(22) [1913] 40 Cal. 274=40 I. A. 37=17 I. C. 696 (P.C.).
(23) [1916] 31 I. C. 405.
(24) A.I.R. 1928 Oudh 49=3 Luck 19=106 I. C. 593 (F.B.).
(25) [1905] A. C. 84=74 L. J. Ch. 263=92 L. T. 241=53 W. R. 402=21 T. L. R. 252.
(26) 57 E. R. 155.
(27) 35 E. R. 690.
(28) 21 R. R. 284.
(29) [1882] 4 All. 500=9 I. A. 70 (P.C.).

she would never be able to exercise her power of transfer or appointment. On the other hand if the intention of the testator as expressed in Cl. 3 was to regulate the course of succession to the estate of Mt. Annapurna Kuar she would be in a position to know definitely during her own lifetime whether at her death an heir of the character described in Cls. 3 and 4 was in existence or not. If not she would be free, according to Cl. 4, to make a transfer of the whole of her estate or exercise her power of appointment in respect of the same estate by means of an alienation or a devise. In this clause again the words used are "her estate" and "herself."

Clause 5.—In our judgment this clause also supports the interpretation which we are placing on the will. The branch of Chandres Singh could only succeed in the right of inheritance to Indersen Singh's estate on intestacy. This possibility the testator has excluded by making a devise of an absolute estate in favour of his wife. That branch could also acquire the estate under a transfer from the holder of the absolute estate, that is Mt. Annapurna Kuar ; but she is deprived of the power to make such a transfer. The first part of the clause clearly deals with the devolution of the estate in the right of inheritance and the devolution is restricted to the testator's male or female issue. We have already pointed out that the female issue would be excluded from inheriting the estate by reason of the provisions of the Oudh Estates Act 1869, and the family custom, but such an issue could succeed as an heir to Mt. Annapurna Kuar, as we have stated elsewhere in this judgment.

Clause 6.—This clause shows that in this particular case we need not draw on our experience of Indian testators attaching void conditions to testamentary dispositions ; we find expressly stated herein the testator's belief that the conditions which he prescribes shall take effect in spite of their illegality.

Clause 7 requires no comment. On the grounds stated above, we agree with the finding of the learned trial Judge that the will of 15th March 1899 conferred an absolute estate on Mt. Annapurna Kuar and that there is no devise by way of a gift over in favour of the defendants. Further we also agree with the learned trial Judge that even if there is such a gift over it is void in law. The only point argued on both sides at the hearing of the appeal was the question of the interpretation of the will of 15th March 1899 and no other point was argued by either side except that it was agreed that in any view of the case the plaintiff is entitled to a decree in respect of the properties mentioned in Sch. D attached to the plaint. The result is that the appeal fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

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* A. I. R. 1932 Oudh 336

RAZA AND SRIVASTAVA, JJ.

H. Hunter, Liquidator of the Bank of Upper India Limited— Defendant—Appellant.

v.

Abdul Ali and *others* — Defendants — Respondents.

Second Appeal No. 294 of 1930, Decided on 31st October 1931, from decree of Sub-Judge, Bara Banki, D/- 2nd June 1930.

(a) Transfer of Property Act (1882), S. 103—Charge holder can enforce payment against whole or any portion of property charged.

A charge holder is entitled to enforce payment against whole or any portion of the property charged. If a person owning only a portion of the property is made to pay the whole amount, his remedy is by a suit for contribution against persons in possession of the other portion.

[P 339 C 1]

*** (b) Transfer of Property Act (as amended by Act 20 of 1929), S. 100 — Charge cannot ordinarily be enforced against transferee for value without notice.**

In the case of charge there is no transfer of any interest in the property in favour of the charge holder as in the case of a mortgage. A charge is merely a security for payment of money to be enforced against the property charged. Thus from the very nature of it, as a general rule, a charge cannot be enforced against a transferee for consideration without notice. In fact this constitutes an essential distinction between a mortgage and a charge. As in the case of a mortgage there is a transfer of interest ; a transferee of the mortgaged property can acquire only the remaining interest of the mortgagor and is therefore bound by the mortgage. But in

the case of a charge, there being no transfer of interest it cannot ordinarily be enforced against a transferee for value without notice : *A. I. R.* 1929 *Oudh* 316, *Dist.* [P 340 C 1]

(c) Oudh Estates Act (1869), S. 33--Award not filed in Financial Commissioner's Court within six months after Act is not decree.

When an award is not filed in the Financial Commissioner's Court within six months after the passing of the Act is not enforceable as a decree. Even if there is an agreement between the parties, and the award is binding as such on the parties to the submission, it cannot be regarded as a decree of Court. [P 339 C 2 ; P 340 C 2]

Ram Bharose Lal and *Suraj Sahai* — for Appellant.

Ghulam Hasan, Itikhar Husain, Nand Lal Tandon, Chaudhri Ehsan Husain, Haider Husain and *Mohammad Wasim* —for Respondents.

Judgment.—These three appeals arise out of three suits which were consolidated and tried together by the learned Additional Munsif of Bara Banki. The plaintiffs in each of the three suits claimed a money decree for certain amounts alleged to constitute arrears of maintenance charged upon immovable property which had been sold at auction and purchased by the contesting defendant, Mr. H. Hunter in his capacity of Liquidator of the Bank of Upper India Limited (in liquidation). The defences raised on behalf of Mr. Hunter which are material for the purposes of these appeals were that the alleged maintenance did not constitute a charge on the property purchased by him, that even if it did he was a purchaser for value without notice and as such could not be liable for its payment and that in any case he was not liable for the whole of the amount claimed.

The learned Munsif rejected the contentions raised in defence and decreed all the suits. Mr. Hunter appealed to the Court of the Subordinate Judge of Bara Banki who concurred with the view of the trial Court on all the points raised in appeal and dismissed them with costs. The defendant Mr. Hunter has come to this Court in second appeal. As the facts of the three suits which have given rise to these appeals though similar in several respects, are not identically the same, we will deal with each appeal separately but before doing so it would be convenient to state certain facts relating to the property purchased by the defendant-appellant which constitute common ground between the parties. Lutf Ullah and Qalandar Bakhsh were two brothers. The family owned four estates, Bhiwal, Hasanpur, Khanpur and Sikandarpur. All these estates, under circumstances which it is not necessary to enter into in these appeals, came into the posssesion of Chaudhri Sarfaraz Ahmad, husband of Mt. Bechanunniss, a daughter of Lutf Ullah. Chaudhri Sarfaraz Ahmad's name was recorded as a talukdar in respect of these estates in list 1 prepared under S. 8, Oudh Estates Act.

After his death the estates came into possession of his widow, Mt. Bechanunnissa. The latter on her death was succeeded by her daughter Mt. Zainubunnissa. After the death of Zainubunnissa her son Chaudhri Shafiquzzaman came in possession of all the aforesaid talukas. During most of the time that Mt. Bechanunnissa, Zainubunnissa and Chaudhri Shafiquzzaman held the estates, the property remained under the superintendence of the Court of Wards. Chaudhri Shafiquzzaman in 1912 executed a deed of trust in favour of his son. Subsequent to the execution of this deed Chaudhri Shafiquzzaman and the trustees jointly executed five mortgage deeds in favour of the Bank of Upper India Ltd., in respect of the aforesaid estates. Soon after Chaudhri Shafiquzzaman was declared an insolvent and the Deputy Commissioner of Bara Banki was appointed receiver of the property. A few years later the defendant-appellant Mr. Hunter as liquidator of the Bank of Upper India instituted a suit on the basis of the above mentioned mortgage deeds, and obtained a a decree for sale. In execution of this decree, on 27th September 1926, he purchased the major portion of the estates including an eight annas share in village Karmemau.

Second Civil Appeal No. 294 *of* 1930.

This appeal arises out of a suit brought by Abdul Ali and Abdul Majid, descendants of Qalandar Bakhsh by his first wife, Mt. Bandhi. Their case was that Qalandar Bakhsh relinquished his moiety thare in the aforesaid talukas and accepted in lieu thereof, an annuity of Rs. 400 per anuum for himself, his wife and his descendants. He left two widows each of whom became entitled to half of this

guzara. The plaintiffs as descendants of one of these widows claimed Rs. 200 as arrears of maintenance from March 1927 to February 1928. They also claimed interest on these arrears at 1 per cent per mensem. The first contention urged in this appeal is that the allowance claimed by the plaintiffs-respondents is not a charge on the talukas in question. There is no written deed creating a charge but the Courts below have relied on Exs. 2 and 7 as constituting acknowledgment of the existence of the charge.

Exhibit 2, dated 3rd May, is the will of Sarfaraz Ahmad. Cl. 5 of this will provides that whatever guzara and maraat had been fixed, they are entered in the names of the persons entitled to them and in respect of the talukas they relate to and that they will continue to remain as ever and will undergo no change except under the rules of the British Indian Association. Details of these allowances and maraat are given at the foot of the document. Under the heading "maraat taluka Bhilwal," there is an entry of Rs. 400 against the name of Qalandar Bakhsh, deceased. There is a sub-detail showing Rs. 200 against the names of each of these two widows of Qalandar Bakhsh. It was argued on behalf of the defendant-appellant that the use of the word maraat and the possibility of reduction in the amount of it as indicated by the recital contained in Cl. 5 of the will shows that it was merely a favour at the pleasure of the estate-holder, payment of which could be withheld at any time. We find ourselves unable to accede to this argument. We are satisfied from a perusal of the will as a whole that the testator used the word "guzara" in relation to persons who were entitled to claim maintenance under the provisions of the Oudh Estates Act and used the word "maraat" in relation to other persons. Whether it be called guzara or maraat in any case there can be no doubt that it was an allowance made payable to the persons concerned. The possibility of reduction contemplated by Cl. 5 was limited to reduction in accordance with the rules of the British Indian Association. It is perfectly clear that the testator did not reserve any power in himself or his heirs to reduce the allowances fixed by him under the will.

It was also argued that the allowance was not heritable. In the list of persons who were given allowances contained at the foot of the will, in the case of several persons mentioned in that list it was distinctly stated that the allowances were for life. There is no such remark against the name of Qalandar Bakhsh. It is also significant that the allowance is noted against the name of Qalandar Bakhsh desceased and that in the details under it, the names of his two widows are entered. Taking all these circumstances into consideration we agree with the Court below that the allowance was clearly intended to be heritable. Next it was contended that the allowance was not a charge on the property. The fact that the incidents of particular allowances has been thrown on particular estates, obviously means that these allowances are to be paid out of the profits of the specified estates. The allowance with which we are concerned in this appeal was thus made payable out of the profits of the Bhilwal estate. It must therefore be held to constitute a charge on that estate. The fact of the allowance being a charge is further confirmed by the will of Mt. Bachanunnissa dated 15th September 1893 (Ex. 7). Cl. 6 of this will expressly confirms the allowances detailed in the will of Chaudhri Sarfaraz Ahmad.

The next contention of the defendant-appellant was that he was a purchaser for value without notice. That he is a purchaser for value cannot be gainsaid but we are unable to hold that he is a purchaser witout notice. Ex. 3 is the copy of an application made by the plaintiffs to the sale officer in order to get their charge notified in the sale proclamation. Ex. 4 is the copy of the report of the Court of Wards made on the back of this application admitting that the plaintiffs had been in receipt of the allowance of Rs. 200 from the Bhilwal estate. Ex. 5 is the copy of the order of the sale officer made in the presence of the vakil of the decree-holder, Mr. Hunter, that the maintenance allowance of Rs. 200 payable to the plaintiffs be notified in the list of bids relating to the Bhilwal estate. Ex. 6, the list of bids, shows that the order was carried out and the allowance was notified. Exs. 14 to 48 are copies of sale certificates obtained by Mr. Hunter relating to various villages of the Bhilwal estate in which mention is made of this

charge of Rs. 200 in favour of the plaintiffs. Thus there is ample evidence to support the finding of the lower Court that the defendant-appellant had sufficient notice of the charge. We must accordingly overrule the contention.

It is not denied by the defendant-appellant that if he purchased the property with notice of the charge he is liable for the plaintiff's claim. But it is contended that he was not the purchaser of the whole of the Bhilwal estate and that he cannot therefore be liable for the whole of the amount claimed. We agree with the learned Subordinate Judge that the plaintiffs are, as charge holders, entitled to enforce payment against the whole or any portion of the property charged. If the defendant-appellant is made to pay the whole amount, his remedy will lie in a suit for contribution against persons in possession of any portion of the Bhilwal estate which has not been purchased by the appellant. This disposes of all the contentions raised in this appeal. The result is that the appeal must fail. We accordingly dismiss it with costs.

Second Civil Appeal No. 293 *of* 1930.

The suit which has given rise to this appeal was instituted by Chaudhri Nisar Ahmad claiming a decree for Rs. 125 with interest thereon at 1 per cent per month on account of arrears of maintenance from March 1927 to February 1928. In case of the defendant's failure to pay the amount in suit, the plaintiff claimed that the money be realized by sale of the Bhilwal estate in the hands of the defendant-appellant. The plaintiff's case was that one Karim Bakhsh was the owner of twelve villages which he entrusted to Lutf Ullah his nephew to be held by the latter by way of trust, that in lieu thereof Karim Bakhsh was given a heritable guzara allowance of Rs. 300 per annum from the Bhilwal estate, that at the first regular settlement, Malik Changa son of Karim Bakhsh laid a claim with regard to the aforesaid villages and that ultimately on 5th June 1869 the British Indian Association gave Malik Changa a decree against Sarfaraz Ahmad for an annual cash guzara of Rs. 300. Sarfaraz Ahmad recognized this guzara as a charge in his will dated 3rd May 1870. It was further ratified and confirmed by Mt. Bechanunnissa under her will dated 15th September 1893. This guzara allowance was alleged to be heritable and to be a charge on the entire Bhilwal estate. The plaintiff who is admittedly one of the grandsons of Malik Changa claimed that by virtue of a family arrangement he had become entitled to Rs. 125 out of the abovementioned allowance of Rs. 300.

The defendant resisted the claim on various grounds. He pleaded that the guzara in question was not a charge on the Bhilwal estate and that the award by the British Indian Association was not according to law and was ultra vires. He further claimed to be bona fide purchaser for valuable consideration and without notice. Lastly it was pleaded that he could not be liable for the whole of the plaintiff's claim. We agree with the lower Court that the award passed by the British Indian Association has not been shown to have been filed in the Financial Commissioner's Court within six months after the passing of the Oudh Estates Act and that it is not therefore enforceable as a decree under S. 33, Oudh Estates Act. But for reasons given by us above in dealing with Second Civil Appeal No. 294 of 1930, we are of opinion that the allowance in question was recognized as a charge on the Bhilwa estate in the wills of Sarfaraz Ahmad and Bechanunnissa. We must therefore overrule the defendant-appellant's contention that the plaintiff's claim in respect of the arrears of allowance is not enforceable as a charge.

For the reasons given in the above appeal in Abdul Ali's case, we must also hold that the guzara allowance in suit was heritable. It may be further pointed out that in 1893 the heirs of Malik Changa brought a suit against the Deputy Commissioner of Barabanki as Manager of the Court of Wards for arrears of the guzara allowance. In this suit an issue was raised whether the guzara in question was heritable or not. It was held that the allowance was heritable and a decree was passed in favour of the heirs of Malik Changa. The defendant-appellant's contention about the guzara not being heritable must therefore fail. The next question is whether the defendant-appellant is or is not a purchaser without notice.

The learned counsel for the plaintiff-respondent has been unable to refer us to any evidence showing that the defendant had any notice of the plaintiff's charge. The plaintiff did not take any steps to have the charge notified in the

sale proclamation issued for the auction sale at which the defendant-appellant made the purchase. The lower appellate Court also has found that the defendant-appellant is a purchaser without notice. We agree with this finding. The learned Subordinate Judge has however held that the defendant-appellant as successor-in-interest of Sarfaraz Ahmad is bound by the charge in spite of his being a purchaser for valuable consideration without notice. We are unable to accept this view of the learned Subordinate Judge. In the case of charge there is no transfer of any interest in the property in favour of the charge holder as in the case of a mortgage. A charge is merely a security for payment of money to be enforced against the property charged. Thus from the very nature of it, as a general rule, a charge cannot be enforced against a transferee for consideration without notice. In fact this constitutes an essential distinction between a mortgage and a charge. As in the case of a mortgage there is a transfer of interest ; a transferee of the mortgaged property can acquire only the remaining interest of the mortgagor and is therefore bound by the mortgage. But in the case of a charge, there being no transfer of interest, it cannot ordinarily be enforced against a transferee for value without notice. This matter is now settled beyond all doubt by the provision added to the last paragraph of S. 100, T. P. Act. This addition is to the following effect:

"And save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

It has been argued on behalf of the plaintiff-respondent that this addition to S. 100 made by S. 50, T. P. (Amendment) Act (20 of 1929) is not applicable to the present case because Act 20 of 1929 came into force on the first day of April 1930 during the pendency of the appeal in the Court of the Subordinate Judge. S. 63, Act 20 of 1929, which enacts a saving clause is to the following effect:

"Nothing in any of the following provisions of this Act, namely, Ss. 3, 4, 9, 10, 15, 18, 19, 27 and 30, Cl. (c), S. 31, Ss. 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62, shall be deemed in any way to affect: (a) the terms or incidents of any transfer of property made or effected before the first day of April 1930 ; (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date ; (c) any right, title, obligation or liability already acquired, accrued or incurred before such date ; or (d) any remedy or proceedings in respect of such right, title, obligation or liability : and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April 1930, in any proceeding pending in Court on that date: and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed."

It will appear from the above that S. 50 of the Amending Act which adds the new clause to S. 100, T. P. Act, is not one of the sections enumerated in this saving clause. But it was contended with reference to the last part of Cl. (d), S. 63, that before the amending Act came into force the plaintiff had acquired the right under the old law to enforce his charge against the defendant in spite of his being a purchaser without notice, and that therefore the provisions of S. 50 of the Amending Act were inapplicable to the present case. In this connexion reliance was placed upon the decision of a Bench of this Court in *Razia Begam* v. *Ishrat Ali* (1). In this case it was held that where a right is charged on specific immovable property either by decree or by contract the subsequent transferee though for valuable consideration and without notice takes it subject to that charge, and therefore a decree-holder purchasing property of his judgment-debtor at an auction sale cannot avoid the specific charge created by the debtor on the property purchased on the ground of his being a bona fide purchaser without notice.

We are of opinion that the plaintiff cannot derive any help from this case. We are not prepared to accept the plaintiff's contention that the charge in question arose under a decree of Court. We have already held that the award of the British Indian Association was not enforceable under S. 33, Oudh Estates Act. Under the circumstances we are unable to treat it as a decree. Even if it were possible to hold that there was an agreement between the parties for reference to arbitration and that the award was binding as such on the parties to the submission, it cannot be regarded as a decree of Court. The conclusion reached by us therefore is that in the present case the charge did not arise under any decree

(1) A.I.R. 1929 Oudh 316=117 I.C. 405.

or contract and no right had accrued in favour of the plaintiff to enforce the charge against the defendant before the amending Act 20 of 1929 came into force. Even apart from the amendment made in S. 100, on general principles as stated above, the charge could not be enforced against the defendant-appellant when he has been found to be a purchaser for value without notice. The result therefore is that this appeal must succeed. We accordingly allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in all the three Courts.

Second Civil Appeal No. 295 *of* 1930.

This appeal arises out of a claim by Shakur Bakhsh plaintiff, for Rs. 37-8-0 on account of arrears of guzara relating to three, six monthly instalments of Rs. 12-8-0 each which fell due in Chait 1334 F., Kuar 1335 F. and Chait 1335 F. The guzara is alleged to be a charge on a half-share in village Kermimau and in case of defendant's failure to pay it, the plaintiff claimed that he should be allowed to realize it by sale of the half share in village Kermimau. The facts of this suit which are altogether different from those of the other two suits are that one Sakhawat Bibi, widow of Karim Bakhsh, obtained a decree against two persons, Imdad Ashraf and Makhdum Bakhsh from the settlement Court for a perpetual maintenance allowance of Rs. 100 per annum, half of which amount was made on a charge on village Kermimau. On 28th September 1888 Mt. Sakhawat Bibi executed a deed of gift of her right to receive the maintenance allowance in favour of the plaintiff. An 8-annas share in village Kermimau was purchased by the Court of Wards, and the said share was included by Shafiquzzaman and his trustees in the deeds of mortgage executed by them in favour of the Bank of Upper India Ltd. Ultimately this 8-annas share of village Kerimimau was also put up to sale in execution of Mr. Hunter's decree and purchased by him. The plaintiff therefore claimed a proportionate amount of Rs. 25 per annum from the defendant-appellant who was in possession of a share in village Kermimau.

Exhibit 2 dated 22nd March 1871 is the copy of a compromise arrived at between Sakhawat Bibi on the one hand and Imdad Ashraf and Makhdum Bakhsh on the other in the suit which had been brought by Sakhawat Bibi in the settlement Court. This compromise provides inter alia that Mt. Sakhawat Bibi was to have a heritable cash allowance of Rs. 100 half of which was payable out of the village Kermimau. The settlement Court passed a decree (Ex. 1) in accordance with the terms of the compromise. The terms of the compromise make it abundantly clear that the guzara amount in question was a charge on Kermimau and that it was heritable. This guzara was decreed in favcur of Shakhawat Bibi in lieu of the proprietary rights which she claimed in village Kermimau and other immovable property. Taking into consideration all the circumstances attending the compromise we agree with the learned Subordinate Judge that the heritable character of the allowance must be presumed to carry with it the character of transferability. This inference is also borne out by the conduct of the parties, which shows that the transfer in favour of the plaintiff made as far back as 1888 has all along been recognized and he has ever since been in receipt of the guzara from the Court of Wards and other holders of the village Kermimau.

The lower appellate Court has found that the defendant-appellant purchased the 8-annas share of village Kermimau without notice of the plaintiff's claim. This finding has not been seriously questioned. There is absolutely no evidence to show that the defendant had any notice of the plaintiff's charge. We must therefore hold in agreement with the Court below that he is a purchaser for value without notice. The question then arises whether the plaintiff can enforce the charge against the moiety share of village Kermimau in the hands of the defendant-appellant. It is quite clear from Exs. 1 and 2, referred to above, that the charge in favour of Sakhawat Bibi was created by the decree of the settlement Court based on the compromise. The case therefore falls within the rule laid down in *Razia Begam* v. *Ishrat Ali* (1). The correctness of this decision has not been questioned before us. Thus according to the law as laid down in this case the plaintiff is entitled to enforce his charge against the defendant-appellant. In other words before Act 20 of 1929 came into force a right had accrued in favour of the plaintiff to enforce his charge against the defendant. S. 63, Act 20 of 1929, saves

any remedy or proceeding in respect of any right acquired before the first day of April 1930 from being affected by any of the provisions of the amending Act. The charge in favour of the plaintiff having arisen under a decree of Court, the lower appellate Court is therefore right in enforcing it against the defendant. This appeal must therefore fail and is dismissed with costs. The result therefore is that Appeal No. 293 of 1930 is allowed and the plaintiff's suit is dismissed with costs in all the three Courts. Appeals Nos. 294 and 295 of 1930 are dismissed with costs.

P.N./R.K. *Order accordingly.*

A. I. R. 1932 Oudh 342

SRIVASTAVA, J.

Ajodhia Prasad — Plaintiff— Appellant.

v.

Mt. Sanjhari Kuar and *others*—Defendants—Respondents.

Second Appeal No. 236 of 1930, Decided on 30th March 1931, against decree of Addl. Sub-Judge, Sultanpur, D/- 27th May 1930.

(a) Transfer of Property Act (1882), S. 91 —Donee from Hindu widow can redeem after donor's death—Mortgagee cannot dispute plaintiff's title which is only voidable—Hindu law, Widow.

The plaintiffs who were the donees of the equity of redemption from a Hindu widow who subsequently died, sued to redeem the mortgage. The mortgagee contended that the alienation in favour of the plaintiffs was void after the widow's death.

Held: that the alienation was only voidable, not void and the mortgagee has no locus standi to resist the claim of the person who on the face of it had a perfectly good title to equity of redemption granted by a Hindu widow: *A. I. R.* 1921 *Bom.* 413, *Foll.*; 25 *Cal.* 1 (*P.C.*), *Rel. on.* [P 343 C 1]

(b) Civil P. C. (1908), S. 11—Right between two persons adjudicated upon—Third person though not party cannot set up defeated person's rights—Evidence Act (1872), S. 40.

When a judgment has established the right to any property between two parties, it is not open to a third person though not party to the judgment to set up the right of that party whose title has been found against as against the successful party. Such cases form the exception to the rule of *res inter alias acta*: *A. I. R.* 1920 *Mad.* 580, *Foll.* [P 343 C 2]

Ghulam Imam—for Appellant.

Hyder Husein—for Respondents.

Judgment.—This is a second appeal against the judgment and decree, dated 27th May 1930, of the Additional Subordinate Judge of Sultanpur, affirming the judgment and decree, dated 11th February 1929, of the Munsif of that place. It arises out of a suit for redemption of a mortgage-deed, dated 15th June 1905, executed by Ambar and Mt. Sukhrani in favour of Randhir Singh, husband of Sanjhari Kuar, defendant 1. The suit was instituted by Mt. Katwari, the widow of Ambar, but subsequently Ajodhia Prasad was also joined as a plaintiff on the ground that Mt. Katwari before the institution of her suit had on 25th March 1926, executed a deed of gift in respect of the property in suit in his favour. Mt. Katwari died during the pendency of the suit which has since her death been carried on by Ajodhia Prasad as the sole surviving plaintiff.

The only defence with which we are concerned in this appeal is that the title possessed by Mt. Katwari in the property in suit was either as a Hindu widow or as a Hindu mother and that the plaintiff's title based on the gift by Mt. Katwari therefore determined on her death and the plaintiff could not maintain the suit for redemption after the death of Mt. Katwari. In this connexion it was also pleaded that one Hiraman was a brother of Ambar and had left a grandson Ramhit who was the nearest reversioner of Mt. Katwari. It was alleged that the only person entitled to redeem the property after the death of Mt. Katwari was Ramhit who was subsequently impleaded as a defendant. The plaintiff met the plea based on the title of Ramhit by asserting that Ramhit had previous to the present suit, instituted a suit for cancellation of the deed of gift dated 25th March 1926, executed by Mt. Katwari in favour of the plaintiff and it was held in that suit that Ramhit had failed to prove that Hirman was a brother of Ambar and that he was the next reversioner of Mt. Katwari. The suit was accordingly dismissed on that ground (Ex. 38). The plaintiff pleaded that this decision has become final between him and Ramhit and it was therefore not open to the defendants to set up the title of Ramhit as a reversioner against him.

Both the lower Courts have held, and it is no longer disputed before me that Mt. Katwari owned the property in suit as limited owner, either in her right as a Hindu widow or as a Hindu mother. But they have held that as defendant 1 was no party to the litigation, just mentioned

between Ramhit and the plaintiff, she was not bound by the decision (Ex. 38) passed in that case. The lower appellate Court has also found on the evidence led in the present case that Ramhit was the nearest reversioner of Mt. Katwari.

I am of opinion that the learned Subordinate Judge has misdirected himself and has not approached the case from the correct standpoint. The lower appellate Court having found that Mt. Katwari held that property in suit either as a Hindu widow or as a Hindu mother it follows that the transfer made by her in favour of the plaintiff even though altogether without necessity, was only voidable and not void. In *Raja Modhu Sudan Singh* v. *Rooke* (1), the question arose as regards the validity of a patni lease granted without legal necessity by a Hindu widow in possession of her husband's estate. It was held by their Lordships of the Judicial Committee that the lease was only voidable, the reversionary heir having the right to treat it as valid. In *Sitaram Ravaji* v. *Khandu Mairala Shinde* (2), the plaintiffs, who were the donees from a Hindu widow sued to redeem possession of the land in the possession of the defendants as mortgagees. The defendants contended that the alienation in favour of the plaintiffs was void after the widow's death. It was held that the alienation was only voidable, not void and the mortgagee had no locus standi to resist the claim of the person who on the face of it had a perfectly good title to equity of redemption granted by a Hindu widow, and the only person who would dispute the validity of such a grant was the reversioner. It may be noted that Ramhit though he was impleaded did not contest the plaintiff's claim. The learned Subordinate Judge referring to the attitude adopted by Ramhit in the case observes as follows:

"Ramhit has not appeared in the case and his disinclination to help the respondant (defendant 1) is probably due to the fact that he is not to gain anything on account of an adverse judgment against him (Ex. 38) in which he was held not to be an heir of Katwari."

Whatever may be the reason for it, the fact remains that Ramhit the alleged reversioner even though he was made a party, did not dispute the title of the plaintiff in the present suit.

The matter needs also to be looked at from another point of view. Defendant 1 seeks to defeat the plaintiff's claim by setting up the title of Ramhit against him. Can he set up such jus tertii when the jus no longer exists as it has already been decided between the plaintiff and Ramhit, that Ramhit has no title and is not the reversionary heir and that decision has become final between them? It is true that the defendant was no party to the decision between the plaintiff and Ramhit and that decision does not therefore operate as res judicata between the plaintiff and the defendant. But I am of opinion that it is not open to the defendant to set up the rights of Ramhit as against the plaintiff in the face of the conclusive adjudication between them that Ramhit has no title to the property as against the plaintiff. I am supported in this view by the principle of a decision of the Madras High Court in *Rahimunnissa Begam* v. *M. A. Srinivasa Aiyangar* (3), in which it was held that when a judgment has established the right to any property between two parties, it is not open to a third person to set up the right of that party whose title has been found against as against the successful party. Such cases form the exception to the rule of *res inter alias acta*.

For the above reasons I am of opinion that the lower appellate Court is wrong in throwing out the plaintiff's claim, on the basis of Ramhit's title as the nearest reversioner. I accordingly allow this appeal with costs, set aside the decision of the lower appellate Court and send the case back to the Court of the Munsif to re-admit it in the register of suits and to dispose of it according to law.

M.N. *Appeal allowed.*

(1) [1897] 25 Cal. 1=24 I. A. 164=7 Sar. 194 (P.C.).

(2) A. I. R. 1921 Bom. 413=59 I. C. 480=45 Bom. 105.

(3) A. I. R. 1920 Mad. 580=54 I. C. 565.

A. I. R. 1932 Oudh 343

SRIVASTAVA, J.

Mt. Riyazulnissa Begam—Defendant—Appellant.

v.

Mt. Askari Begam—Plaintiff—Respondent.

Civil Misc. Appln. No. 402 of 1932, filed in First Appeal No. 62 of 1932, Decided on 5th September 1932.

Civil P. C. (1908), S. 149—Court-fee on appeal is to be calculated as on date of presentation and not of payment—Civil P. C. (1908), O. 44, R. 1.

An application for leave to appeal as a pauper was rejected. The appellant paid proper court-fees payable at the time when the application for leave was presented but the fees were deficient according to scale in force at the time of their payment :

Held : that the effect of the payment, under S. 149 is, that the appeal should be deemed to have been instituted when the memorandum of appeal was originally filed and the court-fee paid was sufficient : *A. I. R.* 1922 *Lah.* 225 and 40 *All.* 381, *Rel. on.* [P 344 C 2]

Ghulam Hasan for *Ali Zaheer*—for Appellant.

Order.—In this case an application was made for permission to appeal as a pauper on 4th April 1932. The application was accompanied with a memorandum of appeal as required by O. 44, R. 1, Civil P. C. The application for leave to appeal as a pauper was heard and rejected on 11th April 1932. Subsequent to this on 20th July 1932 the appellant filed an application along with a court-fee stamp of the value of Rs. 935. The office has reported that if court-fee is calculated on the scale which was in force on 4th April 1932, the amount of Rs. 935 is correct. But if court-fee is calculated on the scale which came into force on 1st May 1932, there is a deficiency of Rs. 247-8-0. We think the case is covered by the principle laid down in *Diayal Das* v. *Sundar Das* (1) and *Mohamad Farzand Ali* v. *Rahat Ali* (2). S. 149, Civil P. C., provides that

" where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fee has not been paid, the Court may in its discretion at any stage allow the person by whom such fee is payable, to pay the whole or part as the case may be of such court-fee ; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance."

The court-fee payable according to the law " for the time being in force " must in our opinion mean the court-fee payable according to the scale which was in force when the memorandum of appeal was filed. The effect of the order of the Court dated 11th April 1932 was only to reject the application for leave to appeal as a pauper, and not to dismiss the appeal. The court-fee has been paid by the appellant within limitation. The effect of this payment under S. 149, Civil P. C., is that the appeal should be deemed to have been instituted on 4th April 1932 when the memorandum of appeal was originally filed. We are accordingly of opinion that the amount of court-fee paid is correct.

M.N. *Order accordingly.*

(1) A. I. R. 1922 Lah. 225 = 65 I. C. 711 = Lah. 35.
(2) [1918] 40 All. 381=45 I. C. 29.

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